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THE

INDIAN DECISIONS

NEW SERIES.

CALCUTTA—VOL. VII.

I.L.R., 14 CALCUTTA.

14 C. 1.

1886 April 30.

Appellate Civil.

14 C. 1.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

SADHUSARAN SINGH AND ANOTHER (*Plaintiffs*) *v.* PANCHDEO LAL AND OTHERS (*Defendants*).* [30th April, 1886.]

Public Demands Recovery Act (*Bengal Act VII of* 1880) *ss.* 2, 8, 10, 19—*Bengal Act VII of* 1868, *s.* 2—*Sale for arrears of Road Cess—Suit to set aside Sale—Ground for setting aside Sale under certificate—Act XI of* 1859, *s.* 33—*Civil Procedure Code, ss.* 290, 311, 312.

Neither the provisions of s. 33 of Act XI of 1859, nor those of s. 2, Bengal Act VII of 1868, affect the jurisdiction of the Civil Court to entertain a suit to set aside a sale under a certificate on any of the following grounds, namely, that no arrears were due at all, that no notice was served in accordance with the provisions of Bengal Act VII of 1880, or that the provisions of s. 290 of the Civil Procedure Code were infringed.

The words " in respect of sales in execution of decrees " in s. 19 of Bengal Act VII of 1880, do not include any proceedings instituted *after the sale* for setting it aside. Sections 311 and 312 therefore of the Civil Procedure Code do not apply to sales under a certificate.

The infringement of the provisions of s. 290 of the Civil Procedure Code is not a mere irregularity, but it vitiates the sale—*Bakshi Nand Kishore* v. *Malak Chand* (1).

The provision in s. 8 of Bengal Act VII of 1880, as to the certificate becoming absolute and acquiring the force and effect of a final decree, [2] does not ome into operation unless the notice required by s. 10 is actually served.

The only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Bengal Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale, is by way of an appeal under s. 2 of Bengal Act VII of 1868.

The effect of s. 2 of Bengal Act VII of 1880 is that Act XI of 1859, and Bengal Act VII of 1868, and Bengal Act VII of 1880, are to be considered as if the provisions contained in them were contained in one Act so far as such construction is consistent with the tenor of the last mentioned Act. By the force

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* Appeal from Original Decree No. 247 of 1884 against the decree of Baboo Matadin Rai Bahadur, Subordinate Judge of Sarun, dated the 10th of June 1884.

(1) 7 A. 289.

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therefore of s. 2 of the Act of 1880, the provisions of s. 2 of the Act of 1868 became applicable to a sale, under an execution issued upon a certificate made under the Act of 1880.

Bengal Act VII of 1880 is an Act for the recovery of all kinds of public demands, and therefore applies to cases of road or other public cesses.

[**Overruled.**, 5 C.W.N. 521 (**F.B.**) = 29 C. 73; **F.**, 14 C. 9 (12); 5 C.L.J. 687 (690); 22 C. 419 (423); 23 C. 641; 18 C. 125 (127); 25 C. 789 (794); **Cons.**, 26 C. 414 (**F.B.**) = 3 C.W.N. 233; **R.**, 12 M. 168 (178) (**F.B.**); L.B.R. (1893—1900) 370; 18 C. 496 (499); 21 C. 360 (365); 11 C.W.N. 803 = 6 C.L.J. 84 = 34 C. 677; 33 C. 1178 (**P.C.**) = 3 A.L.J. 698 = 10 C.W.N. 969 = 4 C.L.J. 177 = 8 Bom. L.R. 719 = 16 M.L.J. 365 = 1 M.L.T. 308 = 33 I.A. 134.]

Plaintiffs (appellants) were the owners of 1 anna 4 pie out of 5 annas 4 pie of Mehal Deopore, which fractional share forms an estate by itself. Under the provisions of Act XI of 1859, separate accounts for payment of Government revenue were opened in respect of the shares of the plaintiffs (1 anna 4 pie), of one Nand Kishore (10 pie), and of one Achabur (10 pie), leaving the residue (2 annas 2 pie) joint. In the Collector's register 10 pie, 1 anna 4 pie, 10 pie, and 2 annas 2 pie shares bear the numbers 112, 113, 114 and 111, respectively.

A certificate No. 46 for the realization of the arrears of road and public works cesses due up to the September *kist* of 1880 from No. 113 was prepared on the 3rd of January 1881.

On the same date a notice was issued upon the plaintiffs under the provisions of Bengal Act VII of 1880, calling upon them, within a certain time, to pay up the arrears.

A return having been made of the due service of this notice, and the arrears not having been paid within the time mentioned in the notice, on the 18th April 1880 the certificate was recorded as a decree in favour of the Secretary of State for India against the plaintiffs.

The certificate was enforced as a decree under the provisions of Bengal Act VII of 1880, and a sale notification, dated the 15th August 1881, was issued under s. 287 of the Civil Procedure Code, fixing the 16th September 1881 as the date of the sale [3] of 1 anna 4 pie of the mehal in dispute belonging to the plaintiffs. It was sold on that date and purchased by the defendants Nos. 2 and 3 in the name of the defendant No. 1. On the 2nd November 1881, plaintiffs made an application for setting aside the sale on the grounds mentioned in it. But the Collector rejected it, treating it as an application under s. 311 of the Civil Procedure Code. He rejected it on the ground that it was not made within the time (30 days from the date of the sale) prescribed in the Limitation Act for such applications. An appeal was preferred to the Commissioner, who rejected it on the 11th August 1882, on the ground that the provisions of the Civil Procedure Code for the reversal of an auction-sale on the ground of irregularities do not apply to a sale held under Bengal Act VII of 1880; that, under s. 2 of Act VII of 1868, an appeal lies to the Commissioner against such sale, but that the said appeal was not preferred within the time allowed by it.

On the 8th August 1883, the present suit was brought for setting aside the sale and for the recovery of the possession of the disputed mehal, it being alleged that the defendants' auction-purchasers took possession of it in the month of October 1882.

The Secretary of State for India (defendant No. 4) and the auction-purchasers (defendants) filed written statements answering the suit on various grounds.

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The lower Court dismissed the suit without taking any evidence, holding, first, that under s. 33 of Act XI of 1859 the suit was barred, no appeal having been preferred to the Commissioner under s. 2 of Bengal Act VII of 1868; and, secondly, that even if the aforesaid enactments did not govern the proceeding instituted for setting aside the sale, but it was governed by ss. 311 and 312 of the Civil Procedure Code, the present suit was barred by the provisions of the latter section.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory* and *Munshi Mahomed Yusuf*, for the appellants.

Baboo *Annoda Persad Banerji* and Baboo *Kali Kissen Sen*, for the respondents.

[4] The Court (MITTER and NORRIS, JJ.) delivered the following

JUDGMENT.

(After stating the facts as above their Lordships proceeded.)

In appeal it is contended before us that the present suit is not barred, because the sale sought to be set aside was null and void. This contention is based upon three grounds: first, that there were no arrears due at all; secondly, that no notice was served upon the plaintiffs as is required by the provisions of Bengal Act VII of 1880; and, thirdly, that the provisions of s. 290 of the Civil Procedure Code were infringed, inasmuch as the auction-sale was held before the expiration of thirty days, calculated from the date on which the copy of the proclamation had been fixed up in the Court-house of the Collector, who in this case acted as the Judge ordering the sale.

We are of opinion that this contention is valid, and that the Subordinate Judge was not right in dismissing the suit, upon a preliminary point, without taking evidence. We shall state hereafter the grounds upon which our decision is founded. But as the defendants have taken another preliminary objection in bar of the suit, it will be convenient to dispose of it here.

It was contended by the defendants in the lower Court that, as no suit was brought by the plaintiff within one year from the date of the service of notice upon them, the certificate issued against them became absolute and acquired the force and effect of a final decree of a Civil Court under s. 8 of Bengal Act VII of 1880. This contention cannot stand, because, in considering this preliminary point before taking any evidence at all in the case, we must assume the facts stated in the plaint to be correct. One of these facts is, that no notice was served upon the plaintiff under s. 10 of the Act. Section 8, clause (*b*) provides that the judgment-debtor may, at any time, within one year *after the service upon him of such notice* as is mentioned in s. 10, bring a suit in the Civil Court to contest his liability. Section 10 requires a notice to be served upon the judgment-debtor with a copy of the certificate issued. It further provides that, from and after the service of such notice, such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector, in the same manner and with like effect as if such immoveable [5] property had been attached under the provisions of s. 274 of the Code of Civil Procedure. Then to come back again to s. 8, it lays down that, if no such suit is instituted within the said period of one year, or if any such suit having been instituted is decided against such judgment-debtor, such certificate shall become absolute, and shall

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have to all intents and purposes the same force and effect as a final decree of a Civil Court.

It is clear to us from these provisions that, unless the notice required by s. 10 is actually served, the provision in s. 8, as to the certificate becoming absolute and acquiring the force and effect of a final decree of a Civil Court, does not come into operation. Consequently the contention of the defendants upon this point cannot prevail, until the question raised in the plaint, namely, whether or not the notice required by s. 10 was served upon the plaintiffs, is decided against them. Then, again, supposing that the notice was served, the certificate issued in this case would then by efflux of time have the effect of a final decree. But even in that case, if the plaintiffs establish the third ground set forth above, they would be entitled to have the sale set aside, because that ground has nothing to do with the validity or otherwise of the certificate issued in this case.

That the non-service of notice required by s. 10 is an irregularity in the Collector's proceedings, which the Civil Court has the power of taking cognizance of in deciding the question, whether such certificate should be held to bind the judgment-debtor, was decided by this Court in *Hem Lotta* v. *Sreedhone Borooa* (1).

Having disposed of this preliminary ground, we shall now deal with the grounds upon which the decision of the lower Court is founded. We shall take up, first, the question whether the present suit is barred by the provisions of s. 312 of the Civil Procedure Code. The sale in question in this case was confirmed by the Collector under a *rubokari*, dated the 15th September 1882. The Collector confirmed the sale under s. 312 of the Civil Procedure Code. One of the questions we have to decide in this case is whether that section is applicable at all.

Supposing that there are material irregularities in publishing or conducting a sale held in execution of a certificate issued under [6] Bengal Act VII of 1880, and supposing such irregularities have caused substantial injury to the owner of the property sold, what are his remedies? Is he entitled to proceed under s. 311 of the Civil Procedure Code, or s. 2, Bengal Act VII of 1868 by way of appeal to the Revenue Commissioner against such sale? Or is he entitled to pursue both these remedies? There is no express provision in Act VII of 1880, or the cognate Acts, that the judgment-debtor in a case like this would be entitled to pursue both remedies. It would also create very great confusion, and might result in conflicting orders of concurrent Courts if it were held that both these remedies were open to him. Section 19 of Bengal Act VII of 1880 says that all the practice and procedure provided by the said Code of Civil Procedure in respect of sales in execution of decree, &c., &c., shall apply to every execution issued to enforce a certificate. It seems to us that the words "in respect of *sales* in execution of decrees," do not include any proceedings instituted *after the sale* for setting it aside. We think, therefore, that only the provisions of the Procedure Code up to the stage on which the auction-sale is held apply to an execution issued to enforce a certificate and therefore the provisions of ss. 311 and 312 are not applicable. Section 312 is therefore no bar to the present suit; but even if Section 312 were applicable, the plaintiffs would be entitled to succeed if they establish that the sale in question was wholly null and void.

(1) 3 C. 771.

We are of opinion that the only remedy of a judgment-debtor whose property has been sold in execution of a certificate issued under Bengal Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale, is by way of an appeal under s. 2 of Bengal Act VII of 1868. This view has been taken by the lower Court, and we concur in it. But we do not think that the ground upon which this conclusion of the lower Court is based is the correct ground upon which it should be based; because the words, "not being a sale made under and by virtue of any execution issued upon a certificate made as hereinafter provided," in s. 2, Bengal Act VII of 1868, having been repealed by Act VII of 1880, it does not necessarily follow that the Legislature intended that an appeal should lie to the Commissioner of Revenue against [7] a sale held under Act VII of 1880, in execution issued to enforce a certificate. It may be reasonably held that those words were repealed, because all the provisions regarding a sale under an execution issued upon a certificate contained in the subsequent part of Act VII of 1868, were also repealed by Bengal Act VII of 1880. But we think that, by the force of s. 2 of Act VII of 1880, the provisions in s. 2, Bengal Act VII of 1868 became applicable to a sale under an execution issued upon a certificate made under Act VII of 1880. Section 2 of Bengal Act VII of 1880 is to the following effect: "This Act, so far as is consistent with the tenor thereof, shall be construed as one with Act XI of 1859, passed by the Governor-General in Council, and Act VII of 1868 passed by the Lieutenant-Governor of Bengal in Council. The powers given by this Act shall be deemed to be in addition to, and not in derogation of, any powers conferred by any Act now being in force for the recovery of any due debt or demand to which the provisions of this Act are applicable." The effect of this section is, that Act XI of 1859 and Act VII of 1868 and Act VII of 1880 are to be considered as if the provisions contained in them were contained in one Act so far as such construction is consistent with the tenor of the last mentioned Act. That being so, the sale in this case may be considered as a sale under Act VII of 1868 within s. 2 of that Act. The appeal under that section against the sale, therefore, lies to the Revenue Commissioner. Similarly all sales under Act VII of 1880 would become final in the manner and at the time provided in s. 27 of Act XI of 1859. But it is doubtful whether s. 33 of Act XI of 1859 is applicable to the present case. That section says: "No sale for arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable, etc." There is no provision in any Act or Regulation that we are aware of by which a demand for road and public cesses is realizable in the same manner as arrears of revenue are realizable. But it is not necessary for us to express any decided opinion upon this point in the view which we take of this case. We think that, if the three grounds which are taken before us are established, s. 33 of Act XI of 1859 would be no bar to the plaintiffs' success even if it be conceded that it is applicable to the present suit. If [8] these grounds are established, the sale in question would, in our opinion, be deemed null and void, and according to the ruling of the majority of the Judges of the Full Bench in *Lala Mobaruk Singh* v. *The Secretary of State for India* (1), s. 33, Act XI of 1859 cannot be set up as a bar to a suit of this nature.

(1) 11 C. 200.

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As regards the third ground taken before us, it is alleged in the fourth paragraph of the plaint that a copy of the sale proclamation was fixed upon the Court-house of the Collector on the 18th of August 1881, and the sale took place on the 16th September 1881. If these facts are substantiated, then it is quite clear that the provisions of s. 290 of the Civil Procedure Code were infringed, and such an infringement is not a mere irregularity, but it vitiates the sale—*Bakshi Nand Kishore* v. *Malak Chand* (1).

Then as regards the first ground, it is true that there is no clear allegation in the plaint that there were no arrears due at all. But it seems to us that the facts stated in it are consistent with a case based upon an allegation of this nature. But this issue, in our opinion, ought not to be raised until the plaintiffs amend their plaint and insert therein a clear allegation to that effect.

There remains to notice only one other point which was raised before us. It was contended that the sale in this case was bad, inasmuch as the provisions of Bengal Act VII of 1880 are wholly inapplicable to the present case. It is said that under s. 98 of Act IX of 1880, arrears of road and public cesses are not realizable under Bengal Act VII of 1880. Section 98, Bengal Act VII of 1880, is to the following effect. "Every amount due, or which may become due, to any Collector, under the provisions of this Act in respect of any arrears of cess, of any expenses, incurred, of any fee or costs payable, of any notices served, of any fines imposed or on any other account, may be realized by such Collector by any process provided by any law for the time being in force for the realization of public demands, and shall be deemed to be a public demand under such law." It is contended before us that, as there is no Act or Regulation in force for the realization of public demands generally, this provision has no operation. It is true that the preamble of Act VII of 1880 and the heading of it describe the Act as an Act to amend the law for the recovery [9] of certain public demands, but s. 1 says that this Act may be called (The Public Demands Recovery Act, 1880). It seems to us that by the words "any law for the time being in force for the realization of public demands" used in s. 98, Act IX of 1880, the Legislature referred to Act VII of 1880. It was not an Act for the recovery of *certain* public demands, but it was an Act for the recovery of all kinds of public demands. The heading and the preamble indicate that it was enacted for *amending* the law for the recovery of *certain* public demands. But the Act itself is an Act for the recovery of all kinds of public demands. We are, therefore, of opinion that this contention cannot succeed.

The result is that the decree of the lower Court will be set aside, and the case will be remanded to that Court to decide it in accordance with the remarks contained in this judgment. Costs will abide the result.

K. M. C. *Appeal allowed and case remanded.*

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(1) 7 A. 289.

14 C. 9.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

RAM LOGAN OJHA AND ANOTHER (*Two of the Defendants*) *v.* BHAWANI OJHA AND ANOTHER (*Plaintiffs*).* [23rd July, 1886.]

Public Demands Recovery Act (Bengal Act VII of 1880), *s*, 19—*Certificate Procedure—Civil Procedure Code (Act XIV of* 1882), *ss.* 311, 312.

A suit will lie in a Civil Court to set aside a sale held under Bengal Act VII of 1880, where the sale proclamation is issued against the whole sixteen annas of the estate, but a sale held only of a portion thereof.

The effect of s. 19 of that Act is, that it relates to the practice and procedure in respect of sales, that is, to the practice and procedure of executing Courts in the carrying out of sales.

[**Cons.**, 26 C. 414 (**F.B.**)=3 C.W.N. 233; 22 C. 419 (423); 5 C.W.N. 521=29 C. 73 (**F.B.**); 29 C. 94 N.=6 C.W.N. 246; **R.**, 11 C.W.N. 745 (756)=34 C. 787; **D.**, 6 C.W.N. 302 (305).]

THIS was a suit brought to set aside a sale held under the Certificate Act, Bengal Act VII of 1880, on account of arrears of road cess for an instalment due in June 1881. The plaintiff stated that he held a two-anna share in three out of the four villages composing Mehal Ismailpore Koel, and that his co-sharers in the remainder were the defendants, that he had opened on the 5th May 1882, a separate account for payment of the road and public works cesses on his own share, and had paid all cesses due [10] therefor; that on the 15th May 1882, his share in mouza Ismailpore Koel was attached and sold under the Public Demands Act by the Collector, and was purchased by defendant No. 25; that on the 14th June 1882 he (the plaintiff) took objection to the sale before the Deputy Collector, but his objection was rejected and the sale confirmed; that on the 29th June he appealed to the Commissioner, but without success, and therefore brought this suit for the purposes above mentioned on the 10th March 1882 on the following grounds, *viz.*:—

(1) That the sale certificate was issued against the whole sixteen annas of the mouza, whilst his, the plaintiff's, share was alone sold.

(2) That the sale was advertised for noon, but was held at 8 A.M.; and that he had suffered material injury, as the property had been sold at an inadequate price.

(3) That the sale proclamation was not duly published.

The defendants put in various written statements, the chief defendants contending that no suit would lie in a Civil Court to set aside a sale held under Bengal Act VII of 1880; that the plaintiff had no right to appeal from the order of the 14th June 1882, to the Commissioner, the order of the Collector being final under s. 311 of the Civil Procedure Code; that the suit was barred, it not having been brought within one year from the date of the order confirming the sale of the 14th of June 1882.

The Subordinate Judge held that the suit was maintainable; that s. 312 of the Civil Procedure Code did not apply; that the plaintiff had not paid all arrears due for road cess; that limitation ran against the plaintiff from the date of the confirmation of the sale on the 14th June 1882, no appeal lying to the Commissioner; that, although there was no

* Appeal from Original Decree No. 436 of 1885, against the decree of Baboo Kali Prosunno Mookerji, Rai Bahadoor, Subordinate Judge of Gya, dated the 24th of April 1885.

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appeal to the Commissioner, yet the plaintiff, having appealed to that officer in all good faith, was, under s. 14 of the Limitation Act, entitled to deduct the time during which he was prosecuting that appeal, and that, therefore, the suit was not barred; that the sale was void, inasmuch as the sale proclamation had been issued against the whole sixteen-annas of the mehal whilst the plaintiff's share therein was alone sold; and inasmuch as the sale proclamation was not duly published in all of the villages composing the mehal, and as the sale was [11] held at 8 A.M., whereas it had been published as to be held at noon, that the plaintiffs had suffered material injury from such sale, as there was abundant evidence to show that the property was of far greater value than the price it was sold for; he therefore set aside the sale.

Two of the defendants appealed to the High Court.

Mr. *Evans*, Mr. *C. Gregory*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Jogesh Chunder Roy*, for the appellants.

Baboo *Rash Behari Ghose*, and Baboo *Karuna Sindhu Mookerjee*, for the respondent.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

JUDGMENT.

This is a suit brought substantially to set aside a sale of an undivided share in Mouzah Ismailpore, forming a part of a mehal which also includes other mouzahs. The plaintiff being one of the sharers in the mehal, his interests were sold for arrears of road cess; and he sues the purchaser and the other persons interested in the transaction.

The lower Court has given a decree in the plaintiff's favour.

It is said, first, that such a suit will not, in any case, lie in a Civil Court; and the ground for that contention is that, in Bengal Act VII of 1880, s. 19, it is said that a certificate may be enforced and executed by all or any of the ways and means mentioned and provided in the Code of Civil Procedure for the enforcement and execution of decrees for money; and that all the practice and procedure provided by the Code of Civil Procedure in respect of sales in execution of decrees, and in various other matters enumerated, shall apply to every execution issued to enforce such certificate. It is said that the effect of that is to incorporate the whole of the enactments of ss. 311 and 312, and the following sections of the Code of Civil Procedure into the certificate procedure; and that therefore, if a judgment-debtor is desirous of objecting to a sale which has taken place, his remedy is to put in his objection in the Court of the Revenue Officer before the sale is confirmed, and then, if his claim be disallowed, to [12] appeal to this Court against the disallowance of his claim; and that under s. 312 no civil suit will lie.

We are distinctly of opinion that that is not the effect of s. 19. Section 19 relates to the practice and procedure in respect of sales, that is, the practice and procedure of executing Courts in the carrying out of sales: and that *that* is the meaning of the section is rendered clear by the words which follow, giving a number of particular matters beyond the mere conduct of the sale to which such practice and procedure apply. That is, we think, the natural construction of the words; and it has been held to be the true construction by another Division Bench of this Court (MITTER and NORRIS, JJ.) in *Sadhusaran Singh* v. *Panchdeo Lal* (1). The suit therefore will lie if the facts justify it.

(1) 14 C. 1.

It is unnecessary to inquire whether the effect of s. 2, Bengal Act VII of 1880, incorporating the provisions of Act VII of 1868, and at the same time amending it, was to give, in a case like the present, an appeal to the Commissioner. In the case already referred to, MITTER and NORRIS, JJ., answered that question in the affirmative. In this case it does not arise, because, rightly or wrongly, an appeal to the Commissioner was made. Nor is it necessary to inquire whether the provisions of s. 33 of Act XI of 1859 have any effect in a case of this kind; and whether therefore it is a condition precedent to the filing of a suit in a Civil Court that an appeal should be made to the Commissioner, because here such an appeal was made.

Then, again, no question of limitation arises in this case, because the appeal to the Commissioner did or did not lie. If it did lie, then it is clear that the plaintiff's period of limitation would begin to run from the date of the Commissioner's decision and the plaintiff is consequently in time. On the other hand, if the appeal to the Commissioner did not lie, then the plaintiff is in time for another reason, because under s. 14 of the Limitation Act the period during which the proceedings were pending before the Commissioner would have to be deducted. This disposes of the questions of law raised in the case.

[13] As to the merits, we do not entertain the slightest hesitation in agreeing with the lower Court in the conclusion at which it has arrived. The subject-matter of the suit is a share in a mouzah, forming part of a mehal, in which there are a large number of shareholders. The certificate was made against Bhawani Ojha, one of the present plaintiffs "and others." Now, one or other of two things must be the case about that certificate. Either the words "and others" mean the other shareholders in the mehal, or else the certificate is an absolute nullity, because, on the face of it, it does not show against whom it is made. If it means the other shareholders, then it is a certificate against this man and his co-sharers; and, though it is drawn up in an unsatisfactory manner, we think that *that* is probably the true construction of the certificate. Taking it, therefore, that the certificate was made against Bhawani Ojha and the other shareholders of the mehal, what follows? A sale proclamation was issued in which the thing advertised for sale was the whole sixteen annas of the mehal, subject to the whole of the sudder jumma; and that was the only thing that could be sold. When the time for the sale came, however, what was sold was not the mehal, nor any part of the mehal, nor one or more of the mouzahs in the mehal, but the interest of a person entitled to a share in three out of the four mouzahs of the mehal. That, it appears to us, made the sale an absolute nullity. One thing was advertised for sale, and another was sold, so that in fact there was no sale proclamation at all. But even if that did not make the sale a nullity, and if it were necessary to inquire whether any damage had arisen by reason of the irregularity in the sale, there would be no doubt in the matter. There is necessarily grave damage in a case where an estate is liable to be sold, and is offered for sale, and then one shareholder is selected as a victim, and his property only is sold for the debts of all the share-holders.

For these reasons we think that the decree of the lower Court is correct, and that the appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

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APPELLATE. CIVIL.

14 C. 14.

14 C. 14.

[14] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

LALIT MOHUN ROY (*Judgment-debtor*) *v.* BINODAI DABEE, MINOR, MOHARANI OF BURDWAN, BY HER NEXT FRIENDS, LALLA BUNIBEHARI KAPUR AND ANOTHER, MANAGERS UNDER THE COURT OF WARDS (*Decree-holder*).* [26 August 1886.]

Sale for arrears of rent—Under-tenure—Bengal Act (VIII of 1869), *ss.* 34, 59—61 *and* 65—*Sale of property other than under-tenure.*

Where a decree had been obtained for arrears of rent of an under tenure and in execution thereof application was made for the attachment and sale of a certain property of the judgment-debtor, other than the tenure for which the arrears were due—objection was taken that the *kabuliat* stipulated that the tenure itself should be first sold in execution of the decree. *Held*, that the *kabuliat* not being referred to, or incorporated with, the terms of the decree, it was not open to the judgment-debtor to go behind the decree, as to the mode in which it was to be executed. But, *held*, on the construction of Bengal Act VIII of 1869, ss. 59—61 and 65, that the under-tenure should first be sold before any other immoveable property could be made available. Section 34 of that Act (introducing the procedure laid down in the Civil Procedure Code into rent suits, "save as is in Act VIII of 1869 otherwise provided") made no alteration in this respect, ss. 59—61 and s. 65 specially providing for such mode of execution.

[**Expl.**, 15 C. 492 (494).]

IN this case a decree was obtained by the managers, under the Court of Wards, of the Burdwan Raj, against the appellant for arrears of rent, and an application was made for execution of that decree by the attachment and sale of a certain property, other than the tenure for which the arrears of rent were due. The judgment-debtor objected to the attachment, on the ground that it was stipulated in the *kabuliat* that the tenure itself should be first attached and sold in satisfaction of a decree for arrears of rent, and that such a decree could only be otherwise executed should the tenure fetch less than the amount due.

The first Court allowed the objection, and refused the application for the attachment and sale of the property other than the tenure itself.

[15] On appeal the Judge reversed this decision, holding in accordance with the case of *Kristo Ram Roy* v. *Janokee Nath Roy* (1), that the decree-holder was not ordinarily bound to proceed first against the tenure, for arrears of rent of which the decree had been obtained; and that if he had bound himself by any agreement, that agreement should have been incorporated in the terms of the decree. The judgment-debtor appealed to the High Court.

Mr. *Woodroffe*, Dr. *Rashbehari Ghose*, Baboo *Amarendra Nath Chatterjee* and Baboo *Jogendra Nath Ghose*, for the appellant.

The Senior-Government Pleader (Baboo *Annoda Prosad Banerji*), for the respondent.

The judgment of the Court (NORRIS and GHOSE, JJ.) after shortly stating the facts, proceeded as follows:—

JUDGMENT.

Two questions have been raised before us by the learned counsel for the appellant. 1st, that under the terms of the *kabuliat*, creating

*Appeal from Order No. 425 of 1885, against the order of A. Gillon, Esq. Officiating Judge of Hooghly, dated the 9th of November 1885, reversing the order of Baboo Saroda Prosad Chatterji, Subordinate Judge of that district, dated the 1st of August 1885.

(1) 7 C. 748.

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the tenancy between the parties, the landlord is bound to sell the tenure itself in the first instance; 2*nd*, that under the provisions of the Rent Law (Bengal Act VIII of 1869) the decree-holder is not entitled to sell any other immoveable property before bringing to sale the tenure itself.

As regards the first of these two contentions we are of opinion that it cannot be sustained. The decree was an ordinary decree for rent; and no reference whatever was made in it to the *kabuliat* or to the terms thereof, and it does not appear that the *kabuliat* was even filed in the rent suit. That being so, it is not open to the judgment-debtor to go behind the decree, and to insist that the terms of the *kabuliat* should regulate the rights and liabilities of the parties as regards the mode in which the decree should be realized.

The second point is by no means free from difficulty. Under the provisions of Act X of 1859, there seems to have been no doubt that such a proceeding as the decree-holder now desires to adopt was unauthorized —see *Desarotulla* v. *Nazim Nazar Ally* (1), [16] and *Jokee Lall* v. *Nursing Narain* (2). But then the question arises whether under Bengal Act VIII of 1869 it is authorized.

The learned Government Pleader who appeared for the decree-holder contended that, under Act VIII of 1869, the decree-holder was entitled to sell either the tenure or any other immoveable property as he pleased; and in support of his contention he relied upon the decision of the Judicial Committee in the case of *Doolar Chand Sahoo* v. *Lalla Chabil Chand* (3), and upon the case of *Kristo Ram Roy* v. *Janokee Nath Roy* (4) decided by a Divisional Bench of this Court.

The Divisional Bench which decided that case has put a certain construction upon the abovementioned decision of the Judicial Committee, and it is a construction which is certainly favourable to the decree-holder; and if we were prepared to adopt the same construction, there would be no difficulty in holding that the judgment-debtor's contention must fail. But we entertain doubts whether the result of the Judicial Committee's decision is what it has been held to be by the Divisional Bench. It will be observed from an examination of the case before the Privy Council that the only question that came before it for consideration was what passed under the sale held by the Court on the 25th of July 1872, whether it was the tenure or simply the right, title and interest of the judgment-debtor therein; and their Lordships held that what the decree-holder intended to sell, and what was in fact sold by the Court, was not the former, but the latter. In arriving at this decision they referred, among other matters, to the petition of the decree-holder, and the inventory attached to it, describing the property which he requested to be sold, and also the provisions of ss. 59 and 34 of Act VIII of 1869; and then they observed—" that although the Maharaja (the decree-holder) might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also the power to proceed against the property of the judgment-debtor." The words " the property of the judgment-debtor " as used by the Judicial Committee in this passage evidently refer to the property described in the decree-holder's petition and [17] inventory, and were not used by them, as we understand, as denoting *any* property other than the tenure. And we are inclined to think that the question whether it

(1) 1 B. L. R. A. C. 216.
(2) 4 W. R. Act X 5.
(3) 6 I. A. 47=3 C. L. R. 561.
(4) 7 C. 748.

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was competent to the decree-holder to sell any *other* immoveable property than the tenure in the first instance, was not considered by the Judicial Committee, and that it is still an open question.

Upon an examination of Bengal Act VIII of 1869, and comparing the several sections thereof, so far they bear upon the matter before us, with the corresponding sections of Act X of 1859, it would appear that, barring the provisions of s. 34 of Act VIII of 1869, the law on the subject was substantially the same under both the Acts; and the question that arises is, whether by reason of that section the decree-holder has the right that is now claimed for him.

Section 34 of the Act runs as follows:—

"Save as in this Act is otherwise providede, suits of every description brought for any cause of action, arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council in relation to Civil Procedure as now are, or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits."

The matters for consideration upon this section are: (1*st*), whether there is any provision in the Act itself regulating the order in which the under-tenure and other immoveable properties belonging to the judgment-debtor should be sold; (2*nd*), whether the words "all proceedings therein shall be regulated by the Code of Civil Procedure" confer upon the decree-holder the right of electing to sell, in the first instance, the tenure, or any other property, as he pleases.

Upon the two matters indicated above, we are of opinion that there is distinct provision in ss. 59 to 61 and 65 of Act VIII of 1869 indicating that, in the case of a decree for rent accruing upon an under-tenure, the under-tenure should be sold in the first instance before any *other immoveable* property can be sold; and that, therefore, notwithstanding that it is optional with the decree-holder either to sell the whole tenure under the Rent Law, or simply the interest of the judgment-debtor, as it may exist upon [18] the day of sale, under the Civil Procedure Code, he is bound to follow the order in which the property, upon which the rent has accrued, and other properties belonging to the tenant, may be brought to sale, as indicated in the above sections.

In view of the opinion expressed by the Divisional Bench in the case referred to above, we should, had we considered the question raised in this appeal one of general importance and likely to recur, have thought it proper to refer this case to a Full Bench. But Act VIII of 1869 has been repealed, and an entirely new Act has come into operation, and so we think a reference to a Full Bench is unnecessary.

We direct that the order of the District Judge, so far as the sale of the immoveable properties is concerned, be set aside, and that of the Sub-Judge restored.

The appellant must have his costs in all Courts.

J. V. W. *Appeal allowed.*

14 C. 18 (P.C.)=13 I.A. 106=10 Ind. Jur. 428=4 Sar. P.C.J. 746.

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14 C. 18 (P.C.)= 13 I.A. 106=10 Ind. Jur. 428=4 Sar. P.C. J. 746.

PRESENT:

Lord Watson, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

REWA MAHTON (*Defendant*) *v.* RAM KISHEN SINGH (*Plaintiff.*)*
[9th July, 1886.]

Civil Procedure Code, 1877, *s.* 246 (1)—*Execution of cross-decrees—Jurisdiction—Bona fide purchaser—Presumption of validity of order for sale.*

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the Judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution.

Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bona fide*, and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale.

[**F.**, 15 C. 557 (558); **Expl.**, 76 P.R. 1890; 26 M. 428 (430)=12 M.L.J. 398; 13 C.W.N. 710 (714)=1 Ind. Cas. 871=11 C.L.J. 254=37 C. 107: **R.**, 14 C. 627; 17 M. 58 (60)=3 M.L.J. 211; 19 M. 219 (221); 21 B. 424 (**F.B.**); 21 B. 463; 22 B. 88; 26 C. 734; 22 A. 377; 23 A. 25 (30); 24 A. 481 (483)=22 A.W.N. 126; 26 B. 543 (548); 5 C.L.J. 696=11 C.W.N. 756 (**F. B.**); 11 C.L.J. 489 (499)=14 C.W.N. 560 (568)=5 Ind. Cas. 390 (395); 7 Ind. Cas. 17 (18); 9 Ind. Cas. 472 (474). **D.**, 25 A. 214 (218)=23 A.W.N. 21 (**F.B.**); 20 Ind. Cas. 337 (340); 16 O.C. 225 (231)=21 Ind. Cas. 570 (572).]

[19] APPEAL from a decree (21st April 1882) of the High Court. reversing a decree (3rd August 1880) of the Subordinate Judge of Bhagalpur.

This was a question as to the construction of s. 246 of the Code of Civil Procedure, Act X of 1877, providing that, if cross-decrees between the same parties, and for the payment of money, are produced to the Court, execution shall be taken out only by the holder of the decree for the larger sum, and only for the balance.

The decree of the High Court, against which this appeal was preferred, set aside a sale made in execution of one Khub Lal's decree against Mussamut Radheh Koeri, now deceased, and represented by the respondent Ram Kishen Singh.

The High Court did not examine the question of fraud, their opinion in regard to s. 246 rendering it unnecessary so to do. Briefly stated, the circumstances connected with the sale were that Khub Lal had originally taken a lease of mouzah Mokandpur from Radheh Koeri, paying to her an advance, to be held in deposit by her as security for the rent; and cross suits resulted in 1877. The lessor sued for two years' rent, and the lessee for a refund of the advance, or zuripeshgi. The Munsif of Jamoi heard the suit together, recording one judgment (7th September 1877), but refusing to set the one sum off against the other

(1) Section 246 of Act XV of 1882.

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before decree; and making two decrees, one for Rs. 788 in favour of Radheh Koeri and the other for Rs. 661 in favour of Khub Lal. The latter on execution issued by the former (10th November 1877), was imprisoned for a period, but released on her failure to pay diet money. Another application (29th March 1878) made by her for execution of her decree gave no credit for the amount due by her to Khub Lal; but, amongst other things, asked for the attachment and sale of his decree against her.

The application was refused by the Munsif, exercising his discretion under s. 230 of Act X of 1877; but on appeal, was granted by the District Judge (26th July 1878), and from this order Khub Lal appealed to the High Court. Pending this appeal, Khub Lal, applied (31st December 1878) for the execution of his decree by the attachment and sale of Koeri's interest in the said mouzah Mohamda. This application was made in the same [20] Court in which she was already carrying out execution of her cross-decree. The Court, without applying s. 246 to the case, made an order (4th November 1878) for the sale of Mohamda which accordingly took place, resulting in the purchase of it by the appellant.

Radheh Koeri then applied, under s. 311 of the Code, to have the sale set aside, alleging that Khub Lal's decree ought not to have been executed, her own decree standing against him in the same Court for a larger amount. She alleged that the execution proceedings had been fraudulently carried on, and the property sold for about half of its value. The Munsif of Jamoi found that there had been no fraud, and rejected the application, passing an order, under s. 312, confirming the sale. This was upheld on appeal (22nd September 1879), the District Judge holding that, after a sale has taken place, the Court having jurisdiction, and the purchaser having become an interested party, inquiries as to irregularity must be restricted, under s. 311, to what had occurred in publication of the attachment, the giving notice, and holding the sale, with consequent material injury to the judgment-debtor. Of the latter there was none here.

Radheh Koeri having failed in getting the sale set aside under s. 311, instituted the present suit. The proceedings thereupon having been fully stated in the judgment on this appeal are not here recounted. The High Court reversed the decree of the Subordinate Judge, who dismissed the suit. The Judges determined the question upon s. 246 alone, holding that the effect of that section was to render the sale invalid under the circumstances.

For the appellant, Mr. *C. W. Arathoon* argued that the High Court had misapplied s. 246, Act X of 1877, disregarding the important consideration that Rewa Mahton was a *bona fide* purchaser, who had paid a fair value of the property sold by the Court's order in execution of decree. As against him, there were no grounds for setting aside the sale.

The respondent did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

Sir B. Peacock.—This is an appeal from a decree of the High Court at Calcutta in a suit in which the respondent, Mussamat [21] Radheh Koeri, was the plaintiff, and Khub Lal and the appellant Rewa Mahton, and others, were the defendants. Koeri died pending this appeal, and Ram Kishen Singh, her son and heir, was substituted for her.

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It appears that on the 7th of September 1877 the Munsif of Jamoi, in the district of Bhagalpur, made two decrees, one in favour of the respondent against Khub Lal for Rs. 788-0-9, and the other in favour of Khub Lal against her for Rs. 661. On the 10th November 1877 the respondent took out execution against Khub Lal for the whole amount of her decree without giving him any credit for the Rs. 661 which he had recovered against her. Under that execution Khub Lal was arrested and detained in prison for a period of about two months, at the expiration of which time he was released on the failure of the respondent to lodge the necessary diet-money. Subsequently, on the 26th March 1878, the respondent made another application for execution against Khub Lal upon her decree, and in that application she gave him no credit for the Rs. 661 which he had recovered against her. Upon that execution being granted, an application was made to the Munsif by Khub Lal to set it aside. The Munsif granted that application, but his decision was, on the 26th July 1878, reversed by the District Judge, who held that the respondent was entitled to execute her decree for Rs. 788, notwithstanding all that had previously taken place. Upon that Khub Lal appealed to the High Court, and whilst the matter was pending before that Court, *viz.*, on the 31st of August 1878, he applied for execution against the respondent for the total amount of his decree for Rs. 661. The execution was issued, and under it the property of the respondent, consisting of a 2 annas share of mouzah Mokandpur Mohamda, was attached and sold to the appellant for a sum of Rs. 9,775. Application was made to set aside that sale under ss. 311 and 312 of Act X of 1877. The Munsif disallowed the application and confirmed the sale, and his order was on appeal affirmed by the Judge. By the last paragraph of s. 312 it is enacted that " No suit to set aside on the ground of such irregularity an order passed under this section, shall be brought by the party against whom such order has been made."

[22] The present respondent, however, brought a regular suit against Khub Lal, and the present appellant, the purchaser under the execution, and others alleging that, owing to her having a decree against Khub Lal for an amount greater than that of his decree against her, the latter decree was not fit to be executed; that the sale under it was contrary to the powers of the Court, and was not binding upon her; and that the purchaser acquired no right under the sale; and, further, that the purchase by the present appellant took place in collusion with Khub Lal; that Khub Lal was really the purchaser; that he, by fraud, had kept her from knowing that the execution had issued; and consequently that the sale in execution ought to be set aside. She prayed: " (1) that the Court will be pleased to hold that the processes of execution of decree of Khub Lal, the defendant No. 1, were carried out entirely in contravention of law; and that in reality, according to law and justice, the defendant aforesaid had nothing to obtain from your petitioner, the plaintiff; and that the sale which has been held is invalid. (2) That the Court will be pleased to hold that the processes of the sale aforesaid, and the sale in question, were executed and held fraudulently. (3) That the Court will be pleased to cancel this sale." Written statements were put in on the part of the several defendants, and issues were settled. The Subordinate Judge in the first instance settled two issues in bar. The first was: " Is this case in the regular department,"—that is, is this suit which is brought as a regular suit—" unfit for hearing under the last portion of s. 312 of the Code of Civil Procedure, or not?" Second: " Was

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it necessary for the defendant, first party, to set off the amount of the decree of the plaintiff against his own decree under s. 246 of the Code of Civil Procedure, or not?" Subsequently he settled further issues of fact. He said: "To-day the arguments of the pleaders for both parties on the first issue were heard. After hearing the arguments of the pleaders for both parties, I come to the conclusion that issues on facts also ought to be framed; that, after receiving the evidence, I shall try, on all the issues, as to whether this sale has been held fraudulently or not, and determine whether, in case fraud be proved, a regular suit will lie for cancelment of the sale in question." Then he settled [23] the following issues of fact: 1*st*, Did the defendant No. 1 take the proceedings for execution of decree and service of attachment processes and a sale notification fraudulently (and) surreptitiously, with a view that the plaintiff might not be aware of it; or were the proceedings of execution of decree and the issue of attachment processes and sale notifications executed in a *bona fide* manner without fraud? 2*nd*. Is the defendant No. 2 "—that is the present appellant—" furzi for the defendant No. 1 in the auction-purchase, or is he the real purchaser; and were the defendants Nos. 2 and 3 aware of the fraud stated by the plaintiff at the time of the auction-purchase or not? 3*rd*. Has the property sold at auction been sold for a small value owing to the fraud alluded to, or not? Those issues came on for trial. Witnesses were heard on both sides, and the Judge delivered judgment, by which, after stating that the pleas in bar were overruled by his predecessor, he decided in favour of the defendants. With regard to the principal point as to the fraud, he said: "There is no proof of the allegation that Khub Lal purchased the share in question in the name of Rewa Mahton." And again: "In my opinion Rewa Mahton is the real purchaser, who made the other defendant, Omed Ali, a partner in his purchase. I do not think that Khub has any interest in the property." He also held that the property was not sold for an inadequate price. An appeal was preferred to the High Court, and that Court, without entering into the question of fraud, or no fraud, but assuming that the defendant, the present appellant, was a *bona fide* purchaser at the sale, proceeded to consider the question whether the sale in execution was valid or not in consequence of the Munsif's having granted Khub Lal's execution when the plaintiff held a decree for a larger amount against him.

That question depends upon s. 246 of the Code of Civil Procedure. Act X of 1877, which enacts as follows: "If cross-decrees between the same parties and for the payment of money be produced to the Court "—that is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not,—execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as [24] remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum." In this case the plaintiff's decree was not brought before the Court when Khub Lal applied for execution. At that time he brought before the Court only his own decree, and the Court ordered that an attachment should issue to satisfy his judgment for Rs. 661, and the property was attached. We cannot in this suit enter into the question whether the decisions upon the petition to set aside the sale under ss. 311 and 312 were correct or not. Those decisions cannot, in consequence of s. 312, be impeached in this suit on the ground of any irregularity which was the subject of those decisions,

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The High Court determined the question simply upon s. 246. They said: "The provisions of s. 246 are explicit, that if cross-decrees between the same parties and for the payment of money be produced to the Court, execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum. It was not competent to the Munsif by his judgment to modify this provision of the law, even if it were his intention to do so which is by no means clear." The High Court does not say that the decree of the plaintiff was brought before the Munsif, or that the two decrees were before him at the time when he awarded execution for the smaller decree. They go on: "Nor does it appear to us that there was anything in the plaintiff's conduct which could render legal and valid proceedings of the defendant, which were without the sanction of law. When the defendant on the 31st August, applied for execution of his cross-decree for a smaller amount he must have been aware that the plaintiff's decree had been produced to the Court, and that since the order of the Appellate Court, 26th July, 1878, it was capable of execution. The defendant accordingly had no right to execution, except as provided by s. 246, and the whole of the subsequent proceedings taken in execution of the defendant's decree were, in our opinion, a nullity, and must be set aside." The Court, therefore, notwithstanding the finding of the lower Court that the defendant—the present [25] appellant—was a *bona fide* purchaser at the sale under the execution, and without themselves entering into the question of fraud or no fraud, held that the execution issued by the Munsif and all the subsequent proceedings, were a nullity, and must be set aside. The defendant-appellant purchased *bona fide*, and for a fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment.

Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of s. 246, and that the judgment of the High Court in that respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.

It would have been more satisfactory if in this case, which was one appealable to Her Majesty in Council, the High Court had not decided the case merely upon the construction of s. 246 without expressing their opinion upon the other issues which were raised and determined by the Subordinate Judge. Their Lordships, being of opinion that the decision of the High Court with reference to s. 246 is erroneous, have been obliged to determine the other issues, and for that purpose to go through the evidence in the absence of the respondent, who did not appear before them on the argument of the case, without having the advantage of any expression of the High Court's opinion as to the effect of that evidence. If the High Court had determined the other issues and had concurred with the Subordinate Judge in his findings, the case would have fallen within the [26] rule of

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concurrent findings of fact, and the examination of the evidence by their Lordships would in all probability have been unnecessary.

Their Lordships having examined the evidence very carefully have come to the conclusion that the Subordinate Judge was correct in holding that there was no fraud; that the defendant was a *bona fide* purchaser under the execution; and that the property was not sold for an inadequate price.

Under these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal to the High Court with costs, to reverse the judgment of that Court, and to affirm the decision of the Subordinate Judge. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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14 C. 26.

APPELLATE CIVIL.

Before Mr. Justice Porter and Mr. Justice Agnew.

RAGHUNATH PERSHAD (*Decree-holder*) *v.* ABDUL HYE AND ANOTHER (*Judgment-debtors*).* [2nd June, 1886.]

Limitation Act (XV of 1877), art. 179 (para. 2)—Appeal against part of decree—Execution against judgment-debtors who were not joined in the appeal.

By a decree of a Court of first instance, dated the 16th August 1880, Rs. 15,260-5-6 was found due against *A* and Rs. 20,099-2-6 against *A* and *B* jointly, the suit being dismissed as against two other defendants who were alleged to have been sureties. The plaintiff appealed against so much of this decree as dismissed the suit against the alleged sureties, not making either *A* or *B* parties respond nts; this appeal was dismissed on the 1st May 1885. On the 27th April 1885 plaintiff applied for execution against *A* and *B*: *Held*, that the application was barred under art. 179 of the Limitation Act.

[**Diss.**, 25 C. 594 (599) (**F.B.**); **F.**, 12 M. 479 (480); **Cons.**, 16 C. 598 (601); **R.**, 22 B. 500; **D.**, 23 C. 876 (878).]

THIS was a suit brought by the plaintiff against Wajiruddin, Abdul Hye, Mussamut Batulan, Abdul Huq, and Abdus Sanad, [27] to recover a sum of Rs. 35,359-8 due under a deed, dated 19th February 1874, the defendants Mussamut Batulan and Abdul Huq being sued as the heirs of one Mussamut Basiran under a security bond executed on her behalf by Abdul Hye on the 2nd March 1874. On the 16th August 1880 the plaintiff obtained a decree against Abdul Hye for Rs. 15,260-5-6, and against Abdul Hye and Wajiruddin jointly for Rs. 20,099-2-6, the suit as against Mussamut Batulan and Abdul Huq being dismissed; the claim against Abdus Sanad having been withdrawn at the hearing. The plaintiff appealed against so much of the decree as dismissed the suit against Mussamut Batulan and Abdul Huq, without making any of the other defendants parties respondents. On the 1st May 1882 this appeal was dismissed; and on the 27th April 1885 the plaintiff applied for execution against Abdul Hye and Wajiruddin. The Subordinate Judge refused the application, holding that it was barred under art. 179 of the Limitation Act,

* Appeal from Order No. 297 of 1885, against the order of Moulvi Mahomed Nurul Hosein, Khan Bahadur, Subordinate Judge of Sarun, dated the 25th of July 1885.

inasmuch as no appeal was preferred against the portion of the original decree which made Abdul Hye and Wajiruddin liable. **1886** JUNE 2.

The plaintiff appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Mr. *C. Gregory*, for the appellant, contended that the words in para. 2 of art. 179 of the Limitation Act must be construed strictly, and that where there has been an appeal, whether against the whole or part of a decree, limitation did not run till the date of the appellate decree ; and cited *Mullick Ahmed Zumma* v. *Mahomed Syed* (1) ; and *Bhoobunessuree Debia* v. *Chunder Monee Debia* (2). APPELLATE CIVIL. **14 C. 26.**

Mr. *O'Kinealy* (with him Moulvie *Mahomed Yusuf*), for the respondents, contended that where there are in reality separate decrees, though on one piece of paper, and there is an appeal against part of the decree only, limitation, so far as the unappealed from part of the decree is concerned, would run from the date of the original decree ; and cited *Wise* v. *Rajnarain Chuckerbutty* (3) ; and *Hur Proshad Roy* v. *Enayet Hossein* (4).

The judgment of the Court (PORTER and AGNEW, JJ.) omitting the statement of the facts, was as follows :—

JUDGMENT.

[28] Article 179 of the Limitation Act of 1877 provides a period of three years' limitation for an application to execute a decree or order of any Civil Court, not provided for by art. 180, or by the Code of Civil Procedure, s. 230, to be computed from (*a*) the date of the decree or order ; (*b*) (where there has been an appeal) the date of the final decree or order of the Appellate Court ; and the question we have to decide in this case is, what construction is to be put upon the words, "where there has been an appeal." Are these words to be read in their widest sense, as including every case in which there has been an appeal against the whole or part of the decree of the lower Court ; or are they to be read in a more limited sense, in cases like the present, where a portion of the decree is not appealed against? For the appellant it is contended that these words must be read strictly, and that where there has been an appeal, whether against the whole or part of the decree of the first Court, limitation does not begin to run till the date of the final decree of the Appellate Court, though that decree does not, and cannot, affect any portion of the original decree. For the respondents it is contended that, where, as in this case, there are really separate decrees, though on one piece of paper, and there is an appeal against part of the decree only, limitation, so far as the unappealed from part of the decree is concerned, begins to run from the date of the original decree.

There does not appear to be any precise authority on the question before us. In *Ram Charan Bysak* v. *Lakhi Kant Bannik* (5) a Full Bench of this Court held that the decree passed by the Appellate Court becomes the final decree in the suit, following the decision of the Madras High Court in *Arunachellathudayan* v. *Veludayan* (6). The decree, however, in the Full Bench case was a joint decree, and it was not necessary to consider the effect of an appeal against part of a decree only. In *Kisto Kinker Ghose Roy* v. *Barodacant Singh Roy* (7) their Lordships of the Privy Council seem to doubt whether these last mentioned cases were rightly decided, though they did not express dissent from them. In this case also the decree of the first Court was [29] a joint decree

(1) 6 C. 194. (2) 21 W. R. 243. (3) 10 B. L. R. 258=19 W. R. 30.
(4) 2 C. L. R. 471. (5) 7 B. L. R. 704. (6) 5 M.H.C. 217. (7) 10 B.L.R. 101.

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and the whole decree was before the Court. In *Gungamoyee Dassee* v. *Shib Sunkur Bhuttacharjee* (1) the appellant obtained a decree on the 12th November 1872, by which the respondents and one Choitun were made jointly and severally liable for a certain sum of money. The decree was *ex parte* against the respondents, but not so as against Choitun who appealed successfully to the High Court. On the 1st August 1876 the appellants took out execution against the respondent. It was held by the District Judge that, though cl. 2 of art. 167 of the 2nd schedule of Act IX of 1871 (corresponding with art. 179 of the present Limitation Act) provided that three years' limitation was to run, where there had been an appeal from the date of the final decree or order of the Appellate Court, yet it could not apply where co-defendants, non-appellants, were in no way affected by the order on appeal. The High Court, however, reversed this decision. Morris, J., said: "We see nothing in the terms of the Act to warrant such a conclusion as this. Here the decree was admittedly a joint decree. Owing to the appeal of Choitun, the decree was amended, and this amended decree, therefore, became the final decree in the cause. The Judge is not justified in supposing that there were two final decrees in this suit—one applicable to the non-appealing defendants and the other to the appealing defendant alone. But even if a doubt could exist on this point, the words of the Act are so wide and comprehensive that the appellants are clearly entitled to the benefit of their natural import. This is the view that has been taken by another Bench of this Court—*In re Dolley Chand* v. *Nirban Singh*—in which precisely the same point was raised and decided on June 18th, 1878. Their Lordships say: "There are no qualifying words as to by whom the appeal is to be made, or what the nature of the appeal to be made should be; but simply that when there has been an appeal, the time shall begin to run from the date of the final decree or order of the Appellate Court. The Court is not authorised to make the terms of the Limitation Act more stringent against the decree-holder than they actually are." That case approaches nearest to the present [30] one. But it is to be observed that the decree was joint and several, and the whole decree was before the Court of Appeal.

In *Mullick Ahmed Zumma* v. *Mahomed Syed* (2), there was a decree for possession with costs against three defendants. Possession was claimed by only one of the defendants. He appealed, and was successful before the Subordinate Judge. The plaintiff appealed to the High Court, and obtained a decree restoring the decision of the first Court. More than three years after the date of the original decree, the plaintiff applied to execute it against one of the defendants who had not appealed. The District Judge held upon the authority of *Hur Proshad Roy* v. *Enayet Hossein* (3), a case which we shall notice hereafter, that the application was barred. The High Court reversed this decision. Pontifex, J., said: "The reason why in that case it was held that limitation would apply was because the appeal there was on the part only of a ten-pie shareholder of the property, leaving the decree capable of execution against the remainder of the property which could not be affected by the result of that appeal. But in the present case the appeal of the one defendant related to the whole case of the plaintiff, and he was successful in getting the suit dismissed by the lower appellate Court, which would have deprived the plaintiff of his right to any costs at all. In special appeal the

(1) 3 C. L. R. 430. (2) 6 C. 194. (3) 2 C. L. R. 471.

plaintiff succeeded in getting the Judge's decree reversed ; and therefore the original decree for costs was restored." In this case again the decree was joint, and the appeal related to the whole case.

These appear to be the only authorities in support of the appellant's case. In none of them was the express point that is raised here decided.

The authorities most applicable to the respondent's case are *Wise* v. *Rajnarain Chuckerbutty* (1) and the case already referred to of *Hurproshad Roy* v. *Enayet Hossein.* (2).

In the first of these cases the suit was for arrears of rent against two persons, and a decree was made as against one, for the rent for a certain period, and as against the other for the remaining period. Execution was taken out against one of the [31] defendants. Subsequently an application was made for execution against the representatives of the other defendant, and it was held to be barred. On appeal to the High Court the following question was submitted for the opinion of a Full Bench: "Whether in the case of such a decree as was sought to be executed in this case, proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other." This question was answered in the negative, Couch, C.J., saying: "Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law—a decree against one person for the rent of one period, and a decree against the other person for the rent of another ; and I think such a decree as this, though it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of s. 20 of the Law of Limitation, there is really no difficulty; the decree is to be kept in force against each, and to be treated as a separate decree against each in such a case as this, as it would be in the case of persons sued for contribution, because it is a separate liability, and each is liable only for his own share. I think that, although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared to be liable." In the other case Hur Proshad Roy and others obtained a decree against Muzhur Hossein and Enayet Hossein for possession of certain property. This decree was reversed on the 6th April 1872, so far as concerned the property in the hands of Muzhur Hossein. In August 1872, an application was made for execution, and some steps were taken to put Hur Proshad into possession. On the 30th May 1873 Enayet Hossein objected to the execution proceedings, on the ground that they had been carried on without his knowledge, and that execution had become barred by limitation. His application was refused. He then sued Hur Proshad and his co-plaintiffs in the previous suit to have the execution proceedings of 1872 declared invalid and inoperative, on the ground that the decree was barred by limitation. Both the lower Courts concurred in granting the [32] decree asked for, and their decisions were upheld in this Court. The Court said: "The original decree was in form made against the three defendants collectively ; some of them appealed, but their appeal was dismissed on the 23rd May 1869. Muzhur Hossein, one of the appellants, preferred a special appeal, but not against the whole decree so as to give the Appellate Court jurisdiction

(1) 10 B. L. R 258=19 W. R. 30.   (2) 2 C. L. R. 471.

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under s. 337 to reverse the decree altogether. His appeal only related to his own ten-pie share. As to the rest of the subject of dispute and the remaining defendants, the judgment of the 23rd May 1869 was final; execution of the decree against them could not have been stayed in consequence of Muzhur Hossein's appeal, and no question between them and the decree-holder was dependent on the result of Muzhur's appeal. It is obvious that, though the decree was drawn up in the form of a single order, it did in fact incorporate in that order separate decrees against Muzhur and the others, and that it did not relate to property in which the defendants had such a common interest and a common defence that the appeal by any one imperilled the whole decree. The reason for suspending the operation of the law of limitation during the pendency of an appeal is, that it is manifestly undesirable to force an execution of a decree, while there exists any doubt as to the rights of the decree-holder against the appellant; but this reason does not apply to such a case as this, in which there had been a final determination of rights between the decree-holder and the present plaintiff which could not be re-opened by the separate appeal of Muzhur Hossein."

The reasons given in these two cases for holding that limitation continued to run seem to us to apply clearly to this case. Here the cause of action against the defendants Abdul Hye and Syed Wajiruddin was totally distinct from the cause of action against the defendants Mussamut Batulan and Abdul Huq, and separate suits might have been brought against each set of defendants. Though there was only one suit, yet there really were separate decrees against each set of defendants. The defendants had no such common interest that an appeal by one set would imperil the whole decree; in fact, if there had been a final decree against all the defendants, it would have had to be executed against different properties.

[33] The plaintiff could not object to the decree so far as it affected the defendants Abdul Hye and Syed Wajiruddin. The defendants Mussamut Batulan and Abdul Huq could not have objected to the decree as far as they were concerned, nor as against their co-defendants who accepted their liability. They could not have obtained a reversal of the whole decree under s. 544 of the Civil Procedure Code, for it did not proceed on grounds common to all the defendants. The decree which it is sought to execute is the original decree which became final as against the defendants Syed Wajiruddin and Abdul Hye, when the period for appealing against it had expired. If the plaintiffs had then taken out execution those defendants could not have resisted execution on the ground that an appeal was pending with respect to a part of the decree which did not affect their liability. For even if the High Court had held that the defendants Mussamut Batulan and Abdul Huq were sureties, that would not have cut down the liability of the other defendants as principals.

We think, therefore, that there were separate decrees against each set of defendants, that there was no appeal as against the decree affecting the respondents in this appeal, and that the Judge was right in holding that the application for execution was barred by limitation. We dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

14 C. 33.

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14 C. 33.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

JOGESHURI CHOWDHRAIN (*Defendant No.* 2) *v.* MAHOMED EBRAHIM AND OTHERS (*Plaintiffs*).* [2nd June, 1886.]

Suit for arrears of rent—Ejectment—Rent Act (*Bengal Act VIII of* 1869), *ss.* 22, 52.

A landlord who sues for arrears of rent, for the whole of one year, and a portion of the next, and also for ejectment, is not entitled to a decree for the latter.

The right to ejectment under s. 22 of the Rent Act (Bengal Act VIII of 1869), accrues at the end of the year, and forfeiture or determination of the tenancy thereupon takes place, but if the landlord sues for subsequent arrears, he treats the defendant as his tenant, and the right acquired under that section must be taken to have been waived.

[**F.**, 2 C.L.J. 540; 16 C.W.N. 104=11 Ind. Cas. 974; **R.**, 13 Ind. Cas. 671; **D.**, 10 C.L.J. 187 (188)=1 Ind. Cas. 753.]

[**34**] IN this case the plaintiffs sought to recover the rent due in respect of certain jotes held by the defendants for the year 1290 (1883) and the year 1291 (1884) up to the Pous (December) *kist* and for ejectment. Defendant No. 2 alone contested the suit, and pleaded certain payments on account of the rents claimed, and tender of the balance, and that she was not liable to ejectment. The first Court, however, found the issues of fact against the defendant and that the amount of rent claimed was due, and accordingly gave the plaintiffs a decree for the amount with a declaration that if the amount were not paid within 15 days, the defendants should be ejected from the lands in respect of which the arrears were claimed.

Defendant No. 2 thereupon appealed against that portion of the decree which declared her liable to ejectment, and it was argued on her behalf that because the arrears of rent were not admittedly due for the whole of the year 1291, she was not liable to ejectment in consequence of a decree obtained for the aggregate of those arrears and the arrears due on account of the year 1290.

The lower appellate Court, however, declined to acquiesce in this contention and confirmed the decree for ejectment of the Court below.

The same defendant now preferred this second appeal to the High Court, and the same objection was urged as was taken before the lower appellate Court.

Babu *Issur Chunder Chuckerbati*, for the appellant.

Babu *Mohesh Chunder Chowdhry*, for the respondents.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit for the recovery of arrears of rent for the year 1290 and for a portion of the year 1291, that is, up to the Pous *kist* of 1291; and also for ejectment.

The Munsif awarded a decree in favour of the plaintiff for the arrears of rent proved to be due from the defendant for the period in suit, and also for ejectment, under the provisions of s. 52. On appeal it was

* Appeal from Appellate Decree, No. 313 of 1886, against the decree of C. A. Kelly Esq., Judge of Dinagepore, dated the 2nd of February 1886, modifying the decree of Baboo Surbessur Mozumdar, Munsif of Thacoorgai, dated the 18th of August 1885.

1886 June 2. — Appellate Civil. — 14 C. 33.

contended that the plaintiff, having sued for the rent of a portion of the year 1291, was not entitled to a decree for ejectment. But the District Judge was of opinion that this [35] argument was untenable. He says: "It seems inequitable that the defendant should be thus protected, merely because the suit for arrears due on account of both years has been brought," * * * * And then, further on, the Judge says: "The Munsif's order will be so far modified that it will be specified in the decree what the amount of arrears decreed for 1290 are, *plus* the proportionate costs on those arrears, apart from damages decreed, and if the defendant pays in that amount within fifteen days from the date of the decree, execution will be stayed." The same objection has been urged before us here. We are of opinion that the appellant's contention is valid. It is also supported by a decision in the case of *Peer Bux* v. *Mowzah Ally* (1). The facts of that case are, that a suit for ejectment was brought by a landlord against his tenant, alleging that the tenant was liable to be ejected in consequence of his having defaulted to pay the rent of the whole of the year 1267 at the end of that year. It was proved that the plaintiff had distrained for the recovery of arrears of 1268, and recovered a portion of the rent for that year. Upon these facts, it was held that the landlord, having received rent for the year 1268 from the tenant, it was a recognition of the tenancy for that year ; and therefore the landlord was not entitled to eject the tenant on account of arrears due on account of the year 1267. Applying that principle to this case, we think that the plaintiff is not entitled to claim ejectment at all. He has sued for arrears of rent for a portion of the year 1291, and by that he has admitted that the defendant continued in possession during that portion of the year as tenant ; and having admitted that, according to the principle laid down in the case referred to above, the plaintiff cannot treat the defendant as a trespasser, and obtain a decree for ejectment under s. 22 of the Rent Law.

It was contended before us that the contention of the appellant is opposed to the provisions of s. 52, because under that section a landlord has a right to bring a suit for ejectment and for arrears in the same action. But we are of opinion that that is not the proper construction of s. 52. Section 52 only lays down the procedure by which the right, which the landlord has under s. 22 of extinguishing the tenancy, is enforceable, and [36] the claim for rent mentioned therein is the rent on account of which the tenant is liable to be ejected. The Rent Act (Bengal Act VIII of 1869) may be divided into two portions—the first twenty-three sections deal with the substantive law defining the rights of landlords and tenants and the rest of the Act lays down the procedure by which those rights are to be protected and enforced. Section 22 runs as follows: "When an arrear of rent remains due from any ryot at the end of the Bengali year, or at the end of the month of Jeyt of the Fusli or Willayuttee year as the case may be, such ryot shall be liable to be ejected from the land in respect of which the arrear is due, provided that no ryot having a right of occupancy, or holding under a pottah the term of which has not expired, shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." The right that is given to the landlord is this, namely, that if any arrears are due at the end of the year, the tenant is liable to be ejected for non-payment of rent for that year,—that is, the landlord has a right to put an end to the tenancy. And the

(1) 1 Hay 89.

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mode of enforcing those rights in the class of cases mentioned in the proviso is given in s. 52 of the Act. But forfeiture or determination of tenancy takes place when the tenant defaults to pay the rents due at the end of the year. If the landlord still treats the defaulter as his tenant, the right he has acquired under s. 22 must be taken to have been waived. The act of the landlord suing for the rent of the succeeding year would have the effect of an admission that the defendant's possession in that year is that of a tenant. Take the case of a tenant not having a right of occupancy. Under s. 22 he is liable to be ejected from his holding without having recourse to any proceeding in a Court of Justice. But if the landlord brings a suit for arrears of rent for the succeeding year against the tenant, before ejecting him, he cannot afterwards eject him in the middle of the year, because by bringing a suit against him for rent for the next year the landlord admits his tenancy.

We, therefore, dismiss the claim of the plaintiff for ejectment. The decree of the lower appellate Court will be modified accordingly. The appellant is entitled to the costs of this Court and of the lower appellate Court.

H. T. H. *Appeal allowed.*

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14 C. 37=11 Ind. Jur. 141.

[37] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

Krishna Kinkur Roy and another (*Petitioners*) v. Rai Mohun Roy and another (*Objectors*).* [2nd September, 1886.]

Probate Act (*V of* 1881)—*Will of Hindu made before Hindu Wills Act* XXI *of* 1870—*Succession Act, s.* 187—*Application for letters of administration.*

Since the passing of Act V of 1881 the District Courts have jurisdiction to entertain applications for the grant of probate or letters of administration in respect of wills of Hindus made before the 1st September 1870, that is to say, wills of Hindus to which the Hindu Wills Act, XXI of 1870, did not apply.

Semble.—Section 187 of the Succession Act not being made applicable to such wills, it is not obligatory on executors or legatees under them to take out probate or letters of administration in order to establish their rights in a Court of Justice.

[R., 17 C. 272 (275); 25 C. 103 (109).]

This was an application by Krishna Kinkur Roy and Chunder Mohun Roy, made on the 23rd August 1884, for letters of administration under the will of their grandfather, Horo Chunder Roy, who died on the 6th Bhadro 1281 (21st August 1874).

The will was dated 16th Magh 1273 (29th January 1867). By it the bulk of the testator's property was left to his four grandsons, *viz.*, the two petitioners, Kedarnath Roy who was dead, leaving a widow and a daughter, and Shitanath Roy; and Revati Dassi, the testator's widow, was appointed sole executrix. The application was opposed by Rai Mohun Roy, one of the sons of the testator, and by Revati Dassi, on several grounds, the only one material to this report being that the will was executed before the Hindu Wills Act came into force, and the procedure of that Act and of

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* Appeal from Original Decree No. 275 of 1885, against the decree of T. M. Kirkwood, Esq., Judge of Moorshedabad, dated the 10th of December 1884.

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the Probate Act 1881 did not apply; and that the petitioners were therefore not entitled to the letters of administration they asked for.

The following order was made by the District Judge:—

"I dismiss the application on the ground that this will purports to have been executed before the 1st September 1870, and that under Act XXI of 1870 this Court has no jurisdiction to grant [38] letters of administration in respect of any will executed prior to that date—*Bharti* v. *Bharti* (1)—a disability which Act V of 1881 has done nothing to remove. The Bombay High Court, referring to the provisions of Act V of 1881, is of opinion—*Shaik Moosa* v. *Shaik Essa* (2)—that the object of the framers of that Act was to frame an Act which will be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied untouched." Revati, I may add, has not accepted or renounced her post as executrix.

"I award no cost because, but for the defect of jurisdiction of this Court, I think the applicants would have been entitled to the letters they ask for."

From this decision the petitioners appealed.

Dr. *Rash Behari Ghose*, Babu *Amarendra Nath Chatterjee* and Babu *Sharoda Prosunna Roy*, for the appellants.

Dr. *Gooroo Dass Banerjee* and Babu *Gyanendra Nath Dass*, for the respondents.

The following judgments were delivered by the Court (NORRIS and GHOSE, JJ.).

NORRIS, J. (after shortly stating the facts and reading the final order of the lower Court) continued:—

JUDGMENTS.

It was contended before us by the learned pleader for the appellants that Act V of 1881 has altered the law as laid down in *Bharti* v. *Bharti* (1), and that it is now competent to the Mofussil Courts to grant probate or letters of administration in respect of a will not coming within the provisions of the Hindu Wills Act, that is to say, of wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay made prior to 1st September 1870.

In order to determine this point, it was necessary to see what the course of legislation has been.

In 1865 the Indian Succession Act was passed. Section 331 of that Act provided that "the provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan, or Buddhist."* * * In 1870, the Hindu Wills Act was passed; s. 2 of that Act, provided that certain [39] portions of the Indian Succession Act 1865, *viz.*, "ss. 46, 48, 49, 50, 51 55, and 57 to 77 (both inclusive), ss. 82, 83, 85, 88 to 103 (both inclusive), ss. 106 to 177 (both inclusive), ss. 179 to 189 (both inclusive), ss. 191 to 199 (both inclusive), so much of parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and parts XXXIII to XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed, shall, notwithstanding anything contained in s. 331 of the said Act, apply to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the 1st day of September 1870, within the

(1) 6 C. L. R. 138. (2) 8 B. 241.

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said territories," (*i.e.*, the territories subject to the Lieutenant-Governor of Bengal) " or the local limits of the ordinary Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay."

The effect of this section was, amongst other things, to make a District Court of the Lower Provinces of Bengal a Court of competent jurisdiction, for the grant of probate or letters of administration, under the provisions of the Indian Succession Act in respect of wills of Hindus, Jainas, Sikhs, and Buddhists made within the Lower Provinces of Bengal after 1st September 1870; and also to prevent the establishment of any right as executor or legatee unless probate or letters of administration had been granted—see s. 187 of the Indian Succession Act.

In 1881 the Probate and Administration Act was passed; the preamble of that Act recites " that it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply." The provisions of the Indian Succession Act did not apply—(*a*) to the intestate or testamentary succession to the property of any Mahomedan; (*b*) the intestate or testamentary succession of any Hindu, Jaina, Sikh, or Buddhist within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary Original Civil Jurisdiction of the High Courts at Madras and Bombay, whose will was made prior to 1st September 1870, or who died before that date; (*c*) to any will made or intestacy occurring before 1st January 1866; (*d*) to races, sects, or tribes exempted by the Governor-General in Council from the operation of the Act. Section 154 of [**40**] the Probate and Administration Act provides, amongst other things, " that the following amendment shall be made in the Hindu Wills Act (*namely*) for the portion of s. 2 commencing with the words ' s. 179 ' and ending with the words ' Administrator with the will annexed,' the words ' and s. 187 ' shall be substituted." The effect of this amendment was to make the provisions of the Indian Succession Act with respect to the grant of probate of wills and letters of administration to the estates of deceased Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay where such wills were made subsequent to the 1st September 1870, or where such persons died after that date, inapplicable, and at the same time to leave the executor or legatee of such persons under the obligation of obtaining probate or letters of administration from a Court of competent jurisdiction before his rights as such executor or legatee could be established in a Court of Justice.

How then was this obligation to be discharged? Section 2 of the Probate and Administration Act provides that " Chapters II to XIII, both inclusive, of this Act " (which contain provisions identical with those of the Indian Succession Act, 1865, which under s. 154 of the Probate and Administration Act were struck out of the Hindu Wills Act) " shall be applicable to the case of every Hindu, Mahomedan, Buddhist, and person exempted under s. 332 of the Indian Succession Act, 1865, dying before on, or after the 1st day of April 1881."

Section 187 of the Indian Succession Act, 1865, is not incorporated in the Probate and Administration Act. The Bombay High Court in the case referred to says: " It is impossible to suppose that this exclusion of s. 187 from the Act of 1881 could have been done inadvertently; on the contrary, it bears from the very manner in which it was done all the marks of having been done advisedly and of intention; the effect is to bring all Hindus, Mahomedans, and other persons exempted from

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the operation of the Indian Succession Act by s. 332 of that Act either immediately or as soon as the local Government, with the assent of the Governor-General in Council, may think fit, under all the provisions of that Act relating to grant of probate and letters of administration, *excepting* s. 187, which, however, [41] remains in force in those cases to which the Hindu Wills Act of 1870 was made applicable. The object seems to have been to frame an Act which would be applicable to all natives of this country, whilst leaving the existing law as to those Hindus to whom the Hindu Wills Act applied untouched. Not only, therefore, is there no express provision in the Act of 1881 making s. 187 of the Indian Succession Act applicable to Mahomedans and Hindus (except in such cases of Hindu wills as the Hindu Wills Act applies to), but it would appear that, so far as the intention can be gathered from the express provisions of the Act, it was the intention of the Legislature to exclude its operation."

This view of the law may be correct; but why executors of, and legatees under, the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant Governor of Bengal and in the towns of Madras and Bombay made subsequently to the 1st September 1870, should be under the disability created by s. 187 of the Indian Succession Act, and the executors of, and legatees under, the wills of other natives should be relieved from the liability, I am at a loss to understand. But however this may be, I am clearly of opinion that the Bombay case does not decide that a District Judge cannot grant probate or letters of administration of the will of a Hindu whose case does not come within the Hindu Wills Act; it seems to me to decide by implication that he can, but that such grant is not a condition precedent to the establishment by an executor of, or legatee under, such a will of his rights in a Court of Justice.

I am of opinion that the order appealed against should be reversed with costs, and the District Judge be directed to grant letters of administration to the applicant.

Ghose, J.—I agree with my learned colleague in the conclusion at which he has arrived. I think that whatever might have been the state of the law before the passing of the Probate Act (V of 1881) the District Courts are now fully competent under that Act to entertain applications for the grant of probate or letters of administration in respect of wills made before the 1st of September 1870, although in respect to such wills, the provisions of s. 187 of the Succession Act, making it [42] obligatory upon executors or legatees to take out probate or letters of administration, are not applicable.

The learned Judge of the District Court has found that but for the "defect of jurisdiction," which he supposed to exist, the applicants would have been entitled to the letters they ask for. That being so, I agree with my learned brother in holding that the Judge should be directed to grant letters of administration.

J. V. W. *Appeal allowed.*

14 C. 42 (F.B.)

FULL BENCH.

1886 Sep. 4. — Full Bench. — **14 C. 42 (F.B.).**

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Macpherson, and Mr. Justice Grant.

IN THE MATTER OF THE PETITION OF F. W. GIBBONS.
[4th September, 1886.]

Review of judgment of High Court—Criminal Procedure Code (Act X of 1882), *s.* 369.

The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision or interfere with it in any way.

[**F.**, 1 P.R. 1909=6 P.W.R. 1909, Cr.=1 Ind. Cas. 506, Cr.; 12 M.L.T. 350=23 M. L.J. 371=1912 M.W.N. 982=16 Ind. Cas. 518=13 Cr. L.J. 710; **Appl.**, 23 B. 50 (54); **R.**, 38 C. 828=13 Cr. L.J. 120=13 Ind. Cas. 776 (777); 4 Bur. L.T. 211=12 Ind. Cas. 81=12 Cr. L.J. 473 (474); U.B.R. (1905), 1st. Qr., Cr. P.C. 35; **D.**, 10 C.L.J. 80=3 Ind. Cas. 393; 27 A. 92 (94)=1 A.L.J. 495.]

THIS was an application in which the petitioner prayed that the High Court would review or revise the judgment and sentence of a Division Bench of the said Court.

The petitioner's case had been tried before the Sessions Judge of the Assam Valley Districts, and on the trial the jury unanimously acquitted him of the offence with which he was charged. The Judge differed from the verdict, and consequently referred the case to the High Court, under s. 307 of the Criminal Procedure Code. The case came before a Division Bench of the Court, (MITTER and GRANT, JJ.) who reversed the verdict of acquittal and convicted and sentenced the petitioner to one year's rigorous imprisonment, and a fine of Rs. 1,000, or in default to suffer six months' further imprisonment.

Subsequently on the 31st August Mr. *Pugh* (with him Mr. *Evans*) applied to the Chief Justice to appoint a Bench to hear an application to review such order, and considering the importance of the case Mr. *Pugh* asked that a special Bench consisting of [**43**] more than two Judges, might be appointed. This application was based upon a petition in which the accused prayed that the judgment and sentence of the Division Bench of the High Court might be reviewed and revised, and that he might in the *interim* be released on bail. Upon that application the Chief Justice appointed the present Bench to hear the questions raised in the petition argued, but in doing so stated that Mr. *Pugh* was to understand that upon the application being heard, all objections, if any, would have to be considered as to whether the Bench so appointed had any jurisdiction to hear the application at all.

The application now came on for hearing.

Mr. *Pugh* and Mr. *Evans*, for the petitioner.

Mr. *Pugh*.—I apply upon petition for a review or revision of the judgment, or order passed by a Bench of this Court consisting of Mr. Justice Mitter and Mr. Justice Grant, and shall not read the petition further than is necessary to show your Lordships the points which I propose to raise.

PETHERAM, C.J.—The first question is, whether there is any power to review or revise that judgment, whether there is any jurisdiction or not.

1886 Sep. 4. — Full Bench. — 14 C. 42 (F.B.).

Mr. *Pugh.*—I shall only go into such facts as will illustrate the points which will arise.

Wilson, J.—To my mind there is an earlier question, and that is whether this Bench, as at present constituted, can entertain the question.

Mr. *Pugh.*—There is the case of *In the matter of Abdool Sobhan* (1) in which the late Chief Justice considered an order made by Mr. Justice Cunningham and Mr. Justice Prinsep, and in the course of that hearing the Chief Justice observed that the Original Bench had expressed their willingness to hear the case again, and it was taken up.

Mitter, J.—If I remember right that judgment was against your contention. The Chief Justice distinctly ruled that he had no power to constitute a Bench.

Mr. *Pugh* (after reading the judgment in that case).—In applying for this review and hearing I applied for it on the grounds of the extreme gravity of the questions involved. In that case the [**44**] circumstances were that the Judges declined to hear the matter themselves, which is not the case here. No doubt in that case the late Chief Justice thought it was within his competence to order that such a Bench should sit, but I do not know how he arrived at that conclusion. There is no rule on the subject in the Code of Criminal Procedure. Supposing there had been a miscarriage of justice or any error committed, there was no rule that that should only be rectified by the Judges who passed the order and not by a Full Bench of the Court. I contend that such a matter could be heard before any Bench, and that it is within the province of the Chief Justice to appoint a Bench of a larger number than two Judges to hear such a matter.

Wilson, J.—As I understand, the case is this: A Bench of this Court, consisting of two Judges, has duly heard and disposed of the matter, and you now ask that another Bench should be appointed to overrule their decision.

Mr. *Pugh.*—I contend that the Court has power to grant a review in a criminal matter of this nature. Since the Code of Criminal Procedure of 1861, under which this Court had no power to grant a review, considerable legislation and numerous changes in the law have taken place. In England, there always existed the "writ of error" to the Court of Queen's Bench from the decisions of inferior Courts. When, however, the Court of Queen's Bench was itself in error, —when the error appeared on the face of the judgment, the subject had still his remedy, and under recent legislation he is enabled to go to the Court of Appeal, the section of the Judicature Act conferring such right being in the widest terms. Here the only thing corresponding to that right is the right to ask for a review, and the tendency of legislation here between the two Acts of 1861 and 1882 shows that the intention of the Legislature has been to provide the subject with a more easy and quicker remedy.

Petheram, C.J.—You must go the length of saying that if there is power to review a judgment of conviction there is also power to review a judgment of acquittal.

Mr. *Pugh.*—Of course I must go that length. Section 369 of the Criminal Procedure Code, in limiting the power of Courts [**45**] other than a High Court to alter or review its judgment after it has been signed, by implication shows that a High Court has the power to review its judgments. I contend that that section is an enabling one and should, in

(1) 8 C. 63.

matters such as these, receive a liberal interpretation. Upon the point I rely also on s. 439.

Mr. *Pugh* then proceeded to refer to an unreported case No. 69 of 1885, *Ramdass petitioner*, in which he stated that a Bench consisting of Prinsep and Pigot, JJ., reheard a case after judgment had been signed when he was stopped by the Chief Justice who intimated that he must decline to look into or be guided by unreported cases.

Mr. *Evans* followed on the same side.

The following opinions were delivered by the Full Bench:—

OPINIONS.

PETHERAM, C.J.—I quite agree with the remark of Mr. Evans that this is a matter of very grave importance, and it was because I thought that it was a matter of very grave importance, and not because I had any doubt about the law, that I constituted this Bench for the purpose of hearing it argued, and I was all the more led to do so by the fact that I was told that a Division Bench of this Court had expressed a doubt as to whether there was not a power inherent in the Court itself to review a judgment of a Division Bench in a criminal case; and when I say, to review a judgment of a Division Bench, I mean, to review a judgment of a Division Bench by itself, because, in my opinion, every Division Bench constitutes a Court in itself for the purpose of its judgment, and every judgment of a Division Bench is a judgment of the Court; and speaking for myself, and (as to this I wish to guard myself, from expressing any opinion but my own) I do not think any difference exists between one Bench, and another so that it must be constituted of the same Judges to review a judgment of the Court, supposing it to be a judgment which is subject to review.

Speaking for myself, and, indeed, in this matter I think for the whole of the Judges constituting this Bench, I have no doubt whatever that, in cases of this kind, no power of review resides in the Court or in any Bench of the Court. This is an opinion which I have expressed before in the High Court at Allahabad [**46**] [*Queen-Empress* v. *Durga Charn* (1)], and it is an opinion which has been expressed in the High Court at Bombay [*Queen-Empress* v. *Fox* (2)] and in opposition to which, so far as I know, there is no reported case to be found.

The question arises under various sections of the Code of Criminal Procedure, and the first section that applies to the matter is section 306.

Section 306 provides that where an accused person has been acquitted or convicted by a jury, the Judge shall either record judgment of acquittal or pass sentence on him according to law.

So far as that section is concerned, unless there was another section that qualified it, that acquittal or conviction stands, in my opinion, exactly on the same footing as an acquittal or conviction by the verdict of a jury in England, and is final as to the guilt or innocence of the accused, so far as Courts of Justice are concerned.

Then, following upon that, comes s. 307, and that section provides that, where the Sessions Judge disagrees with the verdict of the jury, he may, if he thinks fit, submit the case to the High Court with his reasons for so disagreeing, and the High Court is then invested with this power in dealing with the case; the High Court "may convict or acquit the accused of any offence of which the jury could have convicted him upon the charge

(1) 7 A. 672. (2) 10 B. 176.

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framed and placed before it ; and, if it convicts him, may pass such sentence as might have been passed by the Court of Sessions."

So that, as it seems to me, the effect of s. 307 read with s. 306 is to say that if the Judge who tries the case is dissatisfied with the verdict and the High Court, upon a consideration of the whole case, accepts his view, they may substitute their verdict for the verdict of the jury, and upon that being done, may pass sentence upon him ; but there is nothing whatever in these two sections to place the judgment and verdict of the High Court, under the circumstances, in any different position from that in which the verdict of the jury and the judgment of the Court would have been if it had been accepted by the Judge and he had passed sentence accordingly ; and the verdict, [47] judgment and sentence, under s. 306, would, under such circumstances, have been final.

That being so, the question then arises, whether this state of things is varied by any of the following sections ; and whether those sections give, either a power of appealing from the Division Bench which heard the matter to some other Bench of this Court, or give the Court itself, or the Bench constituted in the same way, a power of revision.

The first section which is relied upon is s. 369. Section 369 states that "no Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in s. 395 or to correct a clerical error."

In my opinion the effect of the words "other than a High Court" is precisely the same as if in place of them the legislature had at the end of the section added these words, "this section does not apply to the High Court." There is no substantive enactment in that section with reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before, it is unnecessary to consider, but whatever they were, they were reserved and they were in the same position after this section was passed as they had been in before ; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore it appears that this section does not help the applicant.

I should say that in the judgment of Sir Barnes Peacock in this Court, (1) which was upon the law which was in existence before, he expressly decides that, as the law then stood, no such power to review existed ; and therefore that shows clearly that no such power as that existed before, and that, taken along with the construction which we have put upon the section, that it did not create any such power, shows clearly that no power of review exists in this Court, so far as that section is concerned.

The only other section relied upon is s. 439. That section opens in this way: "In the case of any proceeding the record [48] of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may," *et cetera*. In my opinion, the first four lines of that section show, beyond all possibility of doubt, that the record which is referred to in that section is the record of some Court other than that of the High Court, because it is obvious that what is meant is, the record of the case which has

(1) *Queen* v. *Godai Raout,* B. L. R. Sup. Vol. 436.

been called up and brought before the High Court, and not the record of the case which is in the High Court itself, and which it therefore has in its possession and has no need to call for. 1886 Sep. 4. — Full Bench. — 14 C. 42 (F.B.)

Under these circumstances, I think that neither s. 369 nor s. 439 helps the case on which the present application has been made, and that it must therefore fall back on the condition of things created by ss. 306 and 307, and, as I have said before, the verdict and judgment of a Division Bench of this Court, coupled with the sentence, are, in my opinion, absolutely final. As soon as they have been pronounced and signed by the Judges, this Court is *functus officio*, and neither the Court itself nor any Bench of it, has any power to revise that decision or interfere with it in any way.

Mitter, J.—I am of the same opinion. I desire only to add that the last part of s. 439 was enacted in order to meet a case of this kind. Section 266 says: "In this chapter, except in s. 307, the expression High Court means a High Court of Judicature established or to be established under the 24th and 25th Victoria, Chapter 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in Council, may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this chapter."

The last part of this section empowers the Governor-General in Council to extend the procedure laid down by this chapter to the trials of cases before any Court subordinate to this Court. That is the real effect of it. It may happen that a Court subordinate to this Court may make an entry under s. 273; the procedure laid down in Chapter XXIII of the Code having been extended to the trial of cases before that Court. The last part of s. 439 lays down that in that case this Court, although possessing revisional power over the said Court in all [**49**] other respects, would not have the power of reversing or interfering with any order passed by that Court under s. 273.

As regards the question whether this Court as constituted has any jurisdiction to entertain this application, I express no opinion.

Wilson, J.—I am entirely of the same opinion on the main question. There is only one point on which I desire to add anything. The point is not really one of any practical importance, because the Court, as now constituted, does contain both the learned Judges whose judgment we have been asked to review, and therefore the decision of this Court, as at present constituted, will, by reason of their presence, be a valid and efficacious decision; but I have myself very grave doubt whether it does not derive the whole of its efficacy from the fact of those two Judges being present.

I entertain considerable doubt whether, assuming that such an application as this is one that could be entertained in law, any Division Bench of this Court could entertain it with respect to a judgment of another Division Bench, and I think the view taken by Sir Richard Garth in the *case of Abdul Sobhan* (1) tends strongly to confirm this doubt. I only say this by way of safeguard, because, as I said before, the Bench being constituted as at present, the point is not really of any practical importance.

Macpherson, J.—I concur with the Chief Justice.

Grant, J.—I concur with the learned Chief Justice.

H. T. H. *Application refused.*

(1) 8 C. 63.

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14 C. 50=11 Ind. Jur. 143.

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[50] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ANANDO KISHORE DASS BAKSHI (*one of the judgment-debtors*) *v.* ANANDO KISHORE BOSE AND ANOTHER (*Decree-holders*).*

[23rd June, 1886.]

Limitation Act (*XV of* 1877), *ss.* 7 *and* 8, *and sch. II, art.* 178—*Mesne profits, Decree for—execution—Application for assessment of mesne profits—Limitation—Joint-decree-holders—Minor, Right of, to execute whole decree when remedy of major joint-decree-holder is barred.*

In execution of a decree for possession of certain lands and for mesne profits, dated the 15th August 1878, possession having been obtained in August 1880, two decree-holders, one of whom was a minor, applied on the 4th April 1882 for ascertainment of the amount of such mesne profits. Upon that application the Amin was directed to ascertain the amount due, but after repeated reminders had been sent him, and no report being submitted, the execution case was struck off the file on the 19th October 1882. The minor judgment-creditor having attained his majority on the 17th April 1885, an application was made by both decree-holders for execution of the decree by ascertainment of the amount of mesne profits and for the recovery of the amount when so ascertained. The judgment-debtors pleaded limitation.

Held, that the application was not an application for execution of the decree. The decree was divisible into two parts, and the present application must be treated as for the purpose of obtaining a final decree regarding the mesne profits, the previous decree having been in that respect merely interlocutory—*Baroda Sundari Dabia* v. *Fergusson* (1), and *Dildar Hossain* v. *Mujeedunnissa*, (2), followed: *Hem Chunder Chowdhury* v. *Brojo Soondari Debee* (3), dissented from.

Held, also, that the provisions of art. 178 of sch. II of the Limitation Act apply to an application by a decree-holder to make a decree complete (*Baroda Sundari Dabia* v. *Fergusson* (1), upon this point dissented from) and further that s. 8 of that Act had no application to the case, and that therefore, so far as the application of the major decree-holder was concerned his remedy was barred, as his application should have been made within at least three years from the date of the delivery of possession of the lands decreed.

[51] *Held*, further, that under s. 7 of the Limitation Act, the remedy of the minor decree-holder was not barred, as the other decree-holder could not give a valid discharge without his concurrence—(*Ahamudden* v. *Grish Chunder Shamunt* (4) distinguished) and that under s. 231 of the Code of Civil Procedure, he was entitled to execute the whole decree, as, though the remedy of the major decree-holder was barred his right was not extinguished.

[**F.**, 25 M. 431 (**F.B.**); **Appr.**, 20 B. 383 (385); **R.**, 16 M. 436 (438); 6 C.L.J. 383 (397); 19 C. 132 (**F.B.**); 22 C. 425 (433); 28 C. 465 (467)=5 C.W.N. 767; 6 M.L.T. 187=33 M. 78=4 Ind. Cas. 1040 (1041); 20 M.L.J. 633=33 M. 308=8 M.L.T. 321 (322)=7 Ind. Cas. 898 (899); 10 M.L.T. 418=(1911) 2 M.W.N. 450 =21 M.L.J. 1041=12 Ind. Cas. 695; **D.**, 6 C.W.N. 348 (351); 13 C.W.N. 815 (826)=1 Ind. Cas. 670; 15 Ind. Cas. 664.]

IN this case Anando Kishore Bose and Rukini Mohun Bose obtained a decree on the 15th August 1878 for possession of certain lands and for mesne profits from the date of dispossession up to the date of recovery of possession, Rukini Mohun Bose was a minor at the date the decree was passed, and it was not disputed in the case that he did not attain his majority till the 17th April 1885. The application, out of which this appeal arose, was for execution of the decree, in so far as it appertained to the mesne profits, and was made on the 18th September 1885. After the

* Appeal from Order No. 111 of 1886, against the order of Babu P. N. Banerji, Subordinate Judge of Mymensingh, dated the 16th of December 1885.

(1) 11 C. L. R. 17. (2) 4 C. 629. (3) 8 C. 89. (4) 4 C. 350.

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decree was passed, it appeared that on the 4th April 1882 the decree-holders applied for execution of the decree and ascertainment of the amount of mesne profits, possession of the lands in suit having been obtained in August 1880. Upon that application the Court ordered the Amin to ascertain the amount of mesne profits. It appeared that the Amin did not submit his report up to the 22nd September 1882, and that in the interval that elapsed between the 4th April and that date, the Court on some five or six occasions issued reminders to the Amin to submit his report. On the 9th October 1882 the application for execution was struck off the file of the Court.

In answer to the present application the judgment-debtors pleaded limitation, on the ground that no step had been taken within three years to keep the decree alive. The lower Court considered that the reminders issued by the Court to the Amin, between the 4th April 1882 and the 22nd September 1882, constituted steps taken in the execution proceedings, inasmuch as they formed a continuation of the step taken by the decree-holders by their application on the 4th April 1882, because the decree-holders could do nothing further in the matter, until the Amin submitted his report. Upon that ground the lower Court [52] held that the present application was not barred, as it was made on the 18th September 1885, or within three years of the 22nd September 1882. The lower Court was further of opinion that, even if the period of three years was to be counted as running from the 4th April 1882, the application was not barred, inasmuch as Rukini Mohun Bose did not attain his majority till the 17th April 1885, and consequently under the provisions of s. 7 of the Limitation Act he was entitled to apply for execution at any time within three years of that date ; and further that Anando Kishore Bose was equally now entitled to take out execution, as by the provisions of s. 8 of the Limitation Act it held that time would not run against any of the joint judgment-creditors until the minor attained his majority, as till that occurred the decree-holder could not give a valid discharge.

The lower Court accordingly overruled the objection of the judgment-debtors, and granted the application for execution.

Against that order, Anando Kishore Dass Bakshi, one of the judgment-debtors, preferred this appeal to the High Court.

Babu *Ratnessur Sen*, for the appellant.

Babu *Durga Mohan Dass*, for the respondents.

The nature of the arguments and the cases cited upon the hearing of the appeal appear sufficiently in the judgment of the High Court (MITTER and GRANT, JJ.,) which was as follows:—

JUDGMENT.

The respondents Rukini Mohun Bose and Anando Kishore Bose obtained a decree against the appellant and others on the 15th August 1878 for possession of certain lands and mesne profits thereof from the date of dispossession to the date of the recovery of possession. Rukini Mohun Bose was then not of age, and was represented by a guardian. The decree directed the amount to be fixed in execution under ss. 211 and 212 of the Code of Civil Procedure. Rukini Mohun attained his majority on the 17th April 1885. In execution of this decree possession was taken in the month of August 1880.

On the 4th of April 1882 the respondents applied to the Court for the ascertainment of the mesne profits. The Civil Court Amin was directed by the Court to make the necessary inquiry, and [53] notwithstanding

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repeated reminders from the Court, the Amin not having completed his inquiry, the application was struck off on the 9th October 1882.

On the 18th September 1885 the present application was made for the ascertainment of the wasilat, and for the realization of the amount which might be fixed, by the attachment and sale of the judgment-debtors' property. The judgment-debtors pleaded limitation, and the lower Court having overruled it, one of them has preferred this appeal.

The lower Court treated the present application as one for execution of a decree under art. 179 of the second schedule of the Limitation Act. It has overruled the plea of limitation upon two grounds: It has presumed that the reminders to the Amin appointed to inquire into the amount of mesne profits in the year 1882 must have been given at the instance of the decree-holders. These reminders in the lower Court's opinion constituted steps taken in aid of execution ; and as the present application is within three years from the last of these steps, the execution is not barred. The other ground is, that as one of the decree-holders was a minor, till within three years from the date of the present application, his remedy is not barred, under s. 7 of the Limitation Act, and as regards the other decree-holder, his remedy is equally not barred under s. 8, because he could not give a valid discharge without the concurrence of the other decree-holder, during the minority of the latter.

The lower Court is in error in thinking that under s. 8 of the Limitation Act, the remedy of the decree-holder, who was of age at the date of the decree, is not barred ; because the last part of that section, upon which the lower Court evidently relies, applies to a case of *all* the joint creditors or claimants being under a legal disability.

But it seems to us that the present application is not an application for execution of a decree.

The decree in this case is divisible into two parts: one for possession of land and the other for mesne profits. That part of it which directs possession to be awarded to the decree-holders is final. But the other part of it is merely an interlocutory decree, declaring that the decree-holders are entitled to recover [**54**] mesne profits, and it would become final when the amount of the mesne profits would be fixed by the Court. The present application is therefore, an application by which the decree-holders moved the lower Court to make a final decree regarding mesne profits. Although in form it is an application for execution, in reality it is not so—see *Baroda Sundari Dabia* v. *Fergusson* (1) ; *Dildar Hossein* v. *Mujundunissa* (2) ; *contra Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (3). In the last of these cases the first two cases were not cited, and we agree in view taken in those two Rulings. But in the case of *Baroda Sundari Dabia* v. *Fergusson* (1), the Judges were of opinion that the decree-holder is not bound to apply for making the decree complete within three years. But the provisions of art. 178 of the second schedule of the Limitation Act were not considered by the learned Judges. We are of opinion that that article applies to an application by a decree-holder for making the decree complete.

Applying this article to the present application, it seems to us that so far as the decree-holder, who was not a minor at the date of the decree is concerned, his remedy is barred. So far as he is concerned, the application should have been made within three years—*at least*, from the date

(1) 11 C. L. R. 17. (2) 4 C. 629. (3) 8 C. 89.

1886 JUNE 23.

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of the delivery of possession of the lands decreed. But the remedy of the other decree-holder is not barred, because he attained majority within three years from the date of the present application. His remedy is not therefore barred under s. 7 of the Limitation Act. Section 8 has no application, because in our opinion the other decree-holder could not give a valid discharge without his concurrence. Upon this point our attention was called to the case of *Ahamudden* v. *Girish Chunder Shamunt* (1). But that was a case of money due to joint creditors under a *contract*. In the present case the judgment-debtors were made liable as *wrong-doers*. We are of opinion that in this case a discharge given by one of the decree-holders could not have been a valid discharge binding upon the other.

The remedy of the respondent Rukini Mohun Bose being not barred, and he being one of the two joint decree-holders, he [55] should, in our opinion, be allowed to execute the whole decree under s. 231 of the Code of Civil Procedure. We make this order, because in our opinion the *remedy only* of the decree-holder, Anando Kishore Bose, is barred, but his *right* is not extinguished. We are aware of a conflict of decisions upon this point—*Nursing Doyal* v. *Hurryhur Saha* (2); *Krishna Mohun Bose* v. *Okhilmoni Dossee* (3) ; *Ram Chunder Ghosaul* v. *Juggut Monmohiney Dabee* (4). But we agree in the view that the *remedy only* is barred. But we desire to guard ourselves from being understood to say that the remedy barred under a repealed Limitation Act would be revived under the Repealing Act, even if there be no express provision to that effect. We express no opinion upon that point.

The result is, that the order of the lower Court will be varied as directed above.

The appellant will pay the respondent's costs.

H. T. H. *Appeal allowed and order varied.*

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14 C. 55.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

GIRISH CHUNDER CHOWDHRY (*Plaintiff*) v. ABDUL SELAM, A MINOR, REPRESENTED BY BISHESHER SEN, MANAGER APPOINTED BY THE COURT OF WARDS, AND OTHERS (*Defendants*).* [10th June, 1886.]

Minority—Suit by minor—Certificate of administration—Act XL of 1858, *s.* 3.

Whenever an application is made for the appointment of a guardian under Act XL of 1858, and an order is passed appointing a person to be guardian of the minor, even though no certificate be taken out by the person so appointed, the minor becomes a ward of Court, and the period of his minority is extended to 21 years—*Stephen* v. *Stephen* (5); *Stephen* v. *Stephen* (6) dissented from; *Chunee Mul Johery* v. *Brojo Nath Roy Chowdhry* (7), followed.

[R., 13 B. 285 (290) ; (1900) P.L.R. 419 (430).]

[56] IN this case the plaintiff Girish Chunder Chowdhry sued as a minor, and in the title of the suit he was described as a "minor represented

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* Appeal from Appellate Decree No. 2613 of 1885, against the decree of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 16th of September 1885, modifying the decree of Baboo Promotho Nath Mukherjee, Subordinate Judge of that District, dated the 18th of September 1884.

(1) 24 C. 350. (2) 5 C. 897. (3) 3 C. 331. (4) 4 C. 283.
(5) 8 C. 714. (6) 9 C. 901. (7) 8 C. 967.

1886 JUNE 10.

APPELLATE CIVIL.

14 C. 55.

by his nearest friend and guardian, his mother, Khyama Sunduri Chowdhrani." The suit was for contribution on account of Government revenue and cesses alleged to have been paid by the plaintiff, on account of the defendants, in respect of a certain share of a mehal, of which they were joint proprietors. There were five defendants, of whom Nos. 2, 3, and 4 did not enter appearance. No. 1 appeared after the issues had been settled and applied for leave to file a written statement, but he was not allowed to do so. The fifth defendant, who was also a minor, represented by his mother Tripura Sunduri Chowdhrani, alone contested the suit. In her written statement she stated, amongst other things, that the plaintiff and defendant No. 5 were members of a joint Hindu family, and that they were living jointly at the date of the suit, and that the affairs relating to the joint properties were managed on behalf of the minor by his guardian and mother the said Khyama Sunduri Chowdhrani. It was not alleged in the written statement that the plaintiff was not a minor, or the suit not properly framed, nor was any issue raised on that point. It appeared, however, that an objection was taken at the hearing that he was not a minor, but the Court of first instance finding that this plea had not been raised, and that it was only supported by a vague statement of one witness, declined to entertain it, and accordingly decided the case on its merits and gave the plaintiff a decree against the first four defendants, but dismissed his suit against defendant No. 5.

Against that decree, in so far as it dismissed his suit against defendant No. 5, the plaintiff appealed, making defendant No. 5 sole respondent. In the title of the appeal the plaintiff was described as "late a minor, by Khyama Sunduri Chowdhrani, his next friend, but now of full age." Upon the appeal coming on to be heard the lower appellate Court found from the plaintiff's application and affidavit to discharge his guardian, that he was stated to have been 21 years and five months on the 18th May 1885, and as the suit was instituted on the 1st August 1883, unless he was a ward of Court under Act XL, the Court below should have rejected the suit *in limine*. As it was not [57] clear whether or not he was a ward of Court, the District Judge, adjourned the hearing of the appeal for the purpose of having that question ascertained. Upon the appeal coming on again, the lower appellate Court found that an application for the purpose of making the plaintiff a ward of Court was made on the 18th May 1875, and an order granting the application passed on the 8th March 1876, but that no certificate was ever taken out. That Court, therefore, held that the plaintiff had attained his majority upon the institution of the suit, and dismissed the suit against all the defendants.

Against that decree the plaintiff now preferred this second appeal to the High Court, making all the defendants respondents.

Baboo *Kishori Lal Sircar* and Baboo *Kashinath Moitra*, for the appellant.

Baboo *Gurudass Banerjee*, for the respondents.

The following cases were referred to during the course of the arguments: —

Stephen v. *Stephen* (1); *Stephen* v. *Stephen* (2); *Chunee Mul Johary* v. *Brojonath Roy Chowdhry* (3).

(1) 8 C. 714. (2) 9 C. 901. (3) 8 C. 967.

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14 C. 55.

JUDGMENT.

The judgment of the High Court (MITTER and GRANT, JJ.) (after shortly stating the facts) proceeded as follows:—

At the time when the case was argued before the Subordinate Judge, it seems that a somewhat similar objection was pressed, but the Subordinate Judge dismissed it, with the remark that it was not put in issue, and not only was it not put in issue, but, as already pointed out, it was an admitted fact that the plaintiff was a minor, and that his property was managed by his guardian and mother Khyama Sunduri Chowdhrani. An appeal was preferred against the decision of the Subordinate Judge by the plaintiff against the defendant No. 5, the suit having been dismissed as against him. There was no appeal by the other defendants against whom the decree was passed. The District Judge, on an application being made by the minor on attaining majority for discharging the guardian under the provisions of the Procedure Code, allowed an objection to be taken to the frame of the suit based upon a statement contained in the afore-[58] said application. That statement amounted to this, that on the date of the institution of the suit Girish Chunder Chowdhry was over 18 years of age ; and the Judge says: "The suit was instituted on the 1st August 1883 ; so that, unless appellant was a ward of Court under Act XL, the suit below should have been rejected *in limine*. As it is not clear whether he was or was not such ward, the case may stand over till the 16th of September, at the request of his pleader, who consents to pay Rs. 10 postponement fees." Then it was taken up afterwards, and the District Judge found that an application for a certificate was made by the mother on the 18th of May 1875, and an order was passed in March 1876 appointing her manager and guardian of her son, but there was nothing to show that a certificate was actually issued. In this state of things the District Judge, being of opinion that the suit was not properly brought in the name of Girish Chunder Chowdhry as a minor represented by his mother, dismissed the whole suit even against the defendants Nos. 1, 2, and 4. As regards the defendants Nos. 1, 2, and 4, it is quite clear that the District Judge was not right in setting aside the decree of the Court below. That part of the decree of the first Court was not before him, and he had no right to interfere with it. That part of the decree of the District Judge must, therefore, be set aside. Then, as regards the defendant No. 5, against whom the appeal was preferred, it seems to us that the objection upon which the suit was dismissed should not have been allowed by the District Judge to be put forward by the respondent. Not only was no objection taken by the respondent at first upon this point, but the respondent admitted that the plaintiff was a minor, and that his property was managed by his mother Khyama Sundari. That being so, the point should not have been allowed to be urged in the lower appellate Court ; but even if it had been open to the defendant No. 5 to urge this objection, we should have been inclined to hold that, under s. 3 of the Majority Act, the plaintiff Girish Chunder Chowdhry was a minor at the date of the institution of the suit. Section 3 of the Majority Act says "Every minor, of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding [59] anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before." The question is, whether in this case

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the guardian was appointed under Act XL of 1858 by a Court of Justice. In this case we find that on an application (we must take it that it was so, as it is not proved otherwise) by the mother to be appointed manager of the minor's estate and guardian of his person, an order was made appointing her his guardian, and according to the admission of the defendant she was managing the property of the minor. Under these circumstances we are of opinion that the requirements of s. 3 of the Majority Act were fulfilled. Whether the person appointed actually took out a certificate or not is not material in the view which we take of the provisions of s. 3 of the Majority Act. As soon as an application is made for the appointment of a guardian, and an order is passed appointing a person to be guardian of the minor, the minor becomes a ward of Court, and when he becomes a ward of Court, we think it was the intention of the Legislature to extend the period of majority to 21 years under the Act. The language of the section is also in favour of this view. It simply says: "Every minor of whose person or property a guardian has been or shall *be appointed* by any Court of Justice." It does not say that every minor in respect of whose person or property a certificate of guardianship has been *issued*. It being the intention of the Legislature to extend the age of minority to 21 years in those cases where a minor becomes a ward of Court, and the language of s. 3 of the Indian Majority Act carrying out this intention, we are inclined to think that, upon a proper construction of this section, the age of minority is extended to 21 years when an order is made appointing a guardian. Our attention has been called to three decisions of this Court in the cases of *Stephen* v. *Stephen* (1); *Stephen* v. *Stephen* (2); and *Chunee Mul Johary* v. *Brojo Nath Roy Chowdhry* (3). The last mentioned decision is in favour of the view we now take; the other two take a contrary view. If the point was actually before us, with great deference to the Judges who decided [60] those cases, we should be inclined to hold that the plaintiff should not be considered to have attained his majority when the plaint was filed.

We reverse the decision of the lower appellate Court and remand the case to that Court to be decided as between the plaintiff and the defendant No. 5. Costs as between the plaintiff and the defendant No. 5 will abide the result.

The defendants Nos. 1 to 4 must pay the costs of the plaintiff in this appeal.

H. T. H. *Appeal allowed and case remanded.*

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(1) 8 C 714 (2) 9 C. 901. (3) 8 C. 967.

14 C. 60.

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APPEL-
LATE
CIVIL.

14 C. 60.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

KHODABUKSH MUNDUL AND OTHERS (*Defendants*) *v.* MONGLAI MUNDUL AND OTHERS (*Plaintiffs*).* [8th September, 1886.]

Criminal Procedure Code, Act X *of* 1882. *s.* 133—*Removal of Nuisance—Public way—Suit for declaration of right and confimation of possession—Cause of Auction.*

On the 6th of July 1882 the Joint-Magistrate of Krishnagur, on a complaint made by *A*, ordered *B* to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon *B* brought a suit against *A* for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaint did not allege that *B*, in causing the Magistrate to initiate proceedings against *A*, had been actuated by malicious motives and had acted with the intention of wrongfully injuring the plaintiff.

Held, that the suit would not lie. *Mutty Ram Sahoo* v. *Mohi Lal Roy* (1) dissented from.

[**Overruled,** 15 C. 460 (**F.B.**).]

THE facts of this case are stated as follows in the judgment of the Court of first instance, which was delivered on the 28th of March 1883:—

"The plaint states that the bit of land defined in the plaint being about 21 cubits in length and 16 cubits in breadth, appertains to the jamai holding of plaintiffs; that they are-in exclusive [**61**] possession of the same; that in Chait, 1288, they erected a cow-shed on the same without any objection being raised by any one; that on the complaint of the defendants to the effect that the land forms a part of the public way, the Joint Magistrate of this place issued, on the 6th July last, an order requiring plaintiffs to demolish the cow-shed within 15 days: that as the land is not a part of the public way, and as the same is the private property of plaintiffs, this suit is instituted for declaration of their right to the land and confirmation of possession.

"Defendants plead that this suit being instituted virtually to set aside the order of the Criminal Court is not maintainable; that the suit cannot be heard in the absence of Government and of the landlord of the place, and that the land in suit is part of the public way. They also plead limitation."

The following issues were framed by the Court:—

(1). Whether this suit is maintainable in spite of the finding of the Magistrate that the land in suit is a part of the public way?

(2). Whether there is a defect of the necessary parties to this suit?

(3). Whether this suit is barred by limitation?

(4). Whether the disputed land is the property of plaintiffs, and whether they were in exclusive possession of the same?

The Court of first instance decided the first issue in the plaintiffs' favour on the authority of *Mutty Ram Sahoo* v. *Mohi Lal Roy* (1). He also found the second and third issues in the plaintiffs' favour, and in regard to the fourth issue he found that a portion of the land claimed was the property of the plaintiffs and in their exclusive possession. In respect

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* Appeal from Appellate Decree No. 770 of 1885, against the degree of Babu Nuffer Chandra Bhatta, Subordinate Judge of Nuddea, dated the 19th of January 1885, reversing the decree of Babu Uma Kant Chatterjea, Munsif of Krishnagur, dated the 28th of March 1883.

(1) 6 C. 291.

1886 Sep. 8. — Appellate Civil. — 14 C. 60.

of this portion he gave the plaintiffs a decree. Both parties appealed from this decision to the Court of the First Subordinate Judge of Nuddea, who found the fourth issue in plaintiffs' favour, and gave them a decree for all the land claimed by them. The defendants appealed to the High Court on the following grounds, amongst others,—

(1). For that the Courts below are wrong in omitting to try the real question in the case whether the land in dispute formed a part of the public thoroughfare, and if it was so, whether the Civil Court had jurisdiction to entertain the suit.

[62] (2) For that the Courts below should have held that the present suit was not maintainable for defect of necessary parties.

Babu *Kuloda Kinkur Roy*, for the appellants.

Babu *Jugut Chunder Banerjee*, for the respondents.

The judgment of the High Court (Prinsep and Beverley, JJ.) was as follows:—

JUDGMENT.

On information given by the defendants the Magistrate proceeded under Chapter X of the Code of Criminal Procedure, and directed the plaintiffs to remove a hut that they had erected on land found by him to be a public thoroughfare. The plaintiffs now sue for a declaration of their title and confirmation of their possession of the land as their private property as against these defendants.

The defendants pleaded that the suit will not lie to set aside the order of the Magistrate that the land forms part of a public thoroughfare.

Both Courts have relied on the judgment in the case of *Mutty Ram Sahoo* v. *Mohi Lal Roy* (1), in which it was held that a Civil Court can, irrespective of such an order by a Magistrate try the question whether the land, which formed the subject of that order, is private property and not a thoroughfare or public place as between the parties to such suit and those who claim under them. Field, J., one of the learned Judges who decided that case, seems to have gone even further, but White, J., limited the operation of the order of a Civil Court to the parties before it, and we cannot accept that case as an authority beyond that. But we are of opinion that the law laid down in that case is not in accordance with previous decisions on the point. Those cases were not referred to in the argument raised or in the judgments of the learned Judges.

In *Meechoo Chunder Sircar* v. *Ravenshaw* (2), Couch, C.J., and Kemp, J., held that, the matter having been tried in the manner provided by the Code of Criminal Procedure, "the plaintiffs have had what the law gives them, and are not at liberty to have the question tried again. The consequence of that would be that there might be another order by the Magistrate, then another suit, and so on."

[63] No doubt in that case the question between the plaintiff and the Magistrate had been referred to a jury, who had found that the land in suit was part of a public thoroughfare, but such reference to a jury would be entirely optional with a person in the position of the plaintiffs, and because he had not applied for a jury and preferred to show cause against the Magistrate's order, the finality of that order after termination of the proceedings would be none the less binding. *Rooke* v. *The Peari Lall Coal Co.* (3), is an authority in the same direction, and in *Chinta Monee Bapoolee* v. *Digambur Mitter* (4), it was held that there would

(1) 6 C. 291. (2) 11 B. L. R. 9=19 W. R. 345.
(3) 3 B. L. R. Ap. 43=11 W. R. 434. (4) 10 W. R. 409=2 B. L. R. S. N. 15.

be no cause of action against persons who cause the Magistrate to initiate proceedings unless it could be shown that they "were actuated by malicious motives and with the intention of wrongfully injuring the plaintiff." 1886 Sep. 8. —— Appellate Civil. —— 14 C. 60.

If the orders of the lower Courts be maintained, and it be held in accordance with the precedent cited that, as against defendants the plaintiffs had established a private right of property, and if the plaintiffs were again to erect a building on that spot, the Magistrate would not be precluded from acting as before or even enforcing his previous order which is still in force. If therefore a decree in the present suit is inoperative as against the Magistrate (and the decision in *Mutty Ram Sahoo* v. *Mohi Lal Roy* goes to that extent) the interminable procedure condemned by Couch, C.J., in *Meechoo Chunder Sircar* v. *Ravenshaw* would result. But upon the authority of the case of *Chinta Monee Bapoolee* v. *Digambur Mitter* reported in 10 W. R., 409, no case would lie against the defendants before us. These cases are not referred to in the decision of *Mutty Ram Sahoo* v. *Mohi Lal Roy*, and we are therefore not embarrassed with that precedent. We also observe that the Code of Criminal Procedure, 1882, passed since that judgment was delivered in s. 133 declares that no order duly made by a Magistrate under that section shall *be called in question* in any Civil Court.

The suit must therefore be dismissed with costs in all Courts, the orders of both the lower Courts being set aside.

P. O'K. *Orders set aside and suit dismissed.*

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14 C. 64.

[64] CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

KEDARNATH BHATTACHARJI (*Plaintiff*) *v.* GORIE MAHOMED (*Defendant*)* [26th November, 1886.]

Right of Suit—Subscription, Suit for—Liability of subscribers to a proposed Town Hall.

A suit will lie to recover a subscription promised; the subscriber knowing that, on the faith of his and other subscriptions, an obligation is to be incurred to a contractor for the purpose of erecting a building to be paid for our of the monies subscribed.

[F., 13 C.P.L.R. 57 (59).]

THIS was a reference from the Howrah Court of Small Causes.

It appeared that it was thought advisable to erect a Town Hall at Howrah, provided sufficient subscriptions could be got together for the purpose. To this end the Commissioners of the Howrah Municipality set to work to obtain the necessary funds by public subscription, creating themselves, by deed, trustees of the Howrah Town Hall Fund. As soon as the subscriptions allowed, the Commissioners, including the plaintiff, who was also Vice-Chairman of the Municipality, entered into a contract with a contractor for the purpose of building the Town Hall; estimates and plans were submitted to, and approved by, the Commissioners, the original estimate amounting to Rs. 26,000. This estimate, however, was

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* Civil Reference No. 13 A. of 1886, made by Babu Krishna Mohun Mukerji, Officiating Judge of the Small Cause Court of Howrah, dated the 8th of August 1886.

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increased to Rs. 40,000, and it was found that the subscriptions would cover this amount, and the original plans were therefore enlarged and altered.

The defendant was a subscriber to this fund of rupees one hundred, having signed his name in the subscription book for that amount. The defendant not having paid his subscription was sued in the Howrah Court of Small Causes by the plaintiff as Vice-chairman and trustee, and therefore as one of the persons who had made himself liable to the contractor for the costs [65] of the building, to recover the amount entered in the subscription book. Leave to sue, on behalf of himself and all others in the same interest with himself, was granted to the plaintiff by the Registrar of the Court under s. 30 of the Civil Procedure Code.

The defendant contended that the plaintiff had no right to sue. The Judge of the Small Cause Court held that the Registrar had no power to grant leave to sue; that the Town Hall being trust property, the case was one falling under s. 437 of the Code; and that, therefore, the suit was bad *ab initio*. And on the question as to whether such a suit would otherwise lie, after referring to the case of *Kedar Nath Mittra* v. *Alisar Rahoman* (1) he found that the defendant was a man of no education, and it could not therefore be expected that he had put his name to the subscription book with a full knowledge of the object and utility of the Town Hall. He, therefore, found that the defendant was under no legal obligation to pay, and dismissed the suit, making his judgment contingent on the opinion of the High Court on the following points:—

(1). Whether the suit as laid by the plaintiff was legally maintainable? (2). Whether, upon the facts stated, the trustees were entitled to judgment?

On the reference coming up before the High Court,—

Baboo *Rash Behari Ghose* and Baboo *Uma Kali Mukerji*, appeared for the plaintiff.

Baboo *Juggat Chunder Banerji*, for the defendant.

OPINION.

The opinion of the Court (PETHERAM, C. J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—The questions which are proposed for us in this Reference from the Small Cause Court are, first, whether the suit as laid by the plaintiff is legally maintainable; and, secondly, whether, upon the facts stated in the reference, the trustees are entitled to judgment.

The facts of the case appear to be these: The plaintiff is a Municipal Commissioner of Howrah and one of the trustees of [66] the Howrah Town Hall Fund. Some time ago, it was in contemplation to build a Town Hall in Howrah, provided the necessary funds could be raised, and upon that state of things being existent, the persons interested set to work to see what subscriptions they could get. When the subscription list had reached a certain point, the Commissioners, including the plaintiff, entered into a contract with a contractor for the purpose of building the Town Hall, and plans of the building were submitted and passed, but as the subscription list increased, the plans increased too, and the original cost, which was intended to be Rs. 26,000, has swelled up to Rs. 40,000; but for the whole Rs. 40,000 the Commissioners, including the plaintiff, have remained liable to the contractor as much as for the original contract,

(1) 10 C. L. R. 197.

because the additions to the buildings were made by the authority of the Commissioners and with their sanction. The defendant, on being applied to, subscribed his name in the book for Rs. 100, and the question is, whether the plaintiff, as one of the persons who made himself liable under the contract to the contractor for the cost of the building, can sue, on behalf of himself, and all those in the same interest with him, to recover the amount of the subscription from the defendant.

We think he can. Without reference to his being a trustee or a Municipal Commissioner, we think that under the provisions of the Code of Civil Procedure he is entitled to bring an action on behalf of himself and others jointly interested with him. If the action could be maintained on behalf of all, and there were no other section which would preclude this being done, that would cure any technical defect in the case.

Then the question is, whether this is a suit which could be maintained by the whole of the persons who made themselves liable to the contractor if they were all joined.

It is clear that there are a great many subscriptions that cannot be recovered. A man for some reason or other puts his name down for a subscription to some charitable object, for instance, but the amount of his subscription cannot be recovered from him because there is no consideration.

But in this particular case, the state of things is this: Persons were asked to subscribe, knowing the purpose to which the [67] money was to be applied, and they knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work. Under these circumstances, this kind of contract arises. The subscriber by subscribing his name says, in effect.—In consideration of your agreeing to enter into a contract to erect or yourselves erecting this building, I undertake to supply the money to pay for it up to the amount for which I subscribe my name. That is a perfectly valid contract and for good consideration; it contains all the essential elements of a contract which can be enforced in law by the persons to whom the liability is incurred. In our opinion, that is the case here, and therefore we think that both questions must be answered in the affirmative, because, as I have already said, we think that there is a contract for good consideration, which can be enforced by the proper party, and we think that the plaintiff can enforce it, because he can sue on behalf of himself and all persons in the same interest, and, therefore, we answer both questions in the affirmative, and we consider that the Judge of the Small Cause Court ought to decree the suit for the amount claimed, and we also think that the plaintiff ought to get his costs including the costs of this hearing.

T.A.P.

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Full
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Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice O'Kinealy.

Fahamidannissa Begum and others (*Plaintiffs*) *v.* The Secretary of State for India in Council and another (*Defendants*).* [14th August, 1886.]

Assessment of re-formed land after Diluviation—Act IX *of* 1847, *ss.* 1, 6, 7 and 9, *Effect of—Jurisdiction of Board of Revenue, Its extent—Civil Court, Power of—Survey Maps, their evidentiary value.*

Where on inspection of a survey map, and after its comparison with a former *thak* map, the Board of Revenue assessed certain land as alluvial increment, which, however, the Civil Court in a suit against the order of the Board, found upon further evidence to be a re-formation on the original site of a [68] permanently-settled estate, in respect whereof the plaintiff had all along paid revenue without abatement:

Held, that the land was not liable to fresh assessment under the provisions of s. 6 of Act IX of 1847, nor was the comparison of the two maps by the Revenue Officer conclusive on the question of addition to the estate—*Surat Sundari Debi* v. *The Secretary of State* (1), partially overruled.

Held, also (Mitter, J., *dissenting*) that the order of the Board of Revenue fixing the land with liability to assessment was not final, and could be set aside by the Civil Court as *ultra vires*—*Dewan Ram Jewan Singh* v. *The Collector of Shahabad* (2); *Ram Jewan Singh* v. *The Collector of Shahabad* (3) overruled.

Held, by the majority of the Full Bench that the language of s. 9 was not such as would prohibit the present suit; and unless the meaning were clear, its operation should be limited to suits for damages on account of anything done in good faith; for instance, in a case of ouster under s. 7—*The Collector of Murshidabad* v. *Roy Dhunput Singh* (4) approved.

Held, (Mitter, J., *dissenting*)—Section 1 of Act IX of 1847 repealed everything in the Regulations which enacted by what officers and how the question of liability to assessment should be tried, and therefore took away from Collectors and Boards of Revenue the power of giving any binding decision on the point.

Held, also (Mitter, J., *dissenting*) that the effect of the words "shall be final" in s. 6 was to make the assessment final in every case in which there was jurisdiction to assess, but to leave it open to the Civil Courts to inquire in each case whether there was such jurisdiction, or whether the lands assessed were liable to assessment.

Per Mitter, J.—Section 1 has not abolished the judicial functions of the Revenue Authorities under Regulation II of 1891; all that has been abolished by that section are the tribunals constituted by Regulation III of 1828.

Per Mitter, J.—The proceedings of the Revenue Authorities under s. 6 embrace an inquiry upon two questions, *viz.*, the question of the liability to assessment and the rate of assessment, and under the express wording of the section the finality attaches to the whole order of the Sudder Board of Revenue.

[**R.**, 2 C.L.J. 351 (359); 30 C. 291 (302) (**P.C.**) = 7 C.W.N. 193 = 5 Bom. L.R. 1 = 30 I.A. 44.]

This case was referred to a Full Bench by Field and Macpherson, JJ., on the 2nd of March 1886, with the following opinion:

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* Appeal from Appellate Decree No. 384 of 1885, against the decree of H. Beveridge, Esq., Judge of Zillah Furridpur, dated 28th November 1884, reversing the decree of Baboo Juggut Durlay Mozoomdar, Subordinate Judge of that district, dated 21st March 1883.

(1) 11 C. 790.
(2) 18 W. R. 64.
(3) 14 B. L. R, 221 (Note) = 19 W. R. 127.
(4) 15 B. L. R. 49.

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The plaintiff in this case is the proprietor of the permanently-settled estate Chur Mohun Sureswar. He alleges in his plaint that the estate Chur Mohun Sureswar according to a *butward* [**69**] made in the year 1792, consisted of 69 drones odd of land, equivalent to over 10,000 bighas; that subsequently a large plot of this land was washed away, leaving only 37 drones in existence; that Government resumed the estate, but it was afterwards released in 1838 upon the objection of the plaintiff's predecessor in title: that when the *thak* measurement was made in 1859, the greater portion of the estate was under water, some four drones only, equivalent to 652 bighas odd, being above water, that this quantity of land above water was shown upon the *thak* map; that at the time of the survey measurement, which followed the *thak* measurement, the whole estate was under water; that subsequently to the survey measurement, some 2,000 bighas were re-formed upon a part of the site of the estate; that the Deara Deputy Collector, finding that no land of the estate was shown upon the survey map, and proceeding under Act IX of 1847, dealt with the land so re-formed as land which Government was entitled to assess with revenue; that on the 20th of October 1879 the land which was shown in the *thak* map as being in existence, *viz.*, 652 bighas, was released, but the rest of the land was resumed and re-assessed; and that the Board of Revenue confirmed these proceedings on the 19th of April 1881. The plaintiff's case is that the land which has been so resumed and assessed with revenue under the provision of s. 6 of Act IX of 1847, is a re-formation on the original site of his estate Chur Mohun Sureswar, and that the Revenue authorities have no jurisdiction to deal with this land under Act IX of 1847 and assess it with revenue as land added to the estate under the provisions of s. 6 of that Act.

It has been found as a fact by both the Courts below that the land which forms the subject of the present suit is a re-formation on the site of the plaintiff's estate. It was therefore included within the boundaries of that estate as settled at the time of the decennial and permanent settlements.

The learned counsel for the appellant, Mr. Evans, contends that the plaintiff is entitled to a declaration; *first*, that the land in question is part of the plaintiff's permanently-settled estate Chur Mohun Sureswar; and, *secondly*, that the proceedings of the Revenue authorities in assessing this land with revenue under the provisions of s. 6 of Act IX of 1847 were *ultra vires*.

[**70**] We may observe that there is no doubt that the plaintiff has paid the full amount of revenue assessed at the time of the permanent settlement upon the estate, *i.e.*, upon the 69 drones odd, which are said to have been comprised in such estate at the time of the permanent settlement. There is no contention that the plaintiff has ever received any abatement for land diluviated or washed away; and any question therefore of abandonment by the plaintiff of his rights does not arise.

There are several cases decided by this Court which are adverse to the contention raised by the learned counsel for the appellant.

The first of these in the case of *Ram Jewan Singh* v. *The Collector of Shahabad* (1). In this case it was held that ss. 5 and 6 of Act IX of 1847 are to be read together, and that where there is an addition to the estate appearing upon the inspection of the new map, even although

(1) 14 B. L. R. 221 (note)=18 W. R. 64.

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such an addition is a re-formation upon the old site, it comes within s. 6, and is land added to the estate; and it was held that the decision in *Lopez* v. *Maddan Thakur* (1) as to land re-formed on the old site, not being land gained within the meaning of cl. 1 of s. 4 of Regulation XI of 1825, did not affect the construction of Act IX of 1847. It was further held that the 9th section of this Act precluded any suit of this nature brought to question the exercise by the Revenue authorities in good faith of the powers conferred by the Act. It may be observed that this opinion of the effect of the 9th section of the Act has since been dissented from, and a different view now obtains—see the case of *The Collector of Moorshedabad* v. *Roy Dhanput Singh* (2) and the Full Bench case of *Chunder Sikhar Bundopadhya* v. *Abboy Churn Bagchi* (3).

The next case is that of *Ramjewan Singh* v. *The Collector of Shahabad* (4). This follows the case in 14 B. L. R., 221, decided by Couch, C. J., and Ainslie, J., but in this later case Phear, J., concurred in the decision.

[71] The third case is that of *The Collector of Moorshedabad* v. *Roy Dhanput Singh* (2) already referred to in connection with the construction of s. 9 of Act IX of 1847. In this case it was held that where the Revenue authorities had assessed, under the provisions of s. 6 of Act IX of 1847, as an addition to the estate of J. N., land which really belonged to the estate of R. D., having been re-formed on the original site of R.D's estate, although a suit would not lie against Government to contest the assessment made by its officers, still R. D. could maintain a suit against J. N. to assert his title to, and obtain possession of, the land which really belonged to R. D., but which had been settled with J. N. as an addition to J. N.'s estate.

The fourth case is that of *Sarat Sunduri Debe* v. *The Secretary of State for India in Council* (5)

Having carefully considered these cases, we find ourselves unable to agree in the opinion which, deriving support therefrom, would preclude the plaintiff in the present suit from obtaining the remedy which he asks. As, after giving our best attention to the whole subject, we find ourselves unable to concur in the view of the effect of Act IX of 1847 which has been accepted by more than one Division Bench of the Court, we think we ought to state fully the difficulties which present themselves to our minds, and which we are unable to overcome, so as to accept a view which has no doubt great weight of authority in its favour.

By s. 4 of Regulation I of 1793, it was declared that, at the expiration of the decennial settlement, no alteration would be made in the assessment which actual proprietors of land had respectively engaged to pay, but that they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever. At the same time the Governor-General reserved to himself the right of assessing lands at that time alienated, and paying no public revenue,—see cl. (3), s. 8 of the same Regulation.

After the permanent settlement it was found that there were in many parts of Bengal large tracts of waste land not [72] included within the limits of permanently-settled estates, and Government became acquainted by experience with the changes caused in the limits of settled estates by the action of the great rivers in the Bengal delta which from year

(1) 13 M. I. A. 467=5 B. L. R. 521. (2) 15 B. L. R. 54. (3) 6 C. 8.
(4) 19 W. R. 127. (5) 11 C. 784.

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to year caused these changes, vary considerably increasing the area of some estates by the addition of alluvial land. In order to assess revenue on both these classes of land, and so secure to Government an additional income which the State was justified in claiming, Regulation II of 1819 was passed.

The preamble of this Regulation contains the following passage: "It further appears to be necessary, in order to obviate all misapprehension on the part of the public officers or of individuals, to declare generally the right of Government to assess all lands which at the period of the decennial settlement were not included *within the limits of an estate for which a settlement was concluded* with the owners, not being lands for which a distinct settlement may have been made since the above period, nor lands held free of assessment under a valid and legal title; and at the same time *formally to renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a permanent settlement has been concluded*, at the period when such settlement was so concluded, whether on the plea of error or fraud or on any pretext whatever, saving of course mehals expressly excluded from the operation of the settlement."

The first clause of s. 3 enacts "that all lands which at the period of the decennial settlement were not included within the limits of any pergunna, mouza or other division of estates for which a settlement was concluded with the owners, not being lands for which a distinct settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title," shall be liable to assessment, and that the revenue assessed thereon shall belong to Government.

The second clause of the same section enacts that the same "principles shall be deemed applicable, not only to tracts of land such as are described to have been brought into cultivation within the Sunderbuns, but to all *churs* and islands formed since the period of the decennial settlement, and generally to all lands [73] gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks."

This Regulation, therefore, asserts the right of Government to assess revenue upon the two classes of land just indicated, *i.e.*, (1) waste land not included within the limits of any permanently-settled estates; and (2) alluvial additions to such estates. Now, it is impossible to say since the decisions of the Privy Council in the cases of *Lopez* v. *Maddan Thakur* (1) and of *Nogendro Chunder Ghose* v. *Mahomed Esof* (2) that "land re-formed on an old site" is, within the meaning of the second clause of the section just quoted, "land gained by alluvion or dereliction, whether from an introcession of the sea, an alteration in the course of rivers or the gradual accession of soil on their banks."

The 31st section of this Regulation, in order to prevent any misconception, provides that nothing in the Regulation shall affect the right of proprietors of permanently-settled estates "to the full benefit of all waste lands included within the ascertained boundaries of such estates respectively at the period of the decennial settlement and which have since been * * * * reduced to cultivation."

(1) 13 M. I. A. 467=5 B. L. R. 521. (2) 10 B. L. R. 406=18 W. R. 113.

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The proviso relates to the first of the two classes of lands just mentioned.

The second clause of the same section contains a corresponding proviso applicable to the second of those classes. This clause enacts "that all claims by the Revenue Authorities on behalf of Government to additional revenue from *lands which were at the period of the decennial settlement included within the limits of estates for which a permanent settlement has been concluded,* whether on the plea of error or fraud or *any pretext whatever*—saving of course the case of lands expressly excluded from the operation of the settlement, such as *lakheraj* and *thanadari* lands—shall be and be considered wholly illegal and invalid."

It would thus appear that the Legislature, while asserting the right of Government to assess revenue on waste land and alluvial land, not included at the time of settlement within the limits [74] of permanently settled estates, was careful to declare that these provisions were not to be construed so as to justify the assessment of revenue upon any land which fell within the ascertained boundaries of permanently-settled estates. When we use the term " land," here, we may bear in mind the words of the Privy Council in the case of *Lopez* v. *Maddan Thakur*: " Their Lordships are unable to assent to any distinction between surface and site."

We now pass to cl. 1 of s. 4 of Regulation XI of 1825. This clause, using language similar to that of cl. 2 of s. 3 of Regulation II of 1819, provide that " when land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed;" and in the case of land annexed to an estate held immediately from Government, it is provided that this shall not entitle the holder of the land to exemption from the payment to Government of any assessment of public revenue to which he may be liable under the provisions of Regulation II of 1819, or of any other Regulation in force. It would appear clear from these provisions that it was the intention of the Legislature to assess with revenue only such alluvial land as was "gained" within the meaning of the clause just quoted; and that " land re-formed on the old site of an estate " is not " land gained " within the meaning of the provision was settled as far back as 1848 in the case of *Imam Bandi* v. *Hur Gobind Ghose* (1), where it was said that, whoever was the owner before the inundation, remained the owner while the land was covered with water and after it became dry; and again more recently in the case of *Lopez* v. *Maddan Thakur* (2) *and Nogendro Chunder Ghose* v. *Mahomed Esof* (3).

In 1828, Special Commissioners were appointed for the purpose of enforcing the claims of Government to additional revenue derivable from waste land, alluvial land, and land held under invalid revenue free grants; and the jurisdiction of the Civil Courts, so far as it existed in matters of this nature, was suspended [75] and transferred to the Special Commissioners. By cl. 1, s. 4 of Regulation III of 1828, when the jurisdiction of a Commissioner had been established in any particular district, it was competent to the Collector or other local Revenue Officer to institute the inquiries specified in Regulation II of 1819 in regard to any land which he might have reason to believe was held free of assessment.

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(1) 4 M. I. A. 403. (2) 13 M. I. A. 467=5 B. L. R. 521.
(3) 10 B. L. R. 406=18 W. R. 113.

At that time the revenue survey of Bengal had not been completed, and in the absence of any good maps, such inquiries must have been difficult and troublesome to all parties concerned. As soon as the revenue survey was completed, Act IX of 1847 was passed. No doubt the great object of this Act was, as is well pointed out by Couch, C. J., in *Budrunnissa Chowdhrain* v. *Prosunno Kumar Bose* (1) to prevent the great inconvenience which arose from the surveys being made at different times of a number of small portions of land at a great expense.

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That this Act of 1847 was a Procedure Act, and not intended to interfere with the substantive law, was decided in the case last quoted. Couch, C.J., there said (page 267): "Looking at the first section, the Act does not appear to have been intended to do more than make different provisions for the investigations regarding the liability of the lands to assessment or the rights of Government, and it was not intended to alter in any way the right which existed in the law before that Act was passed." If we are to suppose that this Act was intended to alter the substantive law contained in the old Regulations, and to render liable to a fresh assessment of revenue, land situated within the ascertained boundaries of a permanently-settled estate, then we must suppose that it was the intention of the Legislature to alter the declaration already referred to and contained in s. 31 of Regulation II of 1819. In the case of *Lopez* v. *Maddan Thakur* (2) their Lordships of the Privy Council, speaking of Regulation XI of 1825, said: "There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be **[76]** expressed in very plain words, or be made out by very plain and necessary implication."

Now, if the Revenue authorities are justified by Act IX of 1847 in imposing a fresh assessment of revenue upon the land which forms the subject of the present suit, although this land is included within the boundaries of the estate for which the plaintiff has paid up to this time the revenue assessed upon it at the time of the permanent settlement, it is impossible to say that there is not a confiscation or destruction of his proprietary rights as defined and declared by the Regulations of 1793. Most certainly Act IX of 1847 contains no words which express this intention, and we cannot see that there is anything in the provisions of this Procedure Act which conveys this intention by plain and necessary implication. The words "gained from the sea or from a river by alluvion or dereliction," which occur in the first section of the Act, are the same words which are found in cl. 1, s. 4 of Regulation XI of 1825; and looking at the whole of the legislation *in pari materia*, it does seem to us that the same construction is to be put upon these terms in the Act of 1847 as has been put upon them in the Regulation of 1825.

It has been held that title by re-formation on an old site prevails against any claim by Government under cl. 3, s. 4 of Regulation XI of 1825, on the ground that the land thrown up is an island (*see Moni Lal Shahu* v. *The Collector of Sarun* (3) and *The Collector of Rajshahye* v. *Shama Sundari Dabi* (4),) and it may well seem that the same principle should apply in the case now before us.

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(1) 6 B. L. R. 255.
(2) 13 M. I. A. 467=5 B. L. R. 521.
(3) 6 B. L. R. Ap. 93.
(4) 14 B. L. R. 219=22 W. R. 324.

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If this view be adopted, the procedure of Act IX of 1847 applies only where land is gained within the meaning adopted by the Privy Council in construing the Regulation of 1825, and to all investigations concerned with such land, and has no application to land which is not gained in this sense, but which is a re-formation upon an old site of a permanently-settled estate.

We think it right to say that the view which we take does not, in our opinion, conflict with those decisions in which it has [77] been determined that Civil Courts cannot interfere with the action of the Revenue Authorities so long as they act with their jurisdiction ; but it has been repeatedly held that Civil Courts are not debarred from inquiring whether the Revenue Authorities have or have not exceeded their jurisdiction, or from affording a remedy where such jurisdiction has been exceeded, even although the officers concerned were acting *bona fide*,—see for example the cases of *Baij Nath Sahu v. Lala Sital Prasad* (1), *Madan Mohun Mazumdar* v. *Baistop Charan Mondal* (2), *Hargobind Das* v. *Baroda Prasad* (3), *Spencer* v. *Puhul Chowdhry* (4) and *Sarat Sundari Debi* v. *Secretary of State for India* (5).

We think then that we ought to refer the following questions to a Full Bench:—

First.—Whether the provisions of Act IX of 1847 are applicable to land re-formed on the site of a permanently settled estate, the revenue of which estate has been paid without abatement since the permanent settlement.

Secondly.—Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the Revenue Authorities in respect of such land are *ultra vires*.

Mr. *Evans* and Baboo *Mohesh Chunder Chowdhry*, for the appellants.—Act IX of 1847 is a Procedure Act and abrogates the Regulations *pro-tanto*. The substantive law on the subject remains unaffected. The land in suit which has been assessed by the Revenue Authorities forms part of a permanently settled estate. The plaintiff has all along paid the full amount of revenue assessed at the time of the Permanent Settlement upon the estate. The land in question has since been for some time under water ; but it cannot be said that the Permanent Settlement has been abrogated *quoad* submerged lands. There is no difference here between land covered by water and land covered by crop. The Permanent Settlement implies a perpetual contract that the zemindar should hold the land for ever, [78] whether under water or not. In the present case there has been, as a matter of fact, no "gain," the land being a re-formation on the old site. There was nothing to assess. It cannot be said that the Act contemplates the confiscation of private rights ; nor is there anything in the Act which expressly or by implication takes away any such rights. Section 6 of the Act should be strictly construed. The functions of the Revenue Court are merely to assess, and the order of the Board of Revenue is final only in respect thereof. There being nothing to assess in this case, the Act does not apply, and the Revenue Courts in assessing the land have exceeded their power. The Civil Court has jurisdiction to set aside the order of the Board of Revenue as *ultra vires*. The Act has abolished by s. 1 all the previous procedure for the judicial investigation

(1) 2 B. L. R. F. B. 1. (2) 6 B. L. R. 617 note. (3) 6 B. L. R. 615.
(4) 6 B. L. R. 658. (5) 11 C. 784.

of the question of liability to assessment; the Civil Court, therefore, must try the question.

The Civil Courts have exercised jurisdiction in analogous cases under the Butwara Law, the Revenue Sale Law, and the Waste Lands Law.

The evidentiary value of survey maps is never of a conclusive charcter.

The following authorities were referred to and discussed: *Dewan Ram Jewan Singh* v. *The Collector of Shahabad* (1); *Ram Jewan Singh* v. *The Collector of Shahabad* (2); *Mahima Chandra Chuckerbutty* v. *Raj Kumar Chuckerbutty* (3); *Baij Nath Saha* v. *Lala Sital Prasad* (4); *Rani Surat Sundari Debi* v. *Babu Prasanna Kumar Tagore* (5); *Nogendro Chunder Ghose* v. *Mohamed Esof* (6); *The Collector of Rajshahye* v. *Rani Shama Soondree Dabea* (7); *Harshahai Singh* v. *Syud Lootf Ali Khan* (8); *Spencer* v. *Puhul Chowdhry* (9); *The Collector of Murshidabad* v. *Roy Dhunput Singh* (10); *Mussamat Imam Bandi* v. *Hurgovind Ghose* (11); *Lopez* v. *Maddan Mohun Thakur* (12); *Ramanath Thakur* v. *Chundra* [79] *Narain Chowdhry* (13); *Joytara Dassee* v. *Mahomed Mobaruck* (14); *Sarat Sundari Dabi* v. *The Secretary of State* (15); *Kristo Chunder Doss* v. *Steel* (16); *Babu Motee Lall* v. *Maharajah Bhoop Singh Bahadur* (17); Reg. IX of 1814; Reg II of 1819; Reg. XI of 1825; Reg. III of 1828; Act IX of 1847.

The Senior Government Pleader (Baboo *Annoda Pershad Bannerjee*), for the respondent.—The order of the Board of Revenue is final and cannot be questioned in a Civil Court. The land here has been assessed by the Revenue Authorities under s. 6 of the Act, and it has been so assessed on inspection of the survey map. The Board of Revenue has acted within its jurisdiction, and therefore this Court cannot interfere with the order. The proprietary right to the land is not the question in this case; the question is in regard to the assessment. We cannot now go behind the survey map. Section 1 of the Act did not abolish the power of the Board of Revenue to investigate judicially the question of liability to assessment. Sections, 5, 6, 7 and 9 have to be read together. The right of civil suit is confined only to certain cases; s. 7 expressly gives a right of civil suit, and by implication excludes such right in a case under s. 6 which governs the present case. There can be no suit under s 5. Take the analogy of a case under s. 14 of Reg. VII of 1882; the Civil Court has no power to consider whether the new rate of assessment fixed by the Collector is reasonable. The following authorities were cited: *Dewan Ram Jewan Singh* v. *The Collector of Shahabad* (1); *Ram Jewan Singh* v. *The Collector of Shahabad* (2); *Bishonath Dutt* v. *Fool-Chand Birjobashee* (18); *Ram Chund Bira* v. *The Government* (19); *Narain Chunder* v. *Tayler* (20); *Surat Sundari Debi* v. *The Secretary of State* (21).

Mr. *Evans* in reply.

The following opinions were delivered by the Full Bench:—

(1) 14 B. L. R. 221 (note)=18 W. R. 64.
(2) 19 W. R. 127.
(3) 1 B. L. R. A. C. 1.
(4) 2 B. L. R. F. B. 1.
(5) 6 B. L. R. 677.
(6) 10 B. L. R. 406.
(7) 14 B. L. R. 219.
(8) 14 B. L. R. 268.
(9) 6 B. L. R. 658.
(10) 14 B. L. R. 49.
(11) 4 M. I. A. 403.
(12) 13 M. I. A. 467=5 B. L. R. 521.
(13) Marsh 136.
(14) 8 C. 975.
(15) 11 C. 784.
(16) 12 C. 279.
(17) 2 Ind. Jur. N. S. 245.
(18) 5 W. R. 22.
(19) 6 C. L. R. 365.
(20) 4 C. 103.
(21) 11 C. 784 (790).

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OPINIONS.

Wilson, J. (Petheram, C. J., and Prinsep and O'Kinealy, JJ., concurring).—The lands to which this suit relates are a part [**80**] of Chur Mohun Sureswar, and are included within a permanently-settled estate of the plaintiffs. At the time when the first survey map was made, the whole *chur* had become diluviated ; when a second survey map was made under Act IX of 1847, the part of the *chur* now in question had re-formed on the old site. The Revenue Authorities have assessed the land with land revenue under Act IX of 1847. This suit was brought to establish the plaintiffs' right to hold the land as part of their permanently-settled estate, free from liability to any such additional assessment as has been imposed upon it. The first Court gave the plaintiffs a decree, the lower appellate Court reversed it. Against that reversal the present appeal has been brought, and the case has been referred to us by the Division Bench. The questions which we have to decide are substantially two:—(1) Has a Civil Court jurisdiction to inquire whether the lands in question were assessable under Act IX of 1847? (2) If so, were these lands so assessable? The answer to these questions must depend upon the construction to be placed upon the provisions of Act IX of 1847 ; but in order to understand that Act it is necessary to examine the earlier legislation.

The first enactment which it is necessary to consider is Regulation II of 1819. The preamble to that Regulation states, amongst other things, that it " appears to be necessary in order to obviate all misapprehension on the part of the public officers or of individuals, to declare generally the right of Government to assess all lands which, at the period of the decennial settlement, were not included within the limits of an estate for which a settlement was concluded with the owners, nor being lands for which a distinct settlement may have been made since the above period, nor lands held free of assessment under a valid and legal title, and at the same time formally to renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a permanent settlement has been concluded at the period when such settlement was so concluded." Section 3 accordingly expressly declares that all lands not included within a permanently-settled estate, nor subsequently settled, nor held free of assessment under a valid title, are liable to assessment ; and the section expressly says further that this [**81**] principle is applicable " to all *churs* and islands formed since the period of the decennial settlement, and generally to all lands gained by alluvion or dereliction since that period, whether from a retrocession of the sea, an alteration in the course of rivers, or the gradual accretion of soil on their banks."

This preamble and this section contain the substantive law on the subject. All that follows in this and subsequent Regulations refers to procedure for giving effect to that law. That procedure falls under two heads—the determination of the question whether particular lands are or are not liable to assessment, and the assessment of lands found to be liable. These two matters have been dealt with quite separately ; one group of enactments declared by whom and under what procedure the liability to assessment should be decided ; another group of enactments gave the rules for assessment.

The Regulation II of 1819 deals almost entirely with the first head—the trial of the question of liability. By s. 5 things were to be set in motion when a Collector had reason to believe that lands within the sphere

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of his control were liable to assessment. By s. 7 the Collector in such case was to " institute a full and particular inquiry into the circumstances and condition of the land in question at the period of the decennial settlement, and in cases of alluvial land, into the period of its formation." By s. 20 the Collector " having closed his proceedings " was to " record his opinion in a Persian *rubokari* detailing the grounds on which it is founded, and whether the lands appear liable to assessment or otherwise." He was to forward the proceedings to the Board of Revenue and to give a copy of his *rubokari* to the party. By s. 21 the Board in their turn were to record their " opinion " in a *rubokari*, and give a copy to the party. The final *rubokari* of the Collector and the Board were to contain a distinct statement of the subject-matter of the case, the grounds on which the decision may be given," and other matters. If the Board should " *pronounce* " against the liability, the decision was final except on proof in a Court of fraud or collusion. In the event of the Board " declaring the lands liable to assessment," the Collector was to inform the party of " the decision of the [82] Board," and then, and not before, he was to proceed " to fix an assessment on the principle of the general regulations on such information as may be procurable." Sections 22 and 23 provided for the suspension of the assessment proceedings, on certain conditions pending a suit to be at once instituted in a Civil Court, and s. 24 gave a right to sue afterwards within certain limits of time. Section 31 asserts in general terms that " it being left to the Courts of Judicature to decide, on all contested cases, whether lands assessed under the provisions of the Regulation were included at the period of the decennial settlement within the limits of estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the Revenue Authorities in any case in which it shall appear that lands which actually formed, at the period in question, a component part of such an estate, have been unjustly subjected to assessment under the provisions of the Regulation, the zemindars and other proprietors of land will be enabled, by an application to the Court to obtain immediate redress in any case in which the Revenue Authorities shall violate or encroach on the rights secured to them by the permanent settlement."

At each point in the process for ascertaining the liability of land to assessment rules of procedure were given by this Regulation. These were modified in some respects by s. 5 of Regulation IX of 1825, but the provisions I have cited remained so far substantially unchanged.

The next Regulation to which it seems necessary to refer is Regulation VII of 1822. That is a long Regulation, containing an elaborate set of rules for conducting settlements and assessments. It applied only to the Ceded and Conquered Provinces and other districts in which the permanent settlement had never been introduced. It did not deal with the first of the two heads of inquiry to which I have referred, namely, the liability to assessment, but with the second, the assessment itself. It does, however, provide that in a variety of matters arising in the course of a settlement, the Revenue Officers should deal with questions of title; and in every such case recourse to the Civil Courts is carefully provided for as in ss. 14, 15, 16 and 17.

Regulation IX of 1825 applied the last mentioned Regulation [83] VII of 1822 to " all lands not within the limits of estates for which a permanent settlement has been concluded." It also, as has been already mentioned by s. 5, modified in some respects the procedure for trying the liability to assessment provided by Regulation II of 1819.

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Regulation XI of 1825, which deals with the title to *churs* and accretions, by s. 4 reserves any right to assess such lands, which belonged to Government under Regulation II of 1819.

The next regulation is Regulation III of 1828. The preamble refers to the provisions of Regulation II of 1819 as to inquiries with a view to the resumption and assessment of all lands held free of rent or at an inadequate rent under invalid tenures, adding: "such provision having been made with the intention that the decisions of the Collectors and of the Board should be held and considered to be judicial awards, and that the suits preferred to the ordinary Courts being of the nature of appeals should be speedily disposed of." It goes on to show that speedy decisions had for various reasons not been secured, and that it was "expedient to appoint Special Commissioners competent to decide finally all cases of the nature above described." Accordingly s. 2 empowered the Governor-General in Council to appoint in any district Special Commissioners for the final determination of all cases investigated by Collectors under Regulation II of 1819 as to the liability of lands to assessment, as well as certain other cases. It provided further, that in any district in which Special Commissioners were appointed, the powers of the ordinary Civil Courts in such cases should be suspended, and no appeal should lie to them from the decisions of Collectors or Boards of Revenue. By s. 5 the proceedings of the Collector were left much the same as under Regulation II of 1819, except that he might proceed to assess as soon as he had himself decided the question of liability. The award is spoken of as a "decision" and as a "judgment," and it is declared to have the force of a decree. The decisions of the Special Commissioners were made final except in cases in which, if the decision had been by the Sudder Court, an appeal would have lain to the Privy Council, in which case the appeal was preserved. Section 10 provided that suits in Civil Courts to contest decisions of Boards [84] of Revenue should not stay execution, and that such suits should be heard as regular appeals. Other parts of the Regulation related to entirely different matters.

This was the state of legislation prior to the passing of Act IX of 1847. The result of that legislation appears to me to have been this.

The substantive law on the subject was clear. Any land alluvial or otherwise, included in a permanently-settled estate, was not liable to further assessment; any land not so included was liable to assessment.

The determination of the liability of land to assessment, and its assessment if so liable, were distinct questions dealt with by the Legislature in separate groups of provisions: the one was always treated as and declared to be a matter for Courts of Justice, the other for the Revenue Authorities as such.

The question of liability to assessment might be tried and decided—

First—By the Collector, subject to an appeal to the Board of Revenue and to the Civil Courts in districts where there were no Special Commissioners and to the Special Commissioners where there were such.

Secondly—By the Board of Revenue, on appeal from the Collector in districts where there were no Special Commissioners.

Thirdly—In the same districts, by ordinary Civil Courts on appeal from the Board of Revenue.

Fourthly—By Special Commissioners, when such were appointed on appeal from the Collector.

All the authorities alike, the Collector and the Board of Revenue no less than the ordinary Civil Courts and the Special Commissioners, appear

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to me, when trying and deciding the question of liability to assessment, to have been judicial tribunals, making judicial investigations, and passing judicial decisions. So far as the nature of the question tried and determined affects the matter, this would certainly seem to be so; the question was as to the existence of a proprietary right expressly conferred by Statute. In Regulation II of 1819 the finding of the Collector and of the Board of Revenue are spoken [85] of indifferently as "opinions" and as "decisions," and the Board are said to "pronounce against the assessment" or to "declare" the lands liable (ss. 20, 21, 22). Regulation III of 1828 in the preamble says in plain terms that the Legislature had always intended those decisions to be "judicial awards," and the proceedings in the ordinary Courts to question them to be "of the nature of appeals." In this last mentioned Regulation the proceedings are frequently termed "suits," the findings are now called sometimes "decisions," sometimes "judgments," and they have the force of decrees. For these reasons I think that both before and after 1828 the Collector and the Board of Revenue, just as much as the ordinary Courts and Special Commissioners, when trying the question of liability to assessment, were not doing an executive act as officers of the revenue, but were acting as Courts of Justice exercising a Special civil jurisdiction conferred upon them by the Regulations.

I now come to Act IX of 1847. That is "an Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction within the Provinces of Bengal, Behar and Orissa." Section 1 enacts "that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or rivers, by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall cease to have effect within the Provinces of Bengal, Behar and Orissa, and that all such investigations pending before the Collectors and Deputy Collectors, . . . shall forthwith be discontinued, and that no measures shall hereafter be taken for the assessment of such lands, or for the assertion of the right of Government to the ownership thereof, except under the provisions of this Act." Section 3 empowered the local Government, at any time after ten years had elapsed from a previous survey, to order a fresh survey of lands on the banks of rivers or on the sea-shore, in order to ascertain the changes that have taken place in the meantime, and to cause a new map to be made. Section 5 directed that if on inspection of the new map it appeared that land had been washed away from a revenue-paying estate a deduction should be made from the sudder jumma, as to which [86] the orders of the Board of Revenue should be final. Section 6 says "Whenever on inspection of any such new map, it shall appear to the local Revenue Authorities that land has been added to any estate paying revenue to Government, they shall, without delay, assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings to the Sudder Board of Revenue, whose orders thereupon shall be final." Section 7 directed that when on a like inspection it appeared that "an island has been thrown up in a large and navigable river liable to be taken possession of by the Government under cl. 3, s. 4, Regulation XI of 1825," the local Revenue Authorities should take possession of it, and assess and settle it, and that the orders of the Board of Revenue "in regard to the assessment" should be final: "Provided, however, that any party aggrieved by the act of the Revenue Authorities in

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taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the Civil Court." Section 9 says that, "except as regards the proprietary rights to islands, no suit or action in any Court of Justice shall lie against the Government, or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act."

These are the sections which have to be considered, and the broad questions to be decided are, first, whether they have taken away from the Civil Courts all power of inquiring into the liability to assessment of alluvial lands which have been assessed; and, secondly, whether they have made lands liable to be assessed which were not so before. I think it worthy of observation, in the first place that the Legislature of this country has always acted in these matters upon a clear policy, namely, that questions of title are for the Courts of Justice, questions of assessment for the Revenue Authorities. That principle had, prior to 1847, been acted upon for 50 years in the case of alluvial lands, and it is still applied, so far as I know, in all other cases. The construction contended for reverses the settled policy in this one particular instance; it involves a direct infringement of rights of property, amounting in the present case, on the facts found, to [87] confiscation; and it takes away from people their ordinary power of having their legal rights of property determined by Courts of Justice. I think we ought not to adopt such a construction unless the intention of the Legislature has been expressed in clear and unmistakable language; and I can find no clear expression of such an intention; on the contrary, I think the language of the Act shows with reasonable clearness another intention altogether.

The first thing I propose to examine is the meaning of the words in s. 1, which repeals " such parts of the Regulations as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment " of alluvial lands. By the word tribunal, I understand simply a man or body of men constituting a Court of Justice, and I have already given my reasons for thinking that Collectors and Boards of Revenue were Courts of Justice when trying questions of liability to assessment. And the parts of Regulations dealing with this matter of liability are a branch of legislation which has always stood apart, so that, understanding the words as I do, nobody could have the least difficulty in pointing out the parts of Regulations referred to. In my judgment this section repealed everything in the Regulations which enacted by what officers and how the question of liability should be tried, and therefore took away from Collectors and Boards of Revenue the power of giving any binding decision on the point. I am confirmed in this view by the words which follow, which directed Collectors to discontinue, not pending assessments, but pending investigations regarding the liability to assessment.

Then as to s. 6, it is said that under it the orders of the Board are conclusive of the question of title. There seem to me only three possible grounds on which this can be contended. The first is to say that this is a taxing section, and the words " shall assess the same " render liable to assessment all lands which, on comparison of the two maps, the Revenue Officer thinks have been added in the interval between them, whether included in an estate already assessed or not. But it has already been held by a Full Bench—and I think there is no doubt rightly held—that

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[88] this is only a Procedure Act: *Budrunnissa Chowdhrain* v. *Prosunno Kumar Bose* (1).

Secondly, it may be said, and has been said, that though this is only a Procedure Act and not intended to make any land subject to assessment which was not so before, yet it does, as a matter of procedure and evidence, make the former survey map conclusive as to the original limits of each permanently-settled estate, and therefore make the comparison of the two maps by the Revenue Officer conclusive on the question of addition to the estate. This view was acted upon in *Dewan Ram Jewan Singh* v. *Collector of Shahabad* (2); *Ram Jewan Singh* v. *Collector of Shahabad* (3); and *Sarat Sundari Debi* v. *The Secretary of State for India* (4). But this is a very strong effect to attribute to a survey map by *ex post facto* legislation. And a consideration of s. 7 seems to show that the view cannot be correct; the same words exactly are used with reference to an island *chur* that on inspection of the map appears to be the property of Government, but it is obviously impossible that any inspection of maps can show whether the island when formed was or was not separated from the shore by a fordable chanel. Moreover, this construction of the section does not apear to be the view ordinarily acted upon by the Revenue Authorities; it certainly was not acted on by them in the present case. I think that the comparison of the maps is not conclusive, but that what is meant is that the comparison is to set the Revenue Authorities in motion, and that they may then, on the best materials they can procure, proceed to assess what they deem to be assessable.

Thirdly, and this was the main contention before us, it is said that the words which say that the orders of the Board of Revenue "shall be final" are conclusive. What is declared to be final is the order of the Board upon the Collector's assessment. The effect, in my opinion, is to make the assessment final in every case in which there is jurisdiction to assess, but to leave it open to the Civil Courts to enquire in each case whether there was such jurisdiction. There is jurisdiction to assess if the lands [89] assessed are liable to assessment; that question is therefore open to the Civil Courts. The case seems to me the same in principle as a number of cases decided upon other enactments containing similar clauses of finality. Thus by s. 33 of the Revenue Sale Act (Act XI of 1859) it was enacted: "No sale for arrears of revenue or other demands realizable in the same manner shall be annulled by a Court of Justice" except upon certain specified grounds. It was held by a Full Bench that this did not preclude a Civil Court from inquiring whether at the time of a sale any arrear was due, and whether therefore there was any jurisdiction to sell—*Baijnath Sahu* v. *Lala Situl Prosad* (5). So s. 20 of Regulation XIX of 1814, declared the determination of the Board of Revenue upon a Collector's paper of partition to be final. It has been held more than once that that means final as to the matters which the Revenue Authorities are empowered to decide, the jumma and its division, and the mode of division of the lands, and that it is for the Civil Courts to try the title to the land and any question as to the shares—*Spencer* v. *Puhul Chowdhry* (6); *Kunj Behari Singh* v. *Neru Singh* (7). Similar principles were acted on in *Hargobind Das* v. *Baroda Prasad Das* (8). Of course the case would be otherwise if the Revenue Authorities were

(1) 6 B. L. R. 255. (2) 14 B. L. R. 221 (note)=18 W. R. 64.
(3) 19 W. R. 127. (4) 11 C. 784. (5) 2 B. L. R. F. B. 1.
(6) 6 B. L. R. 658. (7) 6 B. L. R. 663 (note). (8) 6 B. L. R. 615.

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empowered not only to assess but also to try the liability to assessment. But that power, I think, was taken away by the first section of the Act.

Stress was laid in argument upon the words in s. 7 expressly giving a right of civil suit to any one aggrieved by the Government taking possession of an island *chur*. It was suggested that this tends to negative the right of suit in other cases. I do not think so. Under s. 6, if my view be correct, the Revenue Officers decide nothing as to proprietary rights, and their action in assessing does not necessarily interfere with the enjoyment of such rights ; there was no necessity, therefore, for saying anything about a civil suit. But taking possession of an island *chur* under s. 7 would, if it were private property, be a direct infringement of private right ; there was, therefore, reason for reserving the right to sue. So that the assertion of the right [**90**] to sue in s. 7 seems to me only to show that the Legislature in 1847 intended to maintain, not to abandon, its traditional policy.

Section 9 was also relied upon as excluding such a suit as the present. That section is not very clear, and two constructions have been placed upon it. In *Dewan Ram Jewan Singh* v. *Collector of Shahabad* (1) Couch, C. J., and Ainslie. J., held it to prohibit suits to establish title. In *Collector of Moorshedabad* v. *Roy Dhunput Singh* (2), Phear and Morris, JJ., limited it to suits for damages. I prefer the latter view ; the mention of good faith is strong in favour of it. The exception in the case of islands tends the other way, but not, I think, very strongly ; there is a great difference between allowing a suit for damages for an actual ouster under s. 7 and for an assessment under s. 6. At any rate, unless the meaning be clear, we should not, I think, adopt a construction which infringes rights of property.

The general conclusion I have arrived at on the examination of this Act is, that the Legislature has abolished all the special provisions for trying the liability to assessment in the case of alluvial lands, has cast it upon the Revenue Authorities to form and act on the best judgment they can in the matter, and has left the question of liability to be decided by the Civil Courts as and when the question may arise. No doubt the Revenue Authorities are right in making the careful inquiries which I understand they do make before assessing such lands ; I think, however, that their conclusions are not of binding force, but that the Civil Courts have, in a suit like the present, jurisdiction to inquire into the question of liability. And this would not make any very great change from the previous law; under Regulation II of 1819 it was entirely in the discretion of the party affected to apply to the Civil Courts before the assessment, or to wait till afterwards. Nor can I see any such obvious inconvenience in this view as to lead me to doubt its correctness. If the Revenue Authorities are sufficiently sure of their right to assess, I suppose they will, as I suppose they do, make an assessment, and, on the basis of that assessment, settle the land with some one according to the ordinary rules, unless a suit like the present [**91**] is first brought, and then leave the rival claimants to fight the matter out between themselves.

If I be right in thinking that the Civil Courts can deal with the question, I think further, for the reasons already stated, that the lands in question in this case were not liable to be assessed.

(1) 14 B. L. R. 221 (note)=18 W. R. 64. (2) 15 B. L. R. 49.

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I would only further notice a little more in detail certain cases bearing upon this question relied upon in the course of the argument, and to which I have already referred. The first is *Dewan Ram Jewan Singh* v. *Collector of Shahabad* (1), decided by Couch, C.J., and Ainslie, J. Nothing is reported except the judgment, but it would seem from that judgment that the case was very similar to the present. The suit was dismissed on two grounds—that it was barred by s. 6 of Act IX of 1847, and that it was barred by s. 9. It is said: "Since in this case there has been an addition to the estate appearing upon the inspection of the new map, although it is, as stated in the plaint, a re-formation upon the old site, it comes within s. 6, and is added to the estate." And again, it is said: "This is a case coming within s. 6, where power is given to assess the land which had been re-formed, and then the same section says expressly that the orders of the Sudder Board of Revenue shall be final. I have stated in detail the reasons which lead me not to agree in this view. As to s. 9, I am also unable to agree in thinking that it applies; the view taken in the case already referred to seems to me preferable.

In *Ram Jewan Singh* v. *The Collector of Shahabad* (2) it is impossible to say from the report what the case before the Court was. But the learned Judges (Couch, C. J. and Phear, J.) appear to have expressed approval of the case previously mentioned.

In the *Collector of Moorshedabad* v. *Roy Dhunput Singh* (3), before Phear and Morris, JJ., a portion of the plaintiff's zemindari had been washed away and re-formed. Being then found in contact with, and an apparent addition to, the estate of one of the defendants, the Revenue Officers assessed it under Act IX of 1847 and settled it with the latter. The plaintiff sued that defendant, with another who claimed under him, and the Government, to recover the land on the strength of his original **[92]** title. The Court held he was entitled to recover, that the assessment under Act IX of 1847 was no doubt binding on the defendant who had accepted a settlement under it, but that it bound no one else. In this decision I wholly concur.

The last case is *Sarut Sundari Debi* v. *The Secretary of State for India* (4). I was a party to the judgment in that case with Beverley, J. The suit was the same in character as the present, and the facts alleged by the plaintiff were similar; and it was held that the suit was barred by s. 6 of Act IX of 1847. It was held, first, that the Civil Court had power to inquire in such a suit whether the Revenue Authorities had jurisdiction to make the assessment they had done; and I think it was rightly so held. It was held, secondly, following the earlier cases, that the former survey map was conclusive as to the boundaries of the estate, and that, therefore, the Revenue authorities had acted within their jurisdiction in making the assessment; in this I think, for reasons I have stated, that we were wrong.

I should set aside the decree of the District Judge by which he reversed that of the Subordinate Judge, and I should affirm the decree of the Subordinate Judge with costs in all Courts.

MITTER, J.—I would answer the first question in the negative. The provisions of Act IX of 1847 are applicable to lands gained from the sea or from rivers by alluvion or dereliction. But land re-formed on the site of

(1) 14 B. L. R. 221 (note)=18 W. R. 64. (2) 19 W. R. 127.
(3) 15 B. L. R. 49. (4) 11 C. 784.

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an estate, the proprietary right in which is vested in a private individual, does not fall under the category of lands gained from the sea or from rivers by alluvion or dereliction.

The second question referred to us is substantially this—whether a Civil Court is competent to entertain a suit, the object of which is to establish that land assessed by the Revenue Authorities as an alluvial increment under Act IX of 1847 is not liable to assessment, on the ground that it does not fall under the category of lands gained from the sea or from rivers by alluvion or dereliction. The decided cases bearing upon the question are all one way, laying down that the jurisdiction of the Civil Court was taken away by s. 6, Act IX of 1847. *Dewan* [93] *Ram Jewan Singh* v. *Collector of Shahabad* (1) ; *Ram Jewan Singh* v. *Collector of Shahabad*, (2): *Collector of Moorshedabad* v. *Roy Dhunput Singh* (3) ; and *Sarat Sundari Dabi* v. *Secretary of State for India* (4). In this last mentioned case, it was also held that Civil Courts have power to try, whether the Revenue Courts have jurisdiction under s. 6 of Act IX of 1847.

In order to arrive at a correct conclusion, regarding the interpretation of the provisions of Act IX of 1847, it is necessary to examine the previous legislation on the subject of the assessment of alluvial increments.

There is no special provision in the Code of 1793 regarding the assessment of alluvial increments. But, under s. 8 of Regulation III of 1793, the Civil Courts were authorized to take cognizance of all suits respecting revenues, &c. It follows, therefore, that, if any demand for assessing alluvial increments had to be enforced, it had to be enforced by a suit in a Civil Court. That this was the law is declared in the preamble of the following Regulations: *viz.*, Regulations VIII of 1811, V of 1813, XI and XXIII of 1817.

By this last mentioned Regulation, the Revenue Officers were, for the first time, authorized, in certain specified districts, to try summarily the question of liability to assessment of alluvial increments. But by s. 12 a party aggrieved by the decision of the Revenue Authorities could "institute a suit in the Courts of Judicature against Government to try the merits of the said decision."

Then came Regulation II of 1819 by which all the previous Regulations were repealed, and an elaborate procedure was laid down for the investigation, by the Revenue Officers, of the question of the liability of lands held revenue free to be assessed with Government revenue. But the right of the party aggrieved by the decision of the Revenue Authorities to contest the correctness thereof was preserved.

By Regulation III of 1828 the jurisdiction of Civil Courts to entertain suits of the above description was taken away in the districts where, under s. 2 of the Regulation, the [94] Governor-General in Council appointed Special Commissioners, who were vested with the power of the final determination of all cases which had been or might be investigated by Collectors and Deputy Collectors or other officers exercising the powers of a Collector under Regulation II of 1819.

In this state of things Act IX of 1847 was passed.

The 1st section of the Act is as follows:—

"It is hereby enacted that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for

(1) 14 B. L. R. 221 (note)=18 W. R. 64. (2) 19 W. R. 127.
(3) 15 B. L. R. 49. (4) 11 C. 784.

investigations regarding the liability to assessment of lands gained from the sea or from rivers by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall from the date of the passing of this Act, cease to have effect within the Provinces of Bengal, Behar, and Orissa, and that all such investigations pending before the Collector and Deputy Collector in the said Provinces at the said date, shall be forthwith discontinued, and that no measure shall hereafter be taken for the assessment of such lands or for the assertion of the right of Government to the ownership thereof except under the provisions of this Act."

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It seems to me that the scope of the Act, so far as it may be gathered from the title of the Act and the 1st section, is, that it lays down rules for the investigation regarding the liability to assessment of alluvial increments, abolishing tribunals and rules of procedure created and prescribed by parts of the Regulations of the Bengal Code for holding such investigation.

The same view was taken by Couch, C.J., in the Full Bench decision —*Budrunnissa Chowdhrain* v. *Prosonno Kumar Bose* (1). He says:—"Now looking at the first section, the Act does not appear to have been intended to do more than make different provisions for the investigations regarding the liability of the lands to assessment or the rights of the Government, and it was not intended to alter in any way the right which existed in the law before that Act was passed."

The first section expressly declares that "no *measures* shall hereafter be taken for the assessment of such lands . . . . except under the provisions of this Act." The first step in [95] the measures for the assessment must necessarily be the establishment of the *right* to assess. That step, according to the first section, must be taken under the provisions of the Act. The Revenue Officers acting under it must therefore first investigate the question regarding the liability to assessment. This investigation is consequently within the jurisdiction vested in them by the Act, and the word "assessment" used in the title of the Act and in the latter part of s. 1 and also in s. 6 therefore, in my opinion, includes an inquiry or investigation into the question regarding the liability to assessment.

Passing over for the present the intermediate sections, we come to s. 6 of the Act. It is to the following effect:—

"And it is hereby enacted that whenever on inspection of any such new map, it shall appear to the local Revenue Authorities that land has been added to any estate paying revenue directly to Government, they shall, without delay, assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Sudder Board of Revenue, whose orders thereupon shall be final."

Now the "proceedings" of the Revenue Authorities mentioned in this section would, as shown above, embrace an inquiry upon two questions, *viz.*, the question of the *liability* to assessment and the question of the rate of assessment. Therefore the "orders" of the Sudder Board of Revenue mentioned in it would also deal with both these questions, and the section says in its concluding part that the said orders shall be *final*. The language of the section does not, in my opinion, warrant us to curtail the force of the word "final," so as to make it applicable to one part of the order only, *viz.*, that relating to the rate of assessment and not to the

(1) 6 B. L. R. 255 (267).

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other. It seems to me that under the express wording of the section, the finality attaches to the whole order, *i.e.*, the whole order dealing with both these questions.

Now it has been said that there was no procedure laid down in the Act for judicially investigating the question of liability to assessment, the whole of the previous procedure under Regulation II of 1819 and Regulation III of 1828 having been swept away by s. 1 of the Act. But it seems to me that only the [96] "tribunals" established by Regulation III of 1828, and the procedure prescribed for their guidance were abolished by that section. The procedure referred to in s. 1, is the specified procedure laid down for "tribunals" abolished. These tribunals are the Special Commissioners and the Officers vested with the power of resumption under Regulation III of 1828, and do not include Collectors and Officers deciding under Regulation II of 1819 the question of the liability of land held revenue-free to be assessed with Government revenue. The word "tribunals" ordinarily means officers whose chief function is judicial. The chief function of a Collector or a Revenue Officer is executive. They, in my opinion, cannot properly be called "tribunals," because in some special matters they may be vested with judicial power.

There is another reason for thinking that the judicial functions of the Revenue Authorities under Regulaton II of 1819 were not abolished by s. 1 of Act IX of 1847.

Section 8 of the Act, which evidently provides for the suits pending in the "tribunals" abolished under s. 1, shows that these were the Resumption Courts established under Regulation III of 1828. It is true that s. 1 says, that proceedings before the Collectors and Deputy Collectors shall be discontinued, but there is no provision for cases pending before the Board of Revenue. I am therefore of opinion that the procedure laid down in Regulation II of 1819 was not abolished.

That being so, and it being provided in s. 6 that the Revenue Authorities shall assess alluvial lands added to an estate "*according to the rules in force for assessing alluvial increments*," it was intended by the Legislature that the investigation into the question of liability should be conducted by the Revenue authorities under Regulation II of 1819, and on that investigation the Revenue authorities should be guided by the provisions of Regulation XI of 1825 in determining whether the subject-matter in dispute is land gained from the sea or from rivers by alluvion and dereliction. The survey maps are not to be deemed final upon the question. The words "*whenever on inspection of any such new map*" in s. 6 and the other sections of the Act indicate, in my opinion, the condition precedent to the *institution* [97] of a proceeding under the Act, *i.e.*, that no proceeding under the Act shall be instituted unless it appear on inspection of the new survey map that lands have been added to, or lost from, an estate, or that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under Regulation XI of 1825. But the investigation shall be completed upon the whole evidence that may be adduced, and is not to be limited to the inspection of the new survey map only. In the case of an island, it would be impossible to form any opinion upon the inspection of the map only ; because it would not necessarily show whether a channel between it and a neighbouring estate is fordable or not.

Hitherto I have confined my attention to the language of s. 6 only in construing the word "final" used in it. But ss. 5 and 7 afford material help in determining this question. It has been conceded, in the

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course of the argument (and rightly conceded, I think), that the orders of the Board of Revenue under s. 5 cannot be questioned in a civil suit. A person may be aggrieved by the order of the Board of Revenue, but still he has no remedy by a civil suit. An owner of an estate may claim reduction of revenue to a larger amount than what he would be entitled to upon *the inspection of the new survey map only*, and the Board of Revenue may disallow such claim. It is admitted that the owner would not be permitted in that case to establish his right in a civil suit. In other words, the order of the Board of Revenue under s. 5 shall be final in all respects. If the word "final" in s. 5 has this meaning, the same word used in the next following section should not have a more limited signification. The enquiry under either of these sections is of a similar nature. In the one case the amount of revenue to be *added* and in the other the amount of revenue to be *deducted* have to be determined. One of the points—and in fact the chief point—for inquiry is the real area of the estate regarding which the investigation takes place. The result of the decision in any particular case under Act IX of 1847, does not affect any title to land, but the amount of revenue payable to Government for the estate in respect of which the investigation takes place.

[**98**] Then again, s. 8 expressly says, that the order of the Board of Revenue "*in regard to the assessment*" shall be final. The absence of these words indicates, in my mind that the Legislature intended to make the order of the Board of Revenue under s. 5 or 6 final upon both the points dealt with by such order.

I have already said that the decided cases bearing upon the point under consideration are all one way, and have taken the view that no civil suit will lie. The last case upon the subject—*Sarat Sundari Debi* v. *Secretary of State for India* (1)—makes, however, this reservation, that where the Revenue Authorities are shown to have exceeded their jurisdiction under Act IX of 1847, the Civil Courts can declare the order of the Board of Revenue to be *ultra vires*. I feel no hesitation in assenting to that view. But in order to ascertain whether the jurisdiction has been rightly exercised or not, the Civil Courts have no power to question the *finding* of the Board of Revenue. If it appears, upon the face of the proceedings of the Revenue Authorities, that they have rightly exercised jurisdiction under Act IX of 1847, the Civil Courts have no power to question their final decision. It appears upon the face of the proceedings of the Revenue Authorities held in this case, that they had jurisdiction under Act IX of 1847, to assess the land in suit as an alluvial increment.

I would therefore return this answer to the second question, that it appearing upon the face of the proceedings that the Revenue Authorities had jurisdiction to assess the lands in suit under Act IX of 1847, a Civil Court has no power to make a decree declaring that the proceedings of the Revenue Authorities in respect thereof are *ultra vires*.

K. M. C.

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(1) 11 C. 784.

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PRIVY COUNCIL,

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[99] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse and Sir B. Peacock.

[*On appeal from the High Court at Calcutta.*]

RAMKUMAR GHOSE AND OTHERS (*Defendants*) *v.* KALIKUMAR TAGORE (*Plaintiff*). [3rd, 6th and 24th July, 1886.]

Kabuliyat, Construction of—Stipulations as to rent of new Chur—Hawaladari tenure—Measurement and Assessment of Chur Land—Landlord and tenant—Bengal Act VIII of 1869, *s.* 14.

A kabuliyat, executed by the tenant of land held in hawala tenure, provided that on an adjoining chur becoming fit for cultivation the whole land, old and new, held by the tenant should be measured, and the old having been deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing pergunnah rates. It provided also that neither (*a*) rent should be realized according to law with interest thereon; or that (*b*) at the close of the year, the owner should, by a notice served on the hawaladar, require him to take a settlement of the excess land and within fifteen days to file a kabuliyat; or (*c*) the excess land might be settled with others.

Such a chur having been formed, the zemindar measured without notice to, and in the absence of, the hawaladar. He then served a notice on the latter requiring him to execute a kabuliyat within fifteen days for payment of a fixed rent upon the excess land as found by the measurement or to yield up possession.

Disregard of this led to a suit in which the zemindar claimed either khas possession or rent on measurement by order of Court.

Held, that neither the kabuliyat nor the terms of s. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement; nor did the absence of authentic measurement as prescribed by the kabuliyat have that effect, or affect the measurement by the amin; but that until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial determination) the zemindar could not put the hawaladar to his choice between (*b*) executing a kabuliyat for the rent, and (*c*) yielding up possession.

APPEAL from a decree (11th May 1883) reversing a decree (29th June 1881) of the Subordinate Judge of Faridpur.

The respondent, who was plaintiff in the suit out of which this appeal arose, was zemindar, or owner by other superior tenure [**100**] of land in Faridpur, the appellants, who were the defendants holding under him by the tenure known as hawaladari (1).

The terms on which the latter were to hold additional land fit for cultivation that might be formed by a chur were entered in a kabuliyat executed on the 23rd April 1850, of which the stipulations are set forth in their Lordships' judgment. The present suit was instituted by the plaintiff to recover either khas possession of, or the rent properly payable for land formed in or before the year 1876, by a chur contiguous to the land held in the original hawala tenure granted to the defendants.

The claim to direct possession rested on a provision in the kabuliyat, whereby, in the event of future accretions, measurement was to be made of the land, both original and new and the defendants were to pay a fixed rent for any amount not exceeding five drones (2), and at the prevailing pergunnah rate for all land in excess of that quantity.

(1) As to this tenure, see the note to *Alimuddi Khan* v. *Kalikrishna Tagore,* reported in 10 C. 895.

(2) A drone is equal to 16 khanis, and a khani equals between 5 and 6 bighas.

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In 1876 a measurement was made by the zemindar, and the excess ascertained, but without notice to the hawaladars, and in their absence. Afterwards the zemindar served the latter with a notice requiring them to appear at his cutcherry and make a settlement for the excess land, or in default of their so doing to yield possession of the land.

The defendants did not dispute that a chur had formed within the contemplation of the provisions of the kabuliyat, nor did they deny that the plaintiff, if he had brought himself within the terms of the kabuliyat, was either entitled to additional rent or else to possession. They did, however, deny his right to either of the above, as claimed in the present proceedings, on the ground that (*a*) the plaintiff had not measured the lands in conformity with the terms of the kabuliyat upon due notice given to them; and (*b*) that he had not given them such notice as was required in regard to the fixing of the rent.

Issues having been settled as to these points, the Subordinate Judge found that there had been no such measurement as the [**101**] kabuliyat required, and he ordered that a measurement should be made by an amin of his Court. He found also that neither the assessment of the rent, nor the subsequent demand for it, had been validly made; and he, accordingly, dismissed the suit.

This was reversed by the High Court (CUNNINGHAM and MACLEAN, JJ.) and a decree was made for the plaintiffs. As to the disputed measurement, the Judges held that the evidence established a measurement fairly within the terms of the kabuliyat. They also found that no objection had been taken by the defendants to the notice given of the plaintiff's claim. They, therefore, considered that the latter was entitled to actual possession of the excess lands, which should be ascertained by reference to the map of the Court amin.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellants, argued that the terms of the kabuliyat as regards measurement not having been complied with, the plaintiff was not entitled to a decree. In support of this he referred to part of the judgment in *Jardine Skinner and Co.* v. *Rani Surut Soondari Debi* (1). He added that, even assuming that the amin's measurement was sufficient ground (which was not admitted) still there could be no decree for direct possession before the defendants had had the option of coming to a settlement with the plaintiff. This was his principal ground. He further objected that there was an entire absence of proof as to the prevailing rate. The pergunnah rates were discussed, and the nature of the proof required in reference to them was explained in *Shadoo Singh* v. *Ramanoograha Lall* (2). It was essential to prove these rates, as appeared from *Kali Krishna Tagore* v. *Golam Ali Chowdhry* (3), which arose in

(1) 5 I. A. 164. (2) 9 W. R. 83.

(3) **14 C. 101 N (P.C.)=8 Ind. Jur. 270.**

PRIVY COUNCIL

PRESENT :

Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

[*On appeal from the High Court at Calcutta.*]

KALI KRISHNA TAGORE *v.* GOLAM ALI CHOWDHRY. [20th February, 1884.]

Assessment—Rent—Kabuliyat—Pergunnah rate—evidence.

Judgment of the High Court at Calcutta affirmed, upon the issue of fact.

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[102] the same neighbourhood. That was a case in which the rent of a chur having been held by the High Court to be governed by the terms applicable to the parent tenure, in the absence of proof of the pergunnah rate, the plaintiff failed to obtain any other rate on an appeal heard by the Judicial Committee.

For the respondent, Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, argued that the High Court had rightly held on the evidence, and the circumstances of the case, that the measurement was sufficiently made within the terms of the kabuliyat. Also that notice, with demand of settlement, having followed thereon, without objection taken by the defendants, the plaintiff had become entitled to direct possession. It was not a condition precedent to the bringing such a suit as the present, [103] that there should have been a measurement; and the High Court had rightly referred to that of the amin.

Mr. *C. W. Arathoon* replied.

JUDGMENT.

Their Lordships' judgment was delivered on a subsequent day (July 24th) by

Lord Watson :—The arguments upon this appeal had reference mainly to the construction of the following stipulations in a kabuliyat, dated 23rd of April 1850, executed by the then tenants, under a hawaldari tenure, of certain lands comprised in, "the chur to the east of Makhuakhali," forming part of the zemindari now belonging to the respondent:—

"If a new chur accretes contiguous to the aforesaid hawala, and as *hakiat* of the aforesaid (torn), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation,

On this appeal, not elsewhere reported, the appellant sought to raise the question at what rate rent was to be assessed on a chur which was held to be an accretion, under Regulation XI of 1825, s. 4, cl. 1, to his under-tenure. *Mr. J. F. Leith*, Q. C. and Mr. *R. V. Doyne* appeared for the appellant. Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the respondent. The judgment of their Lordships, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE, was delivered by the last named, on the 20th February 1884, as follows :

Having heard the opening of this appeal, their Lordships consider that it would be idle to continue the argument. The Subordinate Judge decided the construction of the Regulation in favour of the appellant, and considered that the accretions ought to be assessed at the pergunnah rate. But inasmuch as the appellant failed to prove any such rat·, the Subordinate Judge found no measure of rent except what was given by the kabuliyat, and accordingly he pronounced for that rent. The High Court agreed with the Subordinate Judge in finding that the appellant had not proved the pergunnah rate which he claimed, and with a slight exception they affirmed the decree. But the learned Judges also expressed opinions, adverse to the appellant on the construction of the Regulation. Their Lordships now find that the appellant cannot succeed because of the fatal defect in his evidence. All that Mr. Leith can suggest on that point is that the case should be remanded for an inquiry. But the issue was definitely raised and a great deal of evidence given on it, and the appellant must stand or fall by that evidence. It would not be right now to give him the opportunity of making a new case. That being so, the opinion of their Lordships on the Regulation can have no influence on the result of the appeal, and they do not think it desirable to hear further argument on a question which under such circumstances is not a practical one. All they can do is to decide that the appellant, having failed to prove the pergunnah rate which he alleged, cannot have any more favourable decree than that which the High Court have given him. On this ground, without expressing any opinion on the question which of the two Courts has taken the sounder view of the Regulation, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal with costs.

Solicitor for the appellant : Mr. *T. L. Wilson*.

Solicitors for the respondent : Messrs. *Oehme & Summerhay*.

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a fresh measurement shall be made of the land of the said chur and of the aforesaid hawala; and after a deduction of the aforesaid 13-6-16 gundahs of land, we shall pay rent at the rate of Rs. 2-7-7 pie for the excess of land up to five drones, and at the *sara* (prevailing) pergunnah rates for land exceeding that quantity. If we fail to do so, the rent will be realised according to the law for the realisation of rent, with interest on lapsed instalments according to the demands of the towzi of the said pergunnah; or at the close of the year, you will serve on the spot, and on some conspicuous place in the *mahakuma* (head-quarters) of any hakim, an itlanama (notice) to our address, requiring us to take a settlement of the said excess land, and to file a kabuliyat, and fixing the time at fifteen days; if, thereupon, we do not appear before you and take a settlement and fix a kabuliyat, you will settle the said excess lands with others.

The 13-6-16 gundahs thus referred to was the original extent of the cultivable hawala, and the rent payable for it was fixed by the kabuliyat at Rs. 462. In a suit brought by the zemindar in the year 1865, it was found that 2-11-13 gundahs, &c., had accreted to the said 13-6-16 gundahs, and that for such excess additional rent was payable at the rate of Rs. 2-7-7 pie per khani in terms of the kabuliyat of 1850. The appellants have [**104**] since continued to be tenants of the hawala and said accreted lands, amounting in all to 16-2-9 gundahs, &c., at a *cumulo* rent of Rs. 570-1-1, &c.

It is not matter of dispute that, at the commencement of the year 1876, a new chur had accreted to the hawala in question, which was to a large extent composed of land fit for cultivation. The respondent alleges that, in April of that year, a new measurement of the original hawala and of the accreted chur was made by his servants under his instructions. The measurement was made without intimation to the appellants, and in their absence. The respondent thereafter, on the 28th March 1878, caused a notice to be served on the appellants, who are the registered tenants of the hawala, setting forth the fact of measurement, intimating the precise amount of the increased rent due in respect of the excess land, according to the rates specified in the kabuliyat, and requiring the appellants to appear either before himself or his principal officer within fifteen days from service, " and file a kabuliyat for the said quantity of land and for the said amount of rent; otherwise after the expiry of the said fixed period, under the terms of the said kabuliyat, I shall take khas possession of the land in excess of the said Dr. 16-2-9 gundahs of land for the purpose of settling the same with others."

The appellants paid no attention to the notice, and the respondent, on the 29th March 1879, presented his plaint to the Subordinate Judge, in which he prayed: (1) that the Court should direct a measurement of the excess land and give him khas possession thereof ; or otherwise (2) that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the kabuliyat. On the respondent's motion the Judge ordered a measurement of the accreted land, which was made by the Court amin in presence of the parties, and duly reported. Evidence was then heard on both sides, and, on the 29th June 1881, judgment was given dismissing the suit with costs, but the formal decree was not made out and signed until the 27th July 1881. The Subordinate Judge came to the conclusion, though with some hesitation, that service of [**105**] the notice of 28th March 1878 was established. He was of opinion that the respondent had failed to prove any

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measurement of the excess lands as alleged, and had also failed to prove pergunnah rates, both of which he held to be conditions precedent of the respondent's right to possession. And, as matter of law, the learned Judge decided that the stipulation in the kabuliyat with respect to khas possession, which he terms the forfeiture clause, is void. The learned Judge further held that the suit, so far as it prayed for assessment of rent, could not lie, inasmuch as the case was regulated by s. 14 of the Rent Act.

On appeal the decision of the Subordinate Judge was reversed by the High Court, (Cunningham and Maclean, JJ.) who on the 11th May 1883, gave the respondent a decree for khas possession of whatever land might be found, according to the Civil Court amin's map, to be in excess of 16d, 2k, 9g, 2c, 2k. Unfortunately the amin reports two measurements on the map prepared by him, leaving it to the Court to select one or other of them, and the decree does not specify according to which of these the excess lands are to be ascertained.

The learned Judges of the High Court differed in opinion from the Subordinate Judge, as to the fact of a measurement having been made by the respondent before the notice of 28th March 1878 was served. They state that, upon the evidence, they are "unable to find that there has not been a measurement within the terms of the kabuliyat." Upon that view of the facts they seem to have been of opinion that, on receipt of the notice, the appellants ought to have appeared within the fifteen days, and to have then stated any objections which they had to the measurement or to the rent intimated, and that, seeing they raised no objections to either until the present suit was instituted, the respondent was entitled to the alternative of possession.

Their Lordships are of opinion that the Subordinate Judge erred in holding that the provisions of s. 14 of the Rent Act apply to the additional rent, which is stipulated in the kabuliyat of 1850. There is nothing in the terms of that document, or of s. 14 of the Rent Act, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid for [106] it. It is stipulated that before excess rent is payable, and before the zemindar can call upon his tenants to choose between making a settlement, and yielding possession to him, there shall be a measurement, but the document does not specify by whom that measurement is to be made. If the respondent had given the appellants full notice of his intention to make a new measurement, so as to enable them to be present, if they saw fit, at the time it was made, that would have cast upon them the duty of appearing before him within fifteen days after the notice was served ; and if they had failed to appear within that period, the Court, if satisfied that the measurement was made in good faith, would probably have held them precluded by their own *laches* from objecting to it. But the respondent gave them no intimation of his intention to measure ; and in the notice which he served, he did not require them, in terms of the kabuliyat of 1850, " to take a settlement of the excess land, and to file a kabuliyat," but called upon them within fifteen days to "file a kabuliyat for the said quantity of land and for the said amount of rent." The difference between these two requisitions is not one of form merely, but of substance. What the deed of 1850 contemplates is that after a measurement has been made within the knowledge of the tenants, and to which they ought therefore to be prepared to state specific objections, they may be required to come in and say whether they are or are not willing and ready to take a lease of the excess land. It

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does not contemplate that the new kabuliyat must of necessity be executed within the fifteen days. It is obvious that, after the tenants have come in, and have agreed to take a lease of the excess land, they and the proprietor may differ both as to the precise extent of the land and as to the rent to be paid for it; and in that case their differences must be settled by the Court. On the other hand, their Lordships are of opinion that, under the terms of the kabuliyat of 1850, the proprietor is not precluded from bringing his suit, without taking any preliminary step, in order to have an authentic measurement made and the rent assessed; but, in that case, he cannot put the tenants to their election between paying rent and giving up possession until both these things have been done judicially.

[107] In the present case, their Lordships are of opinion that the measurement of 1876, without intimation to the appellants, coupled with the peculiar terms of the notice of March 1878, is not *per se* sufficient to entitle the respondent to insist on his claim for khas possession of the excess land, as now ascertained by the measurement of the Court amin. But the respondent is, in their opinion, entitled to have a decree, in terms of the alternative prayer of his plaint, fixing the extent of the excess land, and assessing the rent payable for it, in terms of the kabuliyat of 1850. Their Lordships are unable to concur in the finding of the Subordinate Judge, to the effect that the respondent has failed to prove "the prevailing pergunnah rates" within the meaning of a kabuliyat. The evidence on both sides clearly shows that there is not now, and probably never was, any such thing as a fixed scale of rents for lands like these within the pergunnah, but that circumstance does not warrant the conclusion that no pergunnah rate has been proved. It leads to the inference that the parties to the kabuliyat must have contemplated payment of a fair rent, to be computed according to the average of rents paid by the tenants of similar lands within the pergunnah, due regard being had to the nature of the tenure. Their Lordships are of opinion that, taking into account the character of the appellant's tenure, the pergunnah rate ought, for the purposes of this case, to be fixed at Rs. 6-4 annas per khani.

In the absence of any evidence enabling them to decide between Statements A and B contained in the report of the Court amin, their Lordships are of opinion that (the onus being upon the respondent) the measurements given in Statement B must be adopted as correct. They are further of opinion that the increased rent now assessed ought to be paid by the tenants for their possession, from and after the date when the respondent's notice was served upon them.

It will be necessary to remit the cause, in order that the precise extent of excess land for which rent is now payable, and also the precise amount of the increased rent may be ascertained in the Court below, and decree given accordingly. When that has been done, it will be in the option of the respondent [108] either to realize the rents in terms of law or to serve a fresh notice in terms of the kabuliyat of 1850; and, if the appellants do not come in and make a settlement and file a new kabuliyat, he will then be entitled to khas possession of the excess land which has accreted to the original hawala, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865.

The parties to this suit seem to have maintained in the Courts below, as they certainly did in this appeal, pleas far in excess of their respective legal rights, the appellants succeeding before the Subordinate Judge, and the respondent, in his turn, succeeding before the Court of

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Appeal. In these circumstances, it appears to their Lordships that there can be no injustice done by deciding that each of them ought to bear their own costs.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court appealed from, dated 11th May 1883, save in so far as it sets aside the decree of the lower Court, dated the 27th July 1881, and to find that neither the appellants nor the respondent are entitled to the costs of suit incurred by them in either of the Courts below; to declare (1) that the respondent ought to have a decree ascertaining the extent of excess lands in the possession of the appellants, and assessing the rent payable therefor, in terms of the kabuliyat, dated the 23rd April 1850; (2) that for the purpose of ascertaining the extent of the said excess land, the measurements contained in Statement B annexed to the report by the amin of the Subordinate Judge's Court are to be taken as correct, and that from the total area of land in the possession of the appellants ascertained by the said amin to be cultivable and properly assessable with rent, there must be deducted 13*d*. 6*k*. 16*g*. the extent of the original hawala as fixed by the said kabuliyat, the balance remaining after such deduction representing the extent of excess lands for which rent is payable; (3) that the rent payable for the excess lands ascertained as aforesaid is at the rate of Rs. 2-7-7 pie per khani for five (5) drones thereof, and for the remainder thereof at the rate of Rs. 6-4 annas per khani; (4) that rent became payable in respect of the said excess lands from and after the 28th day of March [109] 1878; and, subject to these declarations, to remit the cause to the Court below. There will be no costs of this appeal.

Judgment reversed. Cause remitted.

Solicitor for the appellants: Mr. *A. H. Wilson.*
Solicitors for the respondent: Messrs. *Wrentmore and Swinhoe.*
C.B.

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PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

IMAMBANDI BEGAM (*Plaintiff*) *v.* KAMLESWARI PERSHAD AND OTHERS (*Defendants.*)
[24th, and 25th and 26th June and 21st July, 1886.]

Sale for arrears of revenue—Liability to incumbrances—Act XI of 1859, *ss.* 13 *and* 54 *—Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Surrender of dur-mokurari interest how proved—Limitation Act* (*XV of* 1877), *sch. II, art.* 144.

After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in

regard to limitation under Act XV of 1877, sch. II, art. 144, the twelve years' bar commencing from the date of possession first held adversely.

The mokuraridar having granted a dur-mokurari lease of part of his holding, which was afterwards surrended for good consideration, ikrarnamas to this effect were executed, but not being registered were not receivable in evidence.

Held, that to prove the surrender, a formal deed of re-conveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dur-mokurari interest.

The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid : *Held* that this condition should have been omitted, the amount of rent being determinable by a future proceeding, if necessary.

[**F.**, 19 Ind. Cas. 124 (125) ; **R.**, 6 C.W.N. 905 (911).]

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14 C. 109 (P.C.) = 13 I.A. 160 = 10 Ind. Jur. 468 = 4 Sar. P.C J. 732.

[**110**] APPEAL from a decree (15th February 1881) of the High Court varying after a remand (13th September 1880) a decree (15th August 1878) of the Subordinate Judge of Bhagalpur.

The question raised by this appeal was whether a mokurari lease, or permanent tenure at a fixed rent, had been established as an incumbrance under the provisions of s. 54 of Act XI of 1859 (the Zemindari Revenue Sale Law) upon a share, which had been sold for arrears of revenue, and which had partly come into the possession of the purchaser. The share was one separated in the Collectorate books as part of an entire revenue mehal, named Bisthazari, in the Monghyr district, and comprised about thirty-nine villages. The existence of the mokurari lease depended upon whether or not pottas, dated respectively 13th March and 6th April, had been granted by persons having title to the villages, or any of them comprised in the pottas. And this question again depended on whether, after successive transfers made benami, and to fictitious owners, the villages or any of them, were in reality subject to the ownership of Mussamut Bohu Begum, and after her death to that of other heirs of one Abdur Rahman, and were owned by them at the time of the granting of the pottas.

In 1851 the share belonged to two brothers, of whom one was Abdur Rahman, above mentioned. He was the husband of Mussamut Bohu Begum. The other brother, Mokim Khan, had a son named Isa Khan. On the death of Abdur Rahman, some time before 1856, one-fourth of his interests was inherited by Bohu Begum and three-fourths by Mokim Khan, whose son Isa soon after succeeded to the latter on his death. Bohu Begum died in 1864, and her brothers, who were her heirs, executed the two pottas in 1866. At one time Bohu Begum was benamidar for her husband, and a series of benami transfers took place, which are fully stated in their Lordships' judgment. Therein also are given the facts as to decrees made against benami holders; and as to a tenancy obtained by the Raja Rajendernarain, who, and his son after him, obtained possession of five annas and twelve dams of the share for which rent was paid.

To whom they paid it, and whether to Bohu Begum and her [**111**] heirs after her, down to the year 1866, when the mokurari pottas were granted, were contested points.

As to nine of the villages the plaintiff, alleging that she had been dispossessed by the defendant, asked for restoration of them, and a declaration of her title to them as well as to thirty others.

The defendant not disputing that his purchase was subject to any *bona fide* and subsisting incumbrance, denied that the plaintiff's alleged tenure was so; or that any possession had been held, either by the

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plaintiff's lessors, or any one on her account, within twelve years before the institution of the present suit on 26th February 1878.

The Subordinate Judge in his first judgment held the claim to the mokurari interest to be barred by limitation, finding that the alleged grantors had not held possession within twelve years before the suit.

On the plaintiff's appeal the High Court (MITTER and MACLEAN, JJ.) being of opinion that "the question of limitation could not be entirely separated from the questions of title, and other questions which arose," remanded the suit for further evidence (under s. 566 of Act X of 1877) as to the execution of the leases of 1866, and other points.

A return was made that, in the opinion of the Subordinate Judge, the alleged grantors of the mokurari leases of 1866 were at that date out of possession, though the leases had been executed, and that they were not *bona fide* incumbrances. The High Court, after the return made, differed from the first Court as to limitation, holding the suit not barred, and also, as to the facts, that the leases were *bona fide* incumbrances. The Judges held that the plaintiff could claim under the leases to the extent of what had actually been the share to which the alleged lessors were entitled at the date of the leases. This was the one-fourth inherited by Bohu Begum, and it was in their opinion reduced by the deduction of a one-anna part. representing what had been conveyed away in a dur-mokurari lease, and never re-conveyed.

The decree of the High Court was that as to certain of the mouzahs in which the plaintiff claimed possession as mokuraridar over a six annas twelve gundas share, she should recover **[112]** possession over a thirteenth gundas share only; and as to her claim in respect of other mouzahs to have her title declared to a like share, she should be declared entitled to eleven gundas share only. It was further decreed that she should pay Rampersad Das, the auction-purchaser, the whole mokurari rent reserved in the pottas of 1861, *viz.*, Rs. 5,801.

From this decree the present appeal was preferred, and the purchaser last mentioned having died pending it, the name of his son and representative, the first respondent, was substituted on the record.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the pottas of 1866 had effect to entitle her to the mokurari interest in the whole share that had fallen to Abdur Rahman. Of this Bohu Begum had been in apparent possession as owner, and her alleged rights had been more than once recognised by Isa Khan in judicial proceedings. If all the indicia of ownership were placed, as they had been here, in the hands of a benamidar, the true owner could only get rid of the effect of an alienation by showing that it was made without his own acquiescence, and that the purchaser had taken with notice of that fact. Here Isa Khan had acquiesced in transfers of the three-fourths as well as the one-fourth, by Bohu Begum. Reference was made to *Bhugwan Doss* v. *Upooch Singh* (1); *Ramcoomar Koondoo* v. *McQueen* (2), and to cases cited in Mayne on Hindu Law and Usage, para. 369.

For the respondent, Mr. *T. H. Cowie* and Mr. *R. V. Doyne* contended that only as to the one-fourth inherited by Bohu Begum could the leases operate. At a revenue sale under Act XI of 1859 it was not only the right, title, and interest that was purchased, but the ownership, subject to any proved and definitely ascertained incumbrance. Section 28 should

(1) 10 W. R. 185. (2) 11 B. L. R. 46.

be contrasted with the terms of s. 259 of Act VIII of 1859. There had been no proof of Isa Khan having abandoned his right to the three-fourths.

Mr. *J. D. Mayne* replied.

Counsel for the respondent were also heard on the cross-appeal which raised the question whether the whole claim was not [113] barred by limitation under art. 144 of the second schedule of Act XV of 1877. Reference was made to *Gunga Govind Mundul* v. *The Collector of the 24-Pergunnahs* (1), where this Committee held that the law under the Regulations having established a limitation of 12 years after that time, not simply was the remedy barred, but the title was extinct, in favour of the possessor. The same principle was maintained in the Limitation Acts.

JUDGMENT.

On a subsequent day, July 21st, their Lordships' judgment was delivered by

SIR R. COUCH.—On the 14th of June 1875 Rampersad, the father of the respondent in the original appeal and appellant in the cross-appeal, purchased at a sale for arrears of Government revenue a share of the mehal Bisthazari, pergunnah Bisthazari, for Rs. 64,600, and received a certificate of sale thereof from the Collector of Monghyr. The sale was made under the provision in s. 13 of Act XI of 1859, the 54th section of which enacts that when a share or shares of an estate may be sold under the provisions of s. 13 or s. 14, the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners. On the 25th of February 1878, the appellant in the original appeal, Imambandi Begum, brought a suit against Rampersad Das and others, claiming to have an encumbrance upon the estate by virtue of two mokurari pottas, one executed by Mirza Tasadduck Hossein Khan, *alias* Jhoti Khan, on the 1st of March 1866 and the other by Mirza Mahomed Taki Khan, *alias* Bari Khan, on the 6th of April 1866. They were the brothers and heirs of Mussamut Fatima Begum, *alias* Nawab Bohu Begum, and they thereby leased in perpetuity to Imambandi Begum, in the names of her servants Syed Jaffer Ali and Mussamut Nazirunissa, the mouzahs specified in the first paragraph of the plaint (being part of the estate purchased by Rampersad Das) at an annual jumma of Rs. 5,801, 7 annas and 6 pie. The main question in the suit and in the appeal is what was the right of Bohu Begum in the estate which was thus leased. The question in the cross-appeal is whether the suit is barred by the law of limitation.

[114] The property in dispute originally belonged to one Abdur Rahman, and it was, along with the share of his brother, Mokim Khan, brought to sale in execution of a decree against them on the 1st of December 1851. It was purchased by their servant, Najaf Ali, and it was proved, and has been found by both the lower Courts, that his purchase was benami for Abdur Rahman and Mokim Khan. Najaf Ali's name appears to have been entered in the Collector's books as the proprietor, and to have remained there till the sale in 1875 to Rampersad Das. On the 26th December 1851 Najaf Ali executed two ikrarnamas—one to Sheik Ahmed Buksh and one to Bohu Begum, who was the wife of Abdur Rahman. In these the sale by auction on the 1st December is mentioned, and it is stated that out of 16 annas of the purchased

(1) 11 M. I. A. 345 (360, 363).

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property he purchased 9 annas 1 dam for one Sheikh Ahmed Buksh, and 6 annas 19 dams for Bohu Begum, and that they having failed to procure the earnest-money and the consideration-money, he had obtained it from Mr. Peter Omraet, and had made a conditional sale of parts of the purchased property to Mr. Omraet for Rs. 19,190, and certain leases for nine years of other parts to Omraet and to other persons on zurpeshgi. Then follow these words: "That when the whole and "entire Rs. 19,190, the consideration-money, with interest, will be paid "off from the proceeds of the villages, or in cash, by Sheikh Ahmed "Buksh and Mussamut Nawab Bohu Begum aforesaid to Mr. Peter "Omraet, purchaser, then I will execute deeds of sale according to their "request for the same consideration-money, that is, the auction sale-"price of the entire property purchased by me, that is, in respect of "9 annas 1 dam to Sheikh Ahmed Buksh and 6 annas 19 dams to Mus-"samut Nawab Bahu Begum aforesaid." The statement that the purchase was made for Ahmed Buksh and Bohu Begum was untrue, and the evidence proved that the loan by Mr. Omraet was negotiated for by Abdur Rahman and Mokim, the real purchasers. The intention of the ikrarnamas appears to their Lordships to have been that, when the mortgage was paid off, Ahmed Buksh and Bohu Begum should be respectively benamidar for each of the brothers in the place of Najaf Ali. If any cash was paid in satisfaction of [**115**] the mortgage it would be paid in their names to give colour to the transaction.

Abdur Rahman died some time between 1854 and 1856. The precise date does not appear. He left as his heirs his brother Mokim, who was entitled to three-fourths of his property, and his wife Bohu Begum, who was entitled to one-fourth. The date of Mokim's death also does not appear, but it was before January 1861, and he left as his heir his son Isa Khan, who thus became entitled to the three-fourths of Abdur Rahman's property.

On the 8th of January 1861 Najaf Ali executed a deed of sale. It begins with the same false statement as to his purchase as is in the ikrarnamas. It then refers to the conditional sale to Omraet and the two ikrarnamas, and after stating that, owing to drought and for payment of Government revenue, Najaf Ali had obtained other loans, and decrees had been obtained against him, it proceeds thus: "Now Mussamut Nawab Bohu "Begum, widow of Khaja Mahomed Abdur Rahman, deceased, has paid "me wholly and in full on account of the purchase-money of the conditional "deed of sale, and the amount of the decree due to the aforesaid gentleman, "in proportion to her own share which has been found due by calcula-"tion, and taken the zurpeshgi due to ticcadars for the aforesaid mouzahs, "and the amounts of debts due to Mahajuns on account of her own share, "upon herself to pay, and asked me to execute and give a deed of sale "in due form." Then Najaf Ali sells and transfers to Bohu Begum the share which was purchased by Abdur Rahman, stating it to be in conformity with the ikrarnama.

There was no evidence of any payment to him by Bohu Begum, and the statement as to that is probably as fictitious as the statement of his purchase having been made for her. The mortgage being a usufructuary one had most probably been paid off from the proceeds of the estate included in it and in the zurpeshgi leases, the expiry of which coincides closely with the alleged payment. The Subordinate Judge thought, from the statement in the deed and the want of proof of payment by Abdur Rahman or out of his estate, that the money was paid by Bohu

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Begum, and that owing to that payment she had acquired an exclusive right to the share, but the Judges of the High Court were of opinion [116] that there was a mere transfer of names, and the real ownership in the property, after Abdur Rahman's death, remained in his legal heirs. This is the conclusion to which their Lordships have come.

It is very difficult to understand what was the real character of the transactions which followed upon the deed of sale. On the 23rd of January 1861 Bohu Begum executed a potta, by which, after stating that the estate was especially owned and possessed by her, she leased it in perpetuity at an annual rental of Rs. 6,000, on payment of Rs. 7,000, as nuzurana money, to one Mussiti Khanum. Three days afterwards she executed another deed by which she conveyed her proprietary right to one Hosseini Khanum. These persons, who were described in the instruments as inhabitants of Patna, were slave girls of Bohu Begum living with her in Patna, where she resided. Some time in 1862 Bolakun, the widow of Ahmed Buksh, in whose favour Najaf Ali had executed a deed of sale of Mokim's share in accordance with the ikrarnama of 1851, and who is shown to be Isa Khan's benamidar, brought a suit against Hosseini and Bohu Begum to enforce her right of preemption based upon the alleged transfer of the disputed share by Bohu Begum to Hosseini. On the 21st of April 1863, this suit was decreed by the first Court, but on appeal by the defendants that decree was reversed by the High Court on the 10th of March 1864. It has been seen that before this suit was brought, Isa Khan had become entitled by inheritance to the share of Mokim and three-fourths of Abdur Rahman's. He did not, however, intervene in this suit, and it may, their Lordships think, be fairly surmised that the sale which was impeached was only a pretended one, and the suit was practically brought by Isa Khan in order to strengthen the benami titles of Bolakun and Bohu Begum, and thereby defeat the creditors of Mokim and Abdur Rahman. It was said in this appeal that it was an admission by Isa Khan that Bohu Begum was the real owner. It may be so, but it is not conclusive and must be looked at with the other evidence.

In May 1856 or 1857 (two documents on the record giving different years) Imambandi Begum had obtained a decree against Bohu Begum for a large sum of money. In execution of that [117] decree an order for the attachment of the disputed property was made on the 18th of May 1861, but the actual attachment was not made till the 27th January 1864. It was probably the apprehension when the property had been transferred into the name of Bohu Begum of this decree being executed that led to the transfers to Mussiti and Hosseini. That proceeding was temporarily successful, for on their intervention the property attached was released on the 6th December 1864. Bohu Begum had died in October 1864, and on the 29th November 1865 Imambandi brought a suit against her brothers and heirs, and Mussiti and Hosseini, to have the order of the 6th December 1864 set aside, and for a declaration that the property was liable to be sold in execution of her decree. In this she was successful, and, having made a fresh application for execution, some of the mouzahs attached in 1864 were sold and realized about Rs. 34,000. At this auction sale Isa Khan was one of the purchasers, which was greatly relied upon as an admission of Bohu Begum's title. It is such an admission, but it is not sufficient to prevail against the evidence that Bohu Begum was only a benamidar. Imambandi did not in these

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proceedings disclose the existence of the mokurari pottas which are the foundation of her present suit.

Where there are *benami* transactions and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important. In this suit it is also the material fact with reference to the law of limitation. On the 16th of December 1862 Raja Mohender Narain, an influential zemindar of the district, obtained a ticca potta from Mussiti Khanum of 5 annas 12 dams of the property in suit in the name of one Gujadhur and a dur-mokurari potta of the remaining one anna of Abdur Rahman's share. On the same date, or shortly afterwards, Hosseini transferred to the Raja her proprietary interest in the one anna. From that time till the surrender which will be afterwards noticed, Raja Mohender, and after his death his son Raja Ram Narain, was in the actual possession of the property, and the question is, who received the rent of the 5 annas 12 dams which he held as lessee. The Subordinate Judge found that Bohu Begum held possession under the bill of sale until her death. He appears to have done this upon both the oral and [118] documentary evidence. One of the Judges of the High Court was clearly of opinion that till the death of Bohu Begum the Raja held the disputed property as her tenant; the view of the other was that the Rajas held as tenants of Bohu Begum for the owners, *viz.*, Abdur Rahman's heirs. With regard to the possession after her death, the Subordinate Judge came to the conclusion that her brothers, whom he calls the two Khans, did not hold possession of the shares in suit, either directly or by collecting the rent from the ticcadar, and that they granted the mokurari to Imambandi while they were out of possession. In his judgment on the first hearing he discusses the evidence and states his reasons for this very fully, and refers to that judgment in his judgment at the hearing on the remand. The Judges of the High Court came to the same conclusion as to the possession of the Khans, but they thought that until the Raja refused to pay the rent to them they were in constructive possession of the property through him.

Both Judges found that there was no payment of rent to Isa Khan till after April 1866, and consequently no adverse possession, and held that the suit was not barred by the law of limitation. The law applicable is art. 144 in the second schedule of Act XV of 1877, which makes the period of limitation (12 years) run from the time when the possession of the defendant becomes adverse to the plaintiff. The Subordinate Judge thought that Isa Khan got into possession by receipt of the rent from the Raja through Mussiti, but he was unable to fix the time when he did so, and their Lordships see no reason for doubting the correctness of Mr. Justice Mitter's opinion that Isa Khan did not assume adverse possession through Mussiti till the end of 1869.

The other Judge, Mr. Justice Maclean, was of opinion that in the absence of clear proof of payment by the Raja to Isa Khan, Bohu Begum, and after her, her brothers were in possession as late as April 1866. The Judges therefore held that the suit was not barred by the law of limitation. This decision is supported by the evidence of Raja Ram Narain, who said that the Government revenue used to be paid out of the collection of the mouzahs, and very little was left after the payment of that, and [119] he did not recollect whether he paid it to any one or not. It does not appear to their Lordships that there is any satisfactory evidence of the receipt of rent by Isa Khan twelve years before the suit was instituted, and the finding of the Subordinate Judge that there was, appears to be

based upon a supposition arising from Isa Khan having won over Mussit the *benami* lessor to his side, and not upon evidence of a receipt of rent directly from the Raja. Therefore, upon the main questions in the appeals, their Lordships have come to the conclusion, that Bohu Begum was the real owner of the one-fourth only, which she took by inheritance from Abdur Rahman, and that her suit as to that is not barred.

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The High Court has made a decree in her favour as to the one-fourth, but with two qualifications, which it appears to their Lordships ought not to have been made. The first is in regard to the one anna, the subject of the dur-mokurari to the Raja Mohender. As to this the evidence of Raja Ram Narain was that in 1874, having been dispossessed and being ready to bring a suit, the servants of the heirs of Bohu Begum and Imambandi Begum came to him, and having taken Rs. 7,000, he made a settlement of the ticca and dur-mokurari and relinquished them to the heirs of Bohu Begum and Imambandi Begum. *Ikrarnamas* were executed, but through some neglect they were not registered within the time required by law to give them validity. The High Court, on the ground that there was no valid reconveyance of the one anna share either to the plaintiff Imambandi or her lessors, deducted it from the one-fourth share. This, in their Lordships' opinion, ought not to have been done. A formal reconveyance of the one anna share was not necessary. The receipt of the Rs. 7,000 and relinquishment of possession by the Raja to Imambandi or her lessors was sufficient to make it subject to the lease and to give a title against Rampersad Das.

The second qualification is that, although entitled to recover only a one-fourth share, she was held bound to pay the whole of the rent reserved by the mokurari pottas, and the decree in her favour is expressly made subject to that condition. The question whether the rent should be apportioned or not does not appear to have been raised, and ought not to be decided in this suit. That condition should be omitted from the decree, leaving [120] the liability for rent to be determined hereafter if it should become necessary. Their Lordships will therefore humbly advise Her Majesty to vary the decree of the High Court in manner following that is to say, that where the plaintiff is decreed to recover a 13 gundas share out of the mouzahs mentioned therein, she shall be decreed to recover a share of 1 anna 13 gundas, and where she is decreed to recover a share of 11 gundas out of the mouzahs mentioned she shall be decreed to recover a share of 1 anna 11 gundas and that the part of the decree whereby she is ordered and decreed to pay the whole of the mokurari rent to Rampersad Das shall be omitted, and that in other respects the decree shall be affirmed. Their Lordships think that the parties should bear their own costs of these appeals and the application to file the cross-appeal, and they therefore make no orders as to them.

Decree varied.

Solicitors for appellant: Messrs. *Oehme* and *Summerhays.*
Solicitor for respondent: Mr. *Wilson.*

C. B.

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APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Porter.

DWARKANATH MISSER (*Defendant*) *v.* TARITA MOYI DABIA AND OTHERS (*Plaintiffs*), AND NACHAN MANDAL AND OTHERS (*Co-defendants*).* [31st August, 1886.]

Evidence of title—Resumption—Chittas.

Government resumption chittas, in the absence of the resumption proceedings, are not conclusive evidence of title as against third persons. *Ram Chunder Sao* v. *Bunseedhur Naik* (1) followed.

[F., 1 C.W.N. 530.]

THIS was a suit brought to recover possession of eight plots of land claimed by the plaintiffs as belonging to their resumed taluk No. 4830.

[121] The defendant, who alone appeared, the putnidar of the village in which the land was situate, denied the plaintiffs' title to four of such plots, and pleaded limitation.

The Munsif gave the plaintiffs a decree for the four plots as to which the plaintiffs' right was not disputed, and as regarded the four disputed plots, he held that, even assuming that they belonged to the plaintiffs' taluk No. 4830, they had been dispossessed therefrom more than twelve years previous to the filing of the suit, and that therefore the suit, as regarded those plots, was barred by limitation.

The Subordinate Judge, on appeal by the plaintiffs, held that the plaintiffs had made out their title to the lands, relying on a copy of a resumption chitta referring to the four plots in dispute; and relying on this proof of their title presumed that the plaintiffs had been in possession within 12 years from the date of suit.

The defendants appealed to the High Court.

Baboo *Rash Behari Ghose*, for the appellant, contended that the copy of the resumption chitta was not a public document, and should not have been admitted in evidence, citing *Ram Chunder Sao* v. *Bunseedhur Naik* (1), and that the Subordinate Judge was wrong in presuming that the plaintiffs were in possession of the property because they had in his opinion proved their title.

Baboo *Ashutosh Dhur*, for the respondent.

The judgment of the Court (BEVERLEY and PORTER, JJ.) was as follows:—

JUDGMENT.

This suit was brought by the plaintiffs to recover possession of certain plots of land which they claim as appertaining to their resumed taluk No. 4830. The claim was resisted by the putnidar who claimed the lands as appertaining to his zemindari.

The Court of first instance found that the plaintiffs had failed to establish their title, and also to prove their possession within twelve years prior to the institution of the suit.

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* Appeal from Appellate Decree, No. 1077 of 1886, against the decree Baboo Parbutty Coomer Mitter, Subordinate Judge of Jessore, dated the 15th of March 1886, reversing the decree of Baboo Jadu Nath Ghose, Munsif of that district, dated the 29th of September 1885.

(1) 9 C. 741.

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The lower appellate Court reversed that decision, holding that a certain resumption chitta, which was filed by the plaintiffs, afforded sufficient and conclusive evidence of the plaintiffs' title; and relying upon this proof of their title, the Sub-Judge went [122] on to presume that the plaintiffs had been in possession within twelve years.

It is contended before us that the chitta relied upon by the lower appellate Court was not evidence in the case, and that it was certainly not such evidence as concluded the parties. We think that this contention must prevail. This point arose in the case of *Ram Chunder Sao* v. *Bunseedhur Naik* (1), in which it was held that a resumption chitta, in the absence of the resumption proceedings, was not evidence to prove the resumption of the particular lands in suit.

The present case appears to be precisely similar. The resumption proceedings have not been put in, and, in their absence, it is impossible to say that the chitta in question correctly describes the lands that were resumed in those proceedings. The lower appellate Court was, therefore, wrong in our opinion in relying upon that chitta as by itself proving the plaintiffs' title.

We think, therefore, that the decree of the lower appellate Court must be set aside and that the first Court restored. The appellant will have his costs in this and in the lower appellate Court.

T.A.P. *Appeal allowed.*

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14 C. 122.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

JOGENDRA NATH MUKERJI (*Plaintiff*) v. JUGOBUNDHU MUKERJI AND ANOTHER (MINOR), BY THEIR MOTHER AND GUARDIAN, NISTARINI DABI AND OTHERS (*Defendants*).*
[24th November, 1886.]

Partition—Suit for partition of a portion of joint property.

Held, (PETHERAM, C. J., doubting), following the weight of authority, that a suit will not lie for partition of a portion only of joint family property. In dismissing the suit leave was reserved to the plaintiff to bring a fresh suit including the whole property.

[F., U.B.R. (1897—1901), Vol. II, 229; Rel. on., 5 N.L.R. 152 (157) = 4 Ind Cas. 236 (239); R., A.W.N. (1905) 169 = 2 A.L.J. 700 = 28 A. 39; U.B.R. (1909) 2nd Qr., C. P.C.O. II, 1—2, p. 21 = 4 Ind. Cas. 812 (814); 3 Ind. Cas. 247 = 10 C.L.J. 503, 18 Ind. Cas. 866; 11 M.L.T. 393 = 23 M.L.J. 64 (72) = 14 Ind. Cas. 524 (529).]

THIS was a suit for partition of certain joint family property consisting of a house and gardens. The plaintiff had admittedly [123] not included in his suit certain property which he alleged to be his separate property, but which the defendants alleged to be a portion of the joint property, and they contended therefore that the suit must be dismissed. As to its being joint property, both the lower Courts found that

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* Appeal from Appellate Decree No. 2296 of 1885, against the decree of C. B. Garret, Esq., Judge, 24-Pergunnahs, dated the 4th of July 1885, affirming the decree of Baboo Nuffer Chunder Bhutta, Subordinate Judge of that district, dated the 21st of August 1884.

(1) 9 C. 741.

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issue in favour of the defendants, *viz.*, that it was joint property. The only question material to this report was whether the suit must be dismissed because all the joint property had not been included. The suit having been dismissed on this ground by the Subordinate Judge, and this decision affirmed on appeal by the Judge, the plaintiff appealed to the High Court.

Baboo *Jogendranath Bose*, for the appellant.

Baboo *Gopi Nath Mookerjee*, for the respondent.

The following authorities were cited:—

For the appellant—*Padmamani Dasi* v. *Jagadamba Dasi* (1) *Mayne's* H. L., s. 417.

For the respondent—*Ramjoy Ghose* v. *Ram Runjun Chuckerbutti* (2); *Parbati Charn Deb* v. *Ainuddeen* (3); *Ram Lochun Pattack* v. *Rughoobur Dyal* (4); and *Radha Churn Dass* v. *Kripa Sindhu Dass* (5).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J. (who, after disposing of a point not material to this report, continued).—Another question that arises is, whether a suit of this kind must be dismissed because it appears that the plaintiff has sought to partition only a portion of the joint property. It is a point upon which I should have thought there was room for doubt, but looking at the authorities I find that the authorities are in favour of such a suit being absolutely dismissed because it cannot be brought in that form, and therefore it seems to me we are bound to follow those authorities and to [124] dismiss this appeal; but in dismissing it we make this addition that we reserve to the plaintiff liberty to bring a fresh suit for the partition of this property bringing in the whole of the family property. The appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

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14 C. 124.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Porter.

J. C. MACGREGOR, RECEIVER OF THE ESTATE OF THE LATE BEJOY KESHUB ROY (*Decree-holder*) *v.* TARINI CHURN SIRCAR (*Judgment-debtor*).* [11th August, 1886.]

Execution of decree—Omission to describe the property to be attached—Act XIV of 1882 *ss.* 237, 245—*Limitation.*

A decree-holder, on the 8th July 1885, applied for execution of a decree, dated the 10th July 1873, omitting to set out specifically in such application a description of the immoveable property sought to be attached. On the 24th July he applied for and obtained one month's time to file a list of these properties; and on the 7th August, after filing the list, applied for the attachment and sale of

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* Appeal from Order No. 196 of 1886, against the order of R. F. Rampini, Esq., Judge of Hooghly, dated the 26th of March 1886, reversing the order of Babu Abinash Chunder Mitter, Second Subordinate Judge of that district, dated the 26th of November 1885.

(1) 6 B. L. R. 134. (2) 8 C. L. R. 367. (3) 7 C. 577=9 C. L. R. 171. (4) 15 W. R. 111. (5) 5 C. 474.

such properties. The judgment-debtor contended that execution was barred by limitation. *Held*, that the omission to file on the 8th July the list describing specifically the properties sought to be attached was a mere defect of description which could be remedied under s. 245 of the Code of Civil Procedure by allowing an amendment to be made, and further that the two applications of the 8th and 24th July should be considered as one entire application dating from the 8th July. *Syud Mahomed* v. *Syud Abedoollah* (1) followed.

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14 C. 124.

[**Overruled,** 17 C. 631 (**F.B.**); **Rel. on.,** 14 C.W.N. 971 (973) = 7 Ind. Cas. 19 (21) = 12 C.L.J. 192 (193); **R.,** 37 C. 399 (406) = 11 C.L.J. 285 (290) = 5 Ind. Cas. 532 (535).]

On the 10th July 1873 the plaintiff obtained against the defendant a decree for rent.

On the 8th July 1885 the plaintiff applied for execution both against the person and property of the judgment-debtor generally, annexing no list of the specific properties which he sought to attach.

On the 24th July 1885 he applied for three months' time in which to file a list of the specific immoveable properties he sought to attach; on this application an order was made granting [**125**] him one month's time. On the 7th August 1885, the decree-holder filed a list of the immoveable properties, and asked for their attachment and sale.

The judgment-debtor objected to the application, on the ground that it was barred, more than twelve years having elapsed since the date of the original decree.

The Subordinate Judge held that the application for further time to file the list of the properties attached was not a new application, but was a continuation and part of the application of the 8th July; and distinguishing the case of *Sreenath Gooho* v. *Yusoof Khan* (2) allowed execution to issue.

The judgment-debtor appealed to the District Judge, who held that the case was very similar to that of *Sreenath Gooho* v. *Yusoof Khan* (2) which laid down the principle that no supplementary list of property can be allowed to be put in after the expiry of the period of limitation; and distinguishing the cases of *Hurry Charan Bose* v. *Subaydar Sheikh* (3) and *Syud Mahomed* v. *Syud Abedoolah* (1); inasmuch as in the first case there had been previous applications for attachment made, and in the second the defect in the decree-holder's application was one of form,—held that the Subordinate Judge was wrong in allowing execution to issue.

The decree-holder appealed to the High Court.

Baboo *Nilmadub Bose*, for the appellant, contended that the petition for leave to file a list of properties after time was not a separate application for execution, but was an application in amendment and continuation of the application of the 8th July.

Baboo *Kamal Krishna Bhuttacharjea* and Baboo *Srish Chunder Chowdhry*, for the respondent.

JUDGMENT.

Petheram, C.J.—I think that this appeal must be allowed.

The question here is from what period a particular application is to date, with reference to the period of limitation.

The application in this case was an application to execute a decree which was dated on the 10th July 1873, and on the 8th July 1885 an application was made to execute that decree. The decree-[**126**] holder applied to execute the decree by arresting the judgment-debtor and by the attachment and sale of his property.

(1) 12 C. L. R. 279. (2) 7 C. 556. (3) 12 C. 161.

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It is perfectly clear that this is an application not to attach and sell any specific portion of the judgment-debtor's property, but to attach and sell the whole wherever it is; and the question is, whether this is an application to attach and sell his property within the meaning of ss. 235 and 237 of the Code of Civil Procedure.

Section 230, which is the first section that applies to this matter, provides that when the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree, or if the decree has been sent to another Court, then to such other Court; and s. 235 says that the application shall be in writing and shall contain certain particulars. And then s. 237 provides that, whenever an application is made for the attachment of any immoveable property of the judgment-debtor, it shall contain certain particulars; and finally it is provided by s. 245 that where the requirements of ss. 235 to 238 have not been complied with, the Court may allow the applicant, within a time to be fixed by the Court, to amend the mistake or omission.

The first question then is, whether this was an application to attach any immoveable property of the judgment-debtor, because it appears from s. 237 that in that case it is necessary to give some indication of what immoveable property of the judgment-debtor it is required to attach; and, therefore, if the application were to attach half the property of the judgment-debtor, I should think myself that that would not be an application at all within the meaning of the section, because it would not show what portion of the property it was intended to attach. But, where the application is to attach and sell the whole of the judgment-debtor's property, it is clear there could be no mistake as to what portion of the property it was intended to attach, because what the creditor says is, I want to take the whole.

The section says that, in addition to stating what property he wants to attach, the applicant shall describe it, and that is essential for the purpose of showing what property it is intended to attach; but sufficiency of description cannot be essential, where it is accompanied by a declaration that the creditor intends [127] to take the whole. If, however, s. 237 does apply, it is a mere defect of description, and that defect can be remedied under s. 245; and all the decisions under the cognate sections of the Code show that, where an application is made on a particular date, and it is afterwards amended under another section the date from which limitation is to run in respect of that application is the original date of its presentation; and that shows that, where the application is afterwards amended by giving the particulars required by s. 237, on an application made at a later period, the two applications become an entire application, dating from the date the first application was presented. Therefore, in my opinion, the date which must be taken as the date from which limitation is to count is the 8th July 1885, and therefore, I think, this petition was in time.

The only other matters which it is necessary to notice are the two or three cases on the subject which were referred to in the course of the argument. The case of *Syed Mahomed* v. *Syud Abedoolah* (1) decided by Mr. Justice McDonell and Mr. Justice Field is, in my opinion, a case clearly in point. It decides the same point that we decide here; and if we had any doubt about this case, it would be our duty to follow that decision. So far as the cases are concerned we decide

(1) 12 C. L. R. 279.

in accordance with them, unless it can be said that a note of Mr. Justice Mitter in the case of *Hurry Charan Bose* v. *Subaydar Sheikh* (1) looks the other way; and at first sight it may be said to do so. He says: "When the case goes back the Munsif will take care that execution does not issue against any property not mentioned in the petition of the previous execution case No. 30 of 1884." **1886 Aug. 11. — Appellate Civil. — 14 C. 124.**

Now that note seems to imply that, in that particular application, some property was mentioned as being the property of the judgment-debtor, but in this case no specific property is mentioned in the application, and the property which is mentioned in it is all the property which the judgment-debtor has, and therefore the case does not come within the view expressed by Mr. Justice Mitter in that note. In that case, as I said before, the particulars of the property would appear to [**128**] have been given, but here no particulars are given which would go beyond the description "the whole of the debtors' property."

For these reasons I think that the judgment of the Subordinate Judge was right, and that of the District Judge was wrong. His judgment will, therefore, be reversed, and that of the Subordinate Judge restored with costs, both in this Court and in the Court below.

T. A. P. *Appeal allowed.*

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14 C. 128=11 Ind. Jur. 186.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

In the matter of Luchminarain, *Petitioner.**

[23rd November, 1886.]

Criminal Procedure Code (Act X of 1882), *ss.* 234, 537—*Charge of three offences of the same kind—Irregularity occasioning a failure of justice.*

An accused was charged with criminal breach of trust as a public servant, in respect of three separate sums of money deposited in the Savings Bank under three separate accounts.

The third of these charges related to the misappropriation of Rs. 195 composed of two separate sums of Rs. 150 and Rs. 45, alleged to have been misappropriated on the 16th and 25th November respectively. These sums the accused in his statement at the trial stated he had paid over on those dates to the depositor, and produced an account book showing entries of such payments on those dates. This statement was proved to be untrue, and the accused was convicted.

On an application to quash the conviction on the ground that the trial had been held in contravention of s. 234 of the Code of Criminal Procedure, *held*, that the entries in the account books did not clearly show that the misappropriation of the sum of Rs. 195 took place on two dates, or consisted of two transactions, the entries having been made for the purpose of concealing the criminal breach of trust; and that under the circumstances the criminal breach of trust with regard to the Rs. 195 was really one offence and could be included in one charge.

Semble (*Per* Petheram, C. J.).—That if a man were tried for four specific offences of the same kind at one trial, such a procedure would not be merely [129] an irregularity which could be cured by s. 537 of the Code, but a defect

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* Criminal Motion No. 450 of 1886, against the order passed by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 26th of July 1886, modifying the order passed by A. L. Clay, Esq., Officiating District Magistrate of Sarun, dated the 10th of June 1886.

(1) 12 C. 161.

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CRIMINAL MOTION

14 C. 128 = 11 Ind. Jur. 186.

in the trial which would render the whole trial inoperative, unless possibly it could be cured by some subsequent proceeding by striking out some portion of the charge.

[**Overruled,** 27 C. 839 (845) = 4 C.W.N. 656; **Diss.,** 21 A. 127 (130); **R.,** 10 M.L.J. 147 (164, 169) (**F.B.**); 25 M. 61 (94) (**P.C.**) = 2 Weir 271 = 11 M.L.J. 233 = 3 Bom. L.R. 540 = 28 I.A. 257 = 5 C.W.N. 866; 83 P.L.R. 190.]

ONE Luchminarain Dass, a Savings Bank clerk in the Chupra Post Office, was charged before the Officiating District Magistrate of Chupra with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the savings bank under three separate accounts.

The charge sheet comprised only three counts, but the third count which related to the misappropriation of a sum of Rs. 195, belonging to one Narain Dass, comprised two separate items of Rs. 150 and Rs. 45, alleged to have been criminally misappropriated by the accused on the 16th and 25th November 1885 respectively. It appeared from entries made in the handwriting of the accused, that he had paid the sum of Rs. 195 to the depositor on two different occasions, and this was so stated by the prisoner at the trial. The circumstances relating to the withdrawal of the sums of Rs. 150 and Rs. 45 from the deposit account of Narain Dass were so closely interwoven and connected together that in trying the accused on a charge regarding either of these sums, it was next to impossible to adduce evidence which did not bear upon the withdrawal of the other.

The Magistrate held that the statement made by the accused as to the payment of the sum of Rs. 195 to the depositor was untrue, and finding the accused guilty, sentenced him to an aggregate punishment of six years' rigorous imprisonment, and to pay a fine of Rs. 600, or in default to undergo 18 months' additional rigorous imprisonment.

The prisoner appealed to the Sessions Judge, who found the charges to have been clearly proved, holding that, although the third count embraced two distinct offences and made up, with counts one and two, four separate offences all of the same kind, yet the circumstances of the withdrawal of the two sums of Rs. 150 and Rs. 45 (composing the third count) were so interwoven together that if the prisoner had been specifically charged with misappropriating either the Rs. 150 or the Rs. 45, the evidence for the prosecution would have been precisely the same as was taken on the third [**130**] count, and that therefore the prisoner had not been prejudiced in his defence so as to cause a failure of justice, although the proceedings of the Magistrate on this point might have been irregular; he therefore declined to direct a new trial on that account, having regard to s. 537 of the Criminal Procedure Code and to the ruling of *The Empress* v. *Uttom Koondoo* (1), and dismissed the appeal. But he found that the sentence passed by the Officiating District Magistrate was illegal, as he had exceeded the power conferred on him by s. 35, cl. (*b*) of the Criminal Procedure Code, and therefore reduced the sentence to one of rigorous imprisonment for one year and four months, and to a fine of Rs. 200, on each of the three counts, or in default to four months' additional rigorous imprisonment, or in all to four years' rigorous imprisonment and to a fine of Rs. 600, or in default to one year's additional rigorous imprisonment.

The prisoner applied to the High Court under the revisional sections of the Criminal Procedure Code, and obtained a rule calling upon the

(1) 8 C. 635.

Crown to show cause why the order made in the case should not be set aside. 1886 Nov. 23.

The *Deputy Legal Remembrancer* (Mr. *Kilby*), who appeared to show cause, contended that the third count could not be split up so as to form two distinct offences. CRIMINAL MOTION

And even supposing it to be so considered, the irregularity could be cured by s. 537 of the Code, the prisoner not having been prejudiced in his defence. 14 C. 128=11 Ind. Jur. 186.

Baboo *Umbica Charan Bose*, *contra*, contended that the trial was bad in law under s. 234 of the Code of Criminal Procedure; that the offences charged against the prisoner being in respect to different sums of money belonging to different persons, he should not have been tried and convicted on one trial; and that this irregularity had materially prejudiced him in his defence; he further contended that the sentence passed was too severe.

ORDER.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—In this case the prisoner, who was a clerk in the Post Office Savings Bank, has been charged and tried for [**131**] embezzling various sums of money which were deposited by various depositors in the same Bank, and the present application is really an application upon a rule which has been obtained to quash the whole proceedings on the ground that the trial is illegal, because the prisoner has been tried for four offences of the same kind at the same trial, whereas under s. 234 of the Code of Criminal Procedure he could only be tried for three such offences.

It is clear from the terms of that section that a man can only be tried for three separate offences of the same kind at the same trial, and, speaking for myself, I think that if a man were tried for four specific offences at one trial, it would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless it were cured by some subsequent proceeding by striking out some portion of the charge, and as to the propriety and legality of such a proceeding we do not at present express any opinion.

The first question is whether the prisoner was tried for more than three distinct offences. The charges in respect of which the trial took place were charges for embezzling the money of the Post-Master-General, the money having been deposited in his hands, and he being the person responsible for it. What appears to have been proved was that the prisoner was the man whose duty it was to receive deposits and make payments, and also to enter in the books of the Post Office, and also in the pass books supplied to the customers, the amounts received by the Post Office and the amounts paid out by him. In some way or other suspicion arose and enquiries were made, and as the result of those enquiries it was ascertained that this man's cash was short by a certain sum of money. Having found out that, the next thing to be done was to enquire what had become of it, and it does appear from the books kept by him that this deficiency was in respect of the accounts of three depositors. Those depositors' accounts showed that they had received particular sums of money, but on an enquiry being made from the depositors it was found that they had not received them, and the inference was that the cash of

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CRIMINAL MOTION.

14 C. 128 = 11 Ind. Jur. 186.

the prisoner being short by those amounts, and the depositors not having received them, those sums were embezzled by him.

[132] As to two of the depositors, the entries made in the books of the prisoner were entries of sums which were alleged to have been paid by him on one particular date, but that is not made out, the fact being that the money having been embezzled by him, the entries were made by him on that particular date for the purpose of concealing the embezzlement, but in the case of these depositors, no question arises to there being more than one offence, and there is no ground for suggesting that more than two offences were committed.

In respect of the third depositor, the amount was short by Rs. 195; that is the amount by which his cash would be short, and is the amount which he says he has not received. The first step to be taken in regard to that was to examine the books which were kept by him in order to see what had become of the money, and that appears in his own hand an entry which shows that he paid the money to this depositor on two different occasions, and he says so in his statement. The statement that he paid the money is proved to be untrue, and is a statement which was made to conceal the fraud and the embezzlement of the money of which he had been guilty.

Then the question arises, does the entry clearly show that the embezzlement of this sum of Rs. 195 took place on two dates and consisted of two separate transactions, so that it was an offence on which the man would have to be charged on two charges. But the offence is an offence of embezzling the sum of Rs. 195; so far as we know, it may have been embezzled at one and the same time, and the only use of two false entries was to make them part of the evidence in the general charge of embezzlement. Under these circumstances, I am of opinion that the embezzlement of the Rs. 195 was really one offence, and could be included in one charge, and though it covers the two entries it is not shown that it was two offences.

Under these circumstances, I do not think it is shown that the prisoner was tried for more than three offences in one trial, and that there is any ground for saying that the trial was illegal; and therefore the rule must be discharged.

T. A. P. *Rule discharged.*

14 C. 133.

[133] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

BISSESSURI DEBI CHOWDHRAIN (*Defendant*) *v.* HEM CHUNDER CHOWDHRY (*Plaintiff*).* [6th August, 1886.]

Enhancement of Rent—Dependant taluk—Bengal Regulation VIII of 1793, *ss.* 48—52 *—Bengal Regulation XLIV of* 1793, *ss.* 2—5.

A purchaser of a zemindari at a public sale may, by virtue of his ordinary right as *zemindar*, enhance the rent of a dependant taluk from time to time under the provisions of Bengal Regulation VIII of 1793, and is not barred from so doing by the provisions of s. 5 of Bengal Regulation XLIV of 1793.

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* Appeals from Appellate Decrees Nos. 309 and 331 of 1886, against the decrees of J. F. Stevens, Esq., Judge of Mymensingh, dated the 10th of November 1885, affirming the decrees of Baboo Parbati Kumar Mitter, Subordinate Judge of that District, dated the 30th of March 1885.

The words "for the same period as the term of their own engagements with Government" in s. 48 of Bengal Regulation VIII of 1793, refer to the period of the decennial settlement and do not mean "in perpetuity"—*Doorga Soondree* v. *Chundernath Bhadooree* (1), dissented from. 1886 Aug. 6.

In an enhancement suit of the nature indicated above, the rate of rent to be fixed as payable by the under-tenure holder must ordinarily be fixed with reference to the rents paid by ryots within the tenure itself and not with reference to those paid by ryots in the neighbourhood outside the limits of the tenure. Appellate Civil.

In the suit out of which this appeal arose, the plaintiff was the proprietor of four annas share of Pergunnah Pukhuria Jainshye. Under a butwara the said four annas share at the date of suit constituted two different estates, No. 5513 and No. 4806. 14 C. 133.

It was alleged by the plaintiff that the said four annas share had been sold for arrears of Government revenue and purchased by the Government; that in course of time one Bhoirubendro Narain Roy became the representative of the Government, and that the plaintiff's ancestor had purchased two annas of the said share from him and obtained a putni settlement of the other two annas; and that he subsequently purchased at an auction sale the zemindari right in the last-mentioned two annas.

[**134**] The defendant was the owner of a dependant taluk within the aforesaid pergunnah, and paid the rent thereof in proportion to four annas to the plaintiff.

This suit was brought to enhance the rent of the four annas share of the said taluk after service of notice under s. 51 of Regulation VIII of 1793.

The grounds upon which the enhancement was sought were thus stated in the plaint:—

"The rates at which the defendant has been paying rent are lower than those paid in this pergunnah by similar class of talukdars with the defendant for similar mehals and for similar lands. The rent of the said mehal has undergone variation as has been stated above. The productive powers of the lands of the said mehals have increased, and a greater portion of the area has been brought under cultivation, without the care, labour, and agency of the defendant; and a new chur, by the name of Nowdanga, has appeared in the front of Jamalpur, and all these have tended to render the aforesaid mehals capable of bearing an enhanced rent; such being the case, the defendant is in every way bound to pay a higher rent.

"That having regard to the *stith jama* of the mehals in defendant's possession at the rates paid in the pergunnah and the neighbourhood by similar class of talukdars as the defendant, the rent of the four annas share of the defendant's alleged aforesaid taluk comes to Rs. 703-2-2, as shown in the subjoined Schedule No. 1 and deducting therefrom Rupees 105-7-6 on account of allowance to the defendant for her alleged talukdari interest and collection charges at 15 per cent., there remains a balance of Rs. 597-10-8, to which should be added Rs. 18-10-10 on account of road and public works cesses, irrespective of the mehals within the Municipality. The plaintiff is, therefore, annually entitled to a total rent of Rs. 616-5-6 from the defendant."

It was further stated in the plaint that a previous suit for enhancement of rent was brought by the plaintiff's predecessor in title against the defendant's predecessor in title. That the aforesaid suit was decreed on the 25th July 1851, the defendant's plea of the rent of the taluk having been fixed in perpetuity being found to be untenable.

[**135**] In accordance with that decree a *jureep hustbood* having been made, the annual rent was fixed at Rs. 375-1.

(1) S. D. A. (1852) 642.

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For the purpose of this report it is only necessary to notice the following points raised in the defence to the suit, as they alone were material in the view of the case taken by the High Court: —

1st.—That the rent of the taluk having been fixed in accordance with the enhancement decree of 1851, it could not be further raised.

2nd.—The rent of the taluk having been fixed originally in perpetuity, it was not *now* (*i.e.*, after the first enhancement decree) liable to enhancement.

3rd.—That the increased rent demanded was excessively high.

As regards the first two objections the Court of first instance was of opinion (*a*) that as the taluk had been once enhanced in 1851, it was not protected from enhancement under s. 16 of the Rent Act ; (*b*) that the contention that a dependant taluk once enhanced cannot be enhanced a second time was unfounded ; and (*c*) that the decree dated the 25th July 1851, had not the effect of fixing the rent of the taluk in perpetuity. With reference to (*b*) and (*c*) the Court of first instance discussed the cases of *Doorga Soondree* v. *Chandernath Bhadooree* (1), *Mohiny Mohun Roy* v. *Ichamoyee Dassea* (2), and *Bunchanund* v. *Hurgopal Bhadery* (3), cited before it, and came to the conclusion that they did not support the contention put forward in the defence.

For fixing the rent of the taluk the Court of first instance issued a commission to a Sub-Deputy Collector, who, after taking evidence regarding the rates paid by the ryots in the adjacent places outside the limits of the taluk in respect of lands of similar description, prepared a rent-roll of it. The Court accepted the report of the Commissioner and deducting 20 per cent. on account of collection charges and the talukdari profits from the gross assets fixed by the Commissioner in the way mentioned above, decreed the suit, assessing the annual rent at Rs. 440-11.

The defendant appealed against this decree, and urged amongst others the following points:—

[**136**] (1) That the rent of the tenure having been already once enhanced since the permanent settlement could not be enhanced a second time.

(2) That the rates ascertained should have been those of the villages comprised in the tenure itself, and not those of adjacent villages.

The District Judge who heard the appeal concurred with the first Court substantially for the reasons given by it in deciding the first point against the appellant.

With reference to the second point he said:—

"It was found impossible to determine the rent of the tenure in question by comparison with the rents of other similar tenures. It is assumed in objection 5 (para. 2 above mentioned) that no attempt has been made to ascertain what are the rates actually paid by the ryots in the tenure, and that the rent payable by the appellant has been calculated on fancy rates which in fact are not prevalent within the tenure. This does not, however, appear to be the case. As I understand it, both parties had full opportunity of producing to the lower Court whatever evidence they thought proper as to the rates current within the tenure, and the lower Court took all such evidence as was adduced before it ; but that evidence was checked by the Sub-Deputy Collector's inquiries as to the rates of adjacent villages. I do not think that there was anything to object to in this."

(1) S. D. A. (1852) 642. (2) 4 C. 612.
(3) 1 Sel. Rep. 192=6 I. D. (O. S.) 142.

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The District Judge then dismissed the appeal, upholding the decree of the lower Court.

In the present second appeal to the High Court, these same two points were again urged on behalf of the defendant-appellant.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerji* and Baboo *Girish Chunder Chowdhry*, for the appellant.

Mr. *Woodroffe*, Baboo *Guru Das Banerji*, Baboo *Jogesh Chunder Roy*, and Boboo *Kishori Lall Sircar*, for the respondent.

The judgment of the High Court (Mitter and Grant, JJ.) sufficiently states, for the purpose of this report, the nature of the [**137**] arguments and the authorities relied on, and was as follows (after setting out the facts stated above):—

JUDGMENT.

With reference to the first point it has been urged (*a*) that in 1851 the plaintiff's predecessor in title having obtained a decree for enhancement under s. 5 Regulation XLIV of 1793, by virtue of his auction purchase right, it would be contrary to the intention of the Legislature as expressed in that Regulation, to allow the plaintiff to raise the rent, again ; (*b*) that under the provisions of Regulation VIII of 1793, it was intended that a zemindar should have the power of enhancing the rent of a dependant taluk where he establishes such right under s. 51 of the said Regulation, once for all, and that he has no right to enhance the rent a second time ; (*c*) that supposing the contention (*d*) is untenable, a zemindar seeking to enhance the rent of a dependant taluk a second time, on the ground that he is entitled to enhance the rent by the special custom of the district, cannot succeed by proving the existence of such custom generally, but must establish that the custom upon which he relies enables him to enhance the rent *a second time*.

In support of (*a*) , the case of *Mohiny Mohun Roy* v. *Ichamoyee Dassea* (1) has been cited. Although this case supports the contention, still it does not help the appellant, because the plaintiff is seeking in this case to enhance the rent of the taluk, not by virtue of his right of an auction-purchaser, but by virtue of his ordinary right of a zemindar to enhance the rent of an under-tenure from time to time. In the case cited, the plaintiff's claim for enhancement under this ordinary right was disallowed, because the defendant established that her tenure was a *mokurari istemrari* one. In the present case the defendant has failed to prove this fact, and in the previous suit, which resulted in the decree of 1851, the contention that the taluk was *mokurari istemrari* was negatived. Although therefore the contention (*a*) is good, it has no effect upon this appeal.

In support of (*b*), the case of *Doorga Soondree* v. *Chundernath Bhadooree* (2) has been cited. There are some observations in this judgment which support the contention. The question [**138**] for decision, however, was the true construction of a decree of 1806, by which the rent of the dependant taluk in question in that case had been previously enhanced. The lower Court held that the decree of 1806 fixed the rent in perpetuity. The Sudder Court in upholding that construction says:—

"The proprietor, from whom the plaintiff purchased, sued, in the case decided in 1806, to have the talukdari rent fixed, *according to clause* 1, s. 51, *Regulation* VIII of 1793, at Rs. 4,581 per annum, and the rents for back years realized for him at that rate. The mention of the section

(1) 4 C. 612. (2) S. D. A. (1852) 642.

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in question carries with it the intention of permanency in regard to the jama then demanded; for that section had application solely to persons of the class of 'dependant talukdars.' Now the principle of settlement with dependant talukdars prescribed by the law s. 48, Regulation VIII of 1793, was that the zemindars were to settle with them 'for the same period as the term of their own engagements with Government,' that is, *in perpetuity*, after the decennial settlement made with the zemindars had been extended to a permanent settlement. Different provisions are made in ss. 48 to 51 for as regulating the rate of rent to be paid by dependant talukdars, but the rate, once adjusted upon those rules, was to be settled as the jama of the zemindari. It is only as to the 'remaining lands' of the zemindaris, that is, all *but* the lands of dependant talukdars, that s. 52 of the Regulation goes on to say that the zemindars are entitled to lease them, 'under the prescribed restrictions, in whatever manner they may think proper.'"

With deference to the learned Judges who decided that case it seems to us that the words "for the same period as the term of their own engagements with Government" in the above extract have been erroneously held to mean "*in perpetuity*." The Regulation VIII of 1793 was a re-enactment with certain modifications of the Regulation which was passed on the 23rd November 1791 (see Preamble) embodying the principles on which a *decennial* settlement of revenue had been made in Bengal on the 18th September 1789. In 1791 this decennial settlement had not been made permanent. The "period" mentioned in the above extract, *i.e.*, in s. 48 of Regulation VIII [**139**] of 1793, therefore means the period of the decennial settlement, *i.e.*, ten years. That this is the right construction appears to be clear from the provisions of s. 2, Regulation XLIV of 1793, which was passed on the same date on which Regulation VIII of 1793 was passed. Section 2, Regulation XLIV of 1793, says: "No zemindars, independent talukdars, or other actual proprietors of land, nor any person on their behalf, shall dispose of a dependant taluk to be held at the same or at any jama, or fix at any amount the jama of an existing dependant taluk for a term exceeding ten years, etc. etc." It provides therefore that no proprietor shall fix at any amount the jama of an *existing* dependant taluk for a term exceeding ten years. This provision and the provision in s. 48 of Regulation VIII of 1793 would be contradictory to one another, if we construe the words "for the same period" in the latter as meaning *in perpetuity*.

Even if the words "the same period" in s. 48, Regulation VIII of 1793, mean "*in perpetuity*," it does not provide that the rent of the taluk is to be *fixed in perpetuity*. On the other hand, s. 48 itself and the three following sections contain provisions which show that there may be dependant taluks with variable rents.

We have not been referred to any provision in the Regulations which either expressly or impliedly shows that the rent of a dependant taluk once enhanced cannot be enhanced again. On the other hand the provisions of ss. 48 to 51 indicate that the burden of proof being thrown upon the zemindar, the question of enhancibility of a dependant taluk would depend upon the terms of the contract under which it has been created. The right given to a zemindar to enhance the rent of a dependant taluk under s. 51, by the proof of the special custom of the district entitling him to do so is, in our opinion, also referable to the terms of the contract. Because whenever such custom is established, it would be presumed,

unless the contrary appeared, that the parties contracted with reference to it, *i.e.*, having regard to the custom the parties intended that enhancibility of the rent would be one of the incidents of the tenure. We are, therefore, unable to accept the contention (*b*) as valid.

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[**140**] The contention (*c*) is, in our opinion, equally untenable. If the enhancibility of the tenure be established by proof of the special custom of the district as one of the incidents of the tenure, it would be for the tenant to establish, on the other hand, that that incident is in any way qualified. We are, therefore, of opinion that the lower Courts are right in deciding that the defendant's tenure is liable to enhancement.

But the contention of the appellant regarding the assessment of the rent is in our opinion valid. The assessment should be fixed with reference to the rates of the villages comprised in the tenure, *i.e.*, it should be fixed upon the existing assets of the taluk. Ordinarily this is the principle upon which the new rent should be fixed. But there may be cases where the talukdar, by making improvident grants of leases at fixed rents, may have reduced the assets of the mehal so as to render the application of this principle unjust to the zemindar. But that case was not set up in the plaint here.

The District Judge also accepts this contention as good ; but he thinks that the lower Court acted in accordance with it. In his opinion the lower Court referred to the evidence of the neighbouring rates in order to check the evidence regarding the rates paid by the ryots of the villages comprised in the tenure. But in this respect the District Judge has fallen into an error. The Court of first instance, as it appears from its judgment, fixed the rent with reference to the neighbouring rates only. It accepted the report of the Sub-Deputy Collector, and it has been shown to us that that report wholly proceeded upon the rents paid by the ryots in the neighbourhood outside the limits of the taluk.

We are, therefore, of opinion that the enhanced rent has been fixed on a wrong principle. It should be fixed upon the existing assets of the taluk, allowing to the talukdar the deduction that has been allowed by the lower Courts. We set aside the decree of the lower Courts only as regards the rent fixed by it, and remand the case to the Court of first instance to assess the rent again upon the existing assets of the taluk. We leave it to the discretion of that Court to decide whether it should allow the parties to adduce fresh evidence or not. Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

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14 C. 141=11 Ind. Jur. 226.

[**141**] CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Grant.

BAIDYA NATH SINGH (*Petitioner*) *v.* MUSPRATT AND OTHERS (*Opposite*).* [7th September, 1886.]

Dismissal of Complaint—Report of Police Officer who is an accused person—Criminal Procedure Code (Act X of 1882), *ss.* 200—203, 437.

Sections 200 to 203 of the Criminal Procedure Code must be read together, and a Magistrate dismissing a complaint under the provisions of s. 203 on any one of the three grounds, *viz.* :—

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* Criminal Motion No. 376 of 1886, against the order passed by L. Hare, Esq., Officiating Magistrate of Maldah, dated the 21st of July 1886.

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(1) If he, upon the statement of the complainant, reduced to writing under s. 200, finds no offence has been committed;

(2) If he distrusts the statement made by the complainant; and

(3) If he distrusts that statement, but his distrust is not sufficiently strong to warrant him in acting upon it, except upon a further enquiry as provided for in s. 202—

must record his reasons for so doing, for if such reasons were not recorded it would be impossible for the High Court, exercising its revisional powers under s. 437 of the Criminal Procedure Code, to consider whether the discretion of such Magistrate has been properly exercised.

It was never contemplated that a Magistrate should call for a report from an accused person under s. 202 for the purpose of ascertaining the truth of the complaint if such accused happened to be an officer subordinate to the Magistrate.

Where, therefore, a complaint was made against a police officer and complainant's statement was duly recorded, and the Magistrate acting under the provision of s. 202 called for a report from such police officer, and acting upon that report dismissed the complaint under s. 203:

Held, that he had acted illegally, and that his order made under the last named section should be set aside, and the case proceeded with according to law from the time at which the complaint was made and the complainant's statement so recorded

[**Diss.**, 28 A. 421=A.W.N. (1906) 76=3 A.L.J. 224=3 Cr. L.J. 327; **F.**, 13 B. 600 (603, 620); **Appr.**, 40 C. 444=17 C.W.N. 290=14 Cr. L.J. 57 (58)=18 Ind. Cas. 345 (346); **R.**, Rat. Unrep. Cr. Cases 954; 11 A.L.J. 754 (755)=20 Ind. Cas. 749 (750)=14 Cr. L.J. 493 (494); 15 C.L.J. 517 (580)=13 Cr. L.J. 609 (650)=16 C.W.N. 1105 (1134)=16 Ind. Cas. 257 (298).]

THE facts upon which this rule was issued were as follows: On the night of the 27th June, some unripe indigo was cut and carried off from certain land, and a charge of theft was laid against one Gopi Mohun Misser and others with regard to that indigo. In the course of investigating that case, Mr. Muspratt, Assistant Superintendent of Police, accompanied by Mr. Hemming, an indigo [**142**] planter and complainant in the case against Gopi Mohun Misser and Mr. Rice, his manager, proceeded to the Nurutunpore Indigo Factory, which belonged to the accused, where it was alleged the stolen indigo had been taken, for the purpose of enquiring into the matter. On the 5th July a complaint was preferred by one Baidya Nath Singh, a servant of Gopi Mohun Misser, against Mr. Muspratt, Mr. Hemming and Mr. Rice, charging them with theft, criminal trespass and assault. The complainant alleged that the three accused, accompanied by others, walked into the factory of Gopi Mohun Misser without any authority, broke open an iron chest, and took some money from it, and that they committed mischief by digging up the floor of the room, going into the cook-house and breaking the cooking pots and spitting into the food that was being cooked. It was also alleged that some of Gopi Mohun's servants had been assaulted. After the complaint was filed Baidya Nath Singh was examined on the same day on solemn affirmation in support of it, and he deposed to the truth of the facts contained in the complaint.

After that evidence had been taken the Magistrate recorded an order upon it to the following effect:—" Forwarded to the Assistant Superintendent, who is requested to state the circumstances under which the house of Gopi Mohun Baboo was searched, if it was searched at all."

In answer to the Magistrate's request, Mr. Muspratt submitted a report, and on the 13th July the Magistrate recorded the following order: " The search complained of was clearly within the power of the Police,

and from the report submitted by the Assistant Superintendent, it does not appear that it was improperly conducted. A *prima facie* case of theft had been made out of which the accounts appeared to disclose an intention on the part of the accused to use violence or force, if necessary, for the accomplishment of his purpose, and under these circumstances a search to discover if there were arms without license or even *latties* in unusual number was reasonable. The complaint will be filed."

On the 16th July the complainant, Baidya Nath Singh, applied to the Magistrate by petition to know what orders had been passed on his complaint, and prayed that he might be allowed to [143] pay the process fees, and that a summons should issue against the accused and witnesses, and that the case might be tried.

On the 21st July the Magistrate recorded the following order: "The complaint does not disclose any offence having been committed. The search was in accordance with the provisions of the law, and the Assistant-Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant-Superintendent's report that they merely accompanied him as witnesses. Complaint is dismissed."

On the 17th August the complainant moved the High Court to set aside that order under the provisions of s. 437 of the Code of Criminal Procedure, on the ground that the procedure adopted by the Magistrate was not warranted by law, and that his petition and statement, taken in support of it on solemn affirmation, clearly disclosed facts which constituted offences under the sections under which he charged the accused.

Upon that application the present rule was issued, calling upon the Magistrate to show cause why his order dismissing the complaint should not be set aside, and why he should not proceed to hear the complaint and try the case.

The rule now came on to be heard.

Mr. *M. M. Ghose* and Mr. *A. P. Gasper*, for the petitioner.

Mr. *Kilby* and Mr. *M. P. Gasper*, for Government.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows: —

JUDGMENT.

This rule was issued on the 17th August last upon the Magistrate to show cause why his order, dated the 21st of July last, dismissing the complaint of the petitioner who obtained this rule, should not be set aside. The order of the Magistrate came to be passed under the following circumstances. The petitioner filed a petition before the District Magistrate on the 5th of July last complaining of certain offences having been committed by the three accused persons. He was examined on the same date, and after recording his examination, the Magistrate passed the following order on the same date: "Forwarded to the Assistant Superintendent, who is requested to state the [144] circumstances under which the house of Gopi Mohun Baboo was searched, if it was searched at all." It may be mentioned here that the Assistant Superintendent who was requested to state the circumstances was the accused person No. 3. Upon that the Assistant Superintendent submitted his report, we are informed, on the 11th of July. Although that report is part of the record of this case, and although the record was sent for, the report has not been appended to the record that has been sent up. That the report is part of the record appears from the final order passed in this

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case, to which we shall refer hereafter. On that report being submitted on the 13th of July, the Magistrate recorded the following order: "The search complained of was clearly within the power of the Police, and from the report submitted by the Assistant Superintendent it does not appear that it was improperly conducted. A *prima facie* case of theft had been made out, of which the accounts appeared to disclose an intention on the part of the accused to use violence or force, if necessary, for the accomplishment of his purpose; and, under these circumstances, a search to discover if there were arms without license or even *latties* in unusual number was reasonable. The complaint will be filed." Then on the 21st of July the Magistrate dismissed the complaint, and he did so apparently under s. 203 of the Criminal Procedure Code, although that section is not mentioned in the order itself. The order dismissing the complaint is to the following effect: "The complaint does not disclose any offence as having been committed. The search made was in accordance with the provisions of the law, and Assistant Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant Superintendent's report that they merely accompanied him as witnesses. Complaint is dismissed." This is the order with reference to which this rule was obtained. It was passed, as already stated, under s. 203 of the Criminal Procedure Code. That section gives very large powers to the Magistrate to dismiss a complaint without issuing a process at all against the accused persons, but certain conditions are laid down in the chapter in which that section occurs, and those conditions must be strictly fulfilled in making an order under [**145**] s. 203. Section 200 provides that, "a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate." Then s. 201 provides the procedure to be adopted by the Magistrate if he finds himself not competent to take cognizance of the case. Section 202 lays down that "if the Chief Presidency Magistrate, or any other Presidency Magistrate whom the local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police officer, or by such other persons, not being a Magistrate or police officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint." Then comes s. 203 which says: "The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under s. 202, there is in his judgment no sufficient ground for proceeding." Reading all these sections together, it seems to us that a Magistrate may dismiss a complaint under s. 203 on any one of these three grounds. In the first place under s. 203 if he, upon the statement made by the complainant, reduced to writing under s. 200, finds that no offence has been committed; in the second place, if he distrusts the statement made by the complainant he may also dismiss the complaint; and in the third place, if he distrusts the complainant's

statement, but his distrust is not sufficiently strong to warrant him to act upon it, he may direct a further enquiry as provided in s. 200, and he may either conduct this inquiry himself or depute a subordinate officer to conduct it. These are the three cases in which a Magistrate has power to dismiss a complaint under s. 203 and refuse the issue of process. It is [146] clear to us that under s. 202 if he distrusts the statement of the complainant, he must record his reasons. In any case he is bound to record his reasons for distrusting the complaint. That appears to us to be quite reasonable. Under s. 437 of the Criminal Procedure Code this Court is vested with the power of revising the order passed by Courts subordinate to it under s. 203, and it would be impossible for this Court to consider whether the discretion vested in the Magistrate under s. 203 had been properly exercised, unless the Magistrate recorded his reasons for dismissing the complaint under s. 203. Now in this case it appears to us that the grounds upon which the Magistrate has dismissed the complaint are such as would warrant this Court in revising the order made by him. The first ground is, that the complaint does not disclose that any offence has been committed. We have read the statement in the complaint, and we think that if that statement is believed and not distrusted, there was sufficient foundation for some kind of criminal charge against the accused persons. Then the order goes on to say: "The search made was in accordance with the provisions of the law, and the Assistant Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant Superintendent's report that they merely accompanied him as witnesses." The Magistrate in recording these reasons has entirely proceeded upon the report of the Assistant Superintendent. That appears clear because he asks for that report, and on that report being submitted on the 11th of July, he recorded the order, extracted above, on the 13th, and in his final order he refers to that report and acts upon it. Now it seems to us that the Magistrate acted illegally in calling for a report from the Assistant Superintendent, who in this case was one of the accused persons, and it was never contemplated that under s. 202 any report could be called for from an accused person if that accused person happened to be an officer subordinate to the Magistrate. Upon this irregularity alone we think that the order of the Magistrate refusing to entertain the complaint must be set aside. We therefore set it aside and return the record to the Magistrate, and direct that he proceed with the case in accordance with the provisions of the law. [147] His procedure up to the time of recording the complaint was quite regular and legal, and he must take up the case at that stage. Taking up the case at that stage, he will proceed to deal with it in accordance with the provisions of the Criminal Procedure Code.

H. T. H. *Rule made absolute.*

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JULY 24.

PRIVY COUNCIL.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

HURRINATH RAI (*Plaintiff*) *v.* KRISHNA KUMAR BAKSHI (*Defendant*).* [13th, 16th and 24th July, 1886.]

Principal and agent—Suit by principal for an account—Object of a decree for an account, as distinguished from a decree made upon the hearing—Costs—Limitation under Act IX of 1871, *sch. II, art.* 118.

A continued agency, or employment as dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. The dewan having denied the receipt of the money, and any kind of accountability, it was found against him that the relation of agency existed between the parties. But, on the ground that it was impossible to decide, upon the evidence adduced at the hearing, how much of the principal's money was unaccounted for, though the attempt had been made to prove a balance due, the appellate Court dismissed the suit. *Held*, that such a suit was essentially one for an account, and that the Courts below should have followed the regular course, *viz.*, to order an account to be taken of the defendant's dealings, with the plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it.

As, however, the defendant had falsely denied his fiduciary position, he was ordered to pay the whole costs of this suit hitherto, including the costs of this appeal, without regard to the result of the account. Limitation under Act IX of 1871, s. 118, which was applicable, commenced from the date on which the agency ceased.

[**F.**, 1 A.L.J. 722 = A.W.N. (1905) 3 = 27 A. 374; **R.**, 69 P.R. 1903; 12 C.W.N. 28 (37) 6 C.L.J. 580; **D.**, 32 C. 719 = 1 C.L.J. 232; 13 C.W.N. 212 (214) = 4 Ind. Cas. 556 (557); 20 M. 418 (420).]

APPEAL from a decree (18th February 1881) of the High Court which dismissed appellant's suit, with costs, reversing a decree [**148**] (11th September 1878) of the Subordinate Judge of Rajshahye, who decreed the claim in part.

The question now raised related to the liability of a continuing agent to account to his principal for money drawn and expended; where among other things affecting the question, the claim was made for a specific sum alleged to have been appropriated by the defendant, but not decreed by the appellate Court, which found it impossible to determine on the evidence, how much, if any, of the principal's money was unaccounted for.

The suit was brought on the 1st June 1877 by the appellant against the respondent, who had been the raja's dewan and manager of estates, from 1263 to 1283 B. S. (1856 to 1876 A. D.) for a balance of Rs. 19,925, "being the sum misappropriated by the defendant," who, for the above period, had alone had authority as the raja's dewan to order disbursements on his account of money in the custody of the raja's *khezanchi*. The plaint further alleged that, on the plaintiff commencing an inquiry, the defendant left his service without notice, and without rendering any account, whereupon an examination of the serishta led to this suit.

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The defendant in his written statement denied the receipt of the money, the misappropriation, or any liability in respect of it, alleging that all disbursements had been made by the raja himself. Among other defences, he relied on limitation under Act IX of 1871. He did not allege that he had, in fact, accounted either himself or by others.

The Subordinate Judge, on issues framed on the above points, found that Rs. 1,369 had been misappropriated. In the absence of any account produced by the defendant, the judgment was asked for, and was given, upon estimates presented by the raja of what would have been the reasonable expenditure, and upon an account representing the sums drawn by the defendant, or upon his order, for the purpose of carrying on litigation, on behalf of the raja, in what was termed in the record the "two-anna case." By this were meant three suits in the Court at Rampur Beaulia, all of which were appealed to the High Court, and one to Her Majesty in Council [**149**] relating to a two annas share in an estate. The total shown by such accounts to have been drawn was Rs. 40,353, consisting of two sums of Rs. 35,266 and Rs. 5,087; while evidence was given to show that the reasonable expenditure would not have exceeded Rs. 23,500 thus leaving a difference of Rs. 16,853. which had, therefore, it was contended, been overcharged to the plaintiff. The Subordinate Judge, however, found that most of the disbursements in the "two-anna case" were made through Tarinikant Chakerbatti, the plaintiff's general mukhtear. He found also that liability was brought home to the defendant only for sums amounting to Rs. 4,388. This was subject to reductions, bringing it down to Rs. 1,369, for which a decree was made.

The plaintiff appealed and the defendant cross-appealed to the High Court.

The Judges of a Divisional Bench (MORRIS and TOTTENHAM, JJ.) reversed this decree and dismissed the suit. They held that the accounts were insufficient; and that in the absence of the jumma-kharach accounts, as rendered by Tarinikant, it was impossible to fix the amount of the defendant's liability or to say how much, if any, of the money drawn remained unaccounted for. In their judgment they dealt first with limitation as follows:—

"It seems to us that either art. 90, or art. 118, which provides six years from the date of accrual of the right to sue, will apply to the present case. It has been argued for the defendant that if this be a case under art. 90, then no cause of action is shown to exist, because it does not appear that an account has been demanded and has been refused. We think, however, that the departure, without notice, of the defendant from the plaintiff's service when the plaintiff's suspicion had been aroused and enquiry commenced, may be construed as a refusal to deliver an account of the money that has passed through his hands. And there is evidence that an account was demanded, while the defendant himself expressly deposes that he was responsible for no account, and that he never gave any. We have no doubt that upon the facts alleged in the plaint there is a right to bring a suit, and if it does not properly fall under art. 90, it will fall under the wider scope of art. 118. The suit [**150**] was brought within one year after the defendant's alleged desertion, and we hold that it is not barred by limitation."

Then, in regard to the merits: "We cannot say that the evidence adduced by the plaintiff is the best that was at his disposal, or that it

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is sufficient to warrant a decree against the defendant. The oral evidence is that of the treasurer, who deposes to the correctness of each item debited to the defendant in the accounts filed, and the testimony of other amlas of the plaintiff, and of various paiks who carried money on various occasions to the defendant at Rampur. But the accounts filed are apparently nothing but the rough *sehas* kept by the treasurer, showing the actual disbursements made by him from day to day, with here and there the adjustment of particular advances; and these accounts are simply loose slips of paper stitched together in bundles. A few only of them bear marks of the defendant's scrutiny and approval as dewan. These accounts are obviously only part of the materials for the complete yearly accounts, which should be regularly prepared and recorded in a zemindar's office. But nothing of this kind has been produced, and not one of the defendant's letters calling for remittances, nor of his written acknowledgment of the receipt of such remittances, is forthcoming. The plaintiff was called upon to produce these accounts, but did not do so on the plea that there were no such papers in his office. He did not then say that the defendant had made away with them, though this has since been suggested. In the face of the evidence on both sides as to the establishment maintained by the plaintiff for the purpose of keeping accounts, and as to the custom prevailing in his office, that a jumma-kharach should be rendered by those who received advances for the plaintiff's business, we cannot believe that no accounts other than those produced were really kept up; and we refuse to believe that the defendant was allowed to make away with them when he left the plaintiff's service. Had he done so, plaintiff would have taken measures to recover them, and bring their abstraction to the notice of the authorities. The absence of the complete accounts is not a merely formal defect in the plaintiff's case, for, without them, it sems to us impossible to fix the amount, if any, of the defendant's liability. We have the direct evidence of Tarinikant Chakerbatti, the naib, [**151**] that at least a very large portion of the expense incurred in the two-anna case, he says Rs. 30,000 or Rs. 35,000, passed through his hands, and that he rendered to the plaintiff a jumma-kharach of that amount. If this be so, that jumma-kharach was an essential document to be produced in this case, and it seems impossible but that the plaintiff did require such a jumma-kharach to be laid before him from time to time. If he did not require it, then it is scarcely reasonable to expect to get it now so many years afterwards. If he did get a jumma-kharach, as alleged by Tarinikant, we must presume from his long silence that he acquiesced in it."

The above were the principal reasons upon which the High Court dismissed the suit.

The plaintiff appealed to Her Majesty in Council.

For the appellant, Mr. *R. V. Doyne* and Mr. *H. Cowell* argued that the High Court had erred in making a final decree instead of ordering that the account between the parties be taken in the usual manner. The suit was one for an account, having been so treated in the plaint and written answer, as well as in the memoranda of appeal and cross-appeal; also it was so described by the High Court in its judgment. An analysis of the evidence was made to show that there was sufficient ground for a decree for an account, and no ground whatever for dismissing the suit without one. The suggestion that the defendant might be exonerated by the existence of a liability to account on the part of the *khezanchi*, Tarinikant, was not only insufficient as a ground for the

dismissal of the suit, but was not borne out by the facts. And the defendant's case having all along been that he never received the money, as soon as it was *prima facie* proved that he had received money as agent, it could not be held that a presumption arose as to the effect of Tarinikant's accounts in clearing the defendant as agent, nor was there any presumption arising from the plaintiff's assumed acquiescence in that mode of accounting. There was no reason why either party, the principal or the agent, should regard the accounts of the treasurer as mutually binding upon them. And there were two grounds on which the appellant could rely: First, that the relation of agency had been established, notwithstanding the defendant's denial; secondly, that [152] there was nothing to show that accounts rendered by Tarinikant, if rendered, were or could be taken to be authorized, vouched for, or explained by the defendant; who also was bound to show that the expenditure had been rightly incurred. Consequently, there should have been an account ordered by the Court below of all moneys come to the hands of the defendant as dewan, and for that purpose the suit should have been remanded to the Court of first instance with costs. The decision as to the law of limitation was not disputed. Reference was made to *Annoda Persad Rai* v. *Dwarka Nath Gangopadhya* (1).

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The respondent did not appear.

JUDGMENT.

Their Lordships' judgment was delivered on a subsequent day, July 24th, by

Lord Hobhouse.—The plaintiff in the suit, who is the present appellant, is the owner of a large estate, and the defendant acted as his dewan for some twenty years or so. Some months before the institution of the suit, the plaintiff demanded an account of the defendant's dealings, but the defendant left the place without rendering any. In June 1877 the plaint was filed. After stating the defendant's position and duties as dewan, the plaintiff alleged that he had taken money out of the treasury in the year 1866, and at other times, and had misappropriated it. He then specified certain sums taken, and certain allowances to which the defendant was entitled, and concluded thus: "There is a balance against him of Rs. 19,925-14 annas, for the recovery of which I institute this suit. If by the decision of the Court a larger sum should be proved to be payable to me by him under proofs and papers, the prayer is also for recovery of the same."

The High Court has said that this is a suit virtually for an account. Their Lordships agree with that view. They think that, though the pleading may not be quite precise or technical, it is impossible to assign any other character to a plaint alleging a continued agency in the defendant for the purpose of drawing and expending the plaintiff's money, and praying relief on the ground that the agent had drawn from his principal more than he had expended for him. To such a claim by a principal the agent [153] may answer that accounts have been settled between him and his principal, or that, though none have been settled, he has in the course of his agency applied for the principal's benefit as much as he has received or more. Nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him.

(1) 6 C. 754.

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Such a suit is essentially one for account. In his written statement, the defendant did not set up the defence of settled account, nor that the account, when taken, would be in his favour. He denied his accountability altogether. He denied the receipts of money which were ascribed to him, and alleged that all the expenditure was effected through the plaintiff's own treasurer and *Poddar*, agreeably to his own instructions. As for the papers produced from the treasury to show drawings of money by the defendant, he charged that they were false and fabricated. Such a line of defence was perfectly legitimate, if true; but it has been found by both the Subordinate Judge and the High Court to be false. The Subordinate Judge finds the plaintiff's treasury accounts to be genuine, and he finds further that in the majority of instances the defendant expended the plaintiff's money without his authority, meaning, as their Lordships understand, that he expended the money by his own general authority as dewan, and did not take the plaintiff's orders for each specific payment. As regards amount, the Subordinate Judge finds that, setting aside two smaller sums which have been sufficiently accounted for in the suit, two larger sums, amounting altogether to Rs. 40,353-8 annas, are proved to have come into the hands of the defendant.

Such findings as these establish a relationship between the plaintiff and the defendant under which the latter is accountable for his receipts. Their Lordships think that the regular course would have been to order an account to be taken of the defendant's dealings with the plaintiff's money as his dewan or agent. In taking the account, either party might waive inquiry as to particular periods of time or particular departments of expenditure, and that is often done. But neither could shut out the other from inquiry into any part of the defendant's transactions as dewan. In such an account the agent is *prima facie* liable for [154] what he has received, and is bound to discharge himself; but the evidence, which is considered sufficient to discharge him, may vary as to different items, and he certainly would be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transactions which have taken place long ago, though under circumstances which prevent any absolute bar by lapse of time.

The Court, however, seems to have thought that its duty was to make a final decree at the hearing upon the items specified in the plaint and the accounts appended to it. And taking a distinction between sums for which the defendant had marked papers, and other sums for which, though paid to him or to his order, he had not marked, the Court found that a sum of Rs. 1,369 was due to the plaintiff, and made a decree for that amount, apportioning the costs of the suit rateably according to the proportion of the amount claimed to the amount recovered. Both parties appealed to the High Court, who dismissed the suit altogether with costs. The present appeal is from that decree. The defendant has not appeared, so that the hearing, has been *ex parte*, and the evidence bearing on the points now material has been minutely examined. Their Lordships have now to weigh the reasons assigned by the Courts below for their decrees.

It is first necessary to deal with the plea of limitation, which is raised by the defendant, and which is governed by Act IX of 1871. Both Courts have decided that there is no such bar in this case. The only articles suggested as applicable to it are those numbered 60, 90 and 118. Their Lordships think it sufficient to say, with both Courts, that time

must be counted from the date on which the defendant ceased to discharge the duties of dewan by departing from the plaintiff's service, and, therefore, whether three years or six years be the limit, there is no bar.

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The principal reason assigned by the Subordinate Judge for his conclusion is that the defendant's mark appears on some of the *sehas* which show advances made to him or to his orders, and does not appear on others. And he cites the plaintiff's treasurer as saying that he was released from liability for the marked items, but was liable for the unmarked ones, and that the defendant was not liable for them. The treasurer's evidence shows that the [155] payment of money on the defendant's orders, without his mark, was an irregular procedure not giving to the treasurer complete immunity from responsibility. But they cannot find that he has anywhere said that the defendant was not responsible to the plaintiff for for the money paid out on his orders ; and if he had said so it would be a mistake of law. The Subordinate Judge was in error when he held that the defendant was not bound to discharge himself of all the sums which he ordered to be drawn from the treasury.

The only other reason assigned by the Subordinate Judge is that most of the disbursements in some law suits called the two-anna case were made through Tarinikant, the plaintiff's general muktear ; that Tarinikant had filed accounts in the plaintiff's treasury which the plaintiff had not produced ; and that the plaintiff had sued Tarinikant for an account, and had claimed against him the sum of Rs. 6,725, which again was claimed in the present suit.

It is not quite clear what the Subordinate Judge considered to be the exact bearing of Tarinikant's interventions in these matters. He did not apply them so as to discharge the defendant of any specific items of charge. And if he thought that the plaintiff was bound to clear up his dealings with Tarini before he could charge the defendant with money taken for the two-anna case, it is difficult to see why such an objection as that does not apply to marked items as well as to unmarked. The High Court appear to have so applied it, and they are logical and consistent in doing so. But it is necessary to see whether the existence of unproduced accounts between the plaintiff and Tarini supplies any reason why a decree for account should not be made between the plaintiff and the defendant. If it does, it appears to their Lordships that the plaintiff was harshly treated in not being allowed an opportunity to produce them, for the defendant did not rely upon them in his written statement, did not call for their production, and apparently did not ask the plaintiff's witnesses any question about Tarinikant, except a quite general one put in the cross-examination of the treasurer. This is one of the circumstances showing what miscarriages are likely to occur if the Court attempts to make a [156] final decree at the hearing of a suit for account, instead of the regular decree for account.

The plaintiff's suit against Tarini was instituted almost simultaneously with his suit against the defendant ; and both were before the Subordinate Judge of Rajshahye. The suit was for an account, and the plaintiff charged Tarini with receiving as mukhtear, on various accounts, the sum of Rs. 17,677-6 of which he had properly spent no more than Rs. 17,227-6, leaving Rs. 450 due from him on those accounts. He also alleged a misappropriation of Rs. 800 on account of which the items were not specified by him, or which do not appear in the present record. Tarini admitted the receipt of some amounts, denied the receipt of others, and claimed a balance due to himself on the account. The suit was

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compromised in the year 1878, and was dismissed, each party paying his own costs.

With regard to the sum of Rs. 6,725, which the Subordinate Judge says the plaintiff has sought to recover against both Tarini and the defendant, their Lordships cannot find such a sum; but it is perhaps a misprint for the sum of Rs. 6,525 which appears in the accounts of both suits. In the Tarini suit it is charged as received by him by way of instalment on the 23rd of Aughran 1280, but it is part of the accounts upon which only Rs. 450 is claimed, and therefore it must be almost, if not wholly, written off in the legitimate expenses which the plaintiff allows to Tarini. In the present suit, a sum of Rs. 6,525 is charged against the defendant as a howlat taken in the name of Tarini on the 23rd Aughran 1277, but it is wholly written off as part of the legitimate expenses which the plaintiff allows to the defendant. Even supposing that there is some error in the dates, and that the two sums relate to the same transaction, their Lordships cannot see that it is proved, or probable, that the plaintiff is seeking to recover the same amount twice over. It is very likely that both the dewan and the mukhtear are bound to account to the plaintiff for the same sum of money,—the dewan, because he ordered its payment, the mukhtear, because he received it and had the application of it. It is very likely that full accounts could not be stated between the principal and his two agents without including some of the same [157] money in both accounts. That might make it expedient for Tarini to be joined with the defendant as an accounting party—a point which need not now be considered, as no objection has been taken to the frame of the suit on that ground. But the appearance of the same items in accounts against two persons, both responsible for them, does not show that the plaintiff is claiming those sums against both. To show that, it would be necessary to go deeper into the accounts, and to find that the plaintiff is trying to get the benefit of the same charge twice over by writing it off against a different set of discharges in each case. Nothing of that kind appears on the record. And their Lordships think that the finding is another illustration of the inconvenience likely to result from making a final decree when a decree for account is the proper one.

The High Court considered that the plaintiff's evidence was defective. The Subordinate Judge thought that the *schas* produced, being rough sheets in the nature of a day-book, were written at the time when the work was being done, and were better evidence than anything copied from them could be. The High Court think them only part of the materials for a complete yearly account, such as should be regularly prepared and recorded in a zemindar's office. Yearly accounts of this kind were called for by the defendant, and none were produced. The High Court attach great importance to the position of Tarini; they comment adversely on the non-appearance of the plaintiff as a witness, and they consider that there must have been some statement of account filed because the word "adai" is written over two of the items of charge. Their conclusion is that it is impossible to say how much, if any, of the sums remains unaccounted for, and therefore the suit must be dismissed. So far do they carry their view, that the plaintiff ought to suffer from not having given the best evidence, that they refuse to give him any relief as to the sum of Rs. 4,388, though the receipt of it is admitted by the defendant, who does not show how it was discharged.

If this were the proper occasion for deciding whether the plaintiff should recover anything, their Lordships would have to consider

long before assenting to the views taken by the High Court. It appears to them that sufficient weight has not been [158] given to the onus thrown upon the defendant by his fiduciary position. They observe that the treasurer states that there were no such yearly accounts as the High Court suppose. If there are such, they may yet be produced, though whether they or the contemporary *sehas* are the better evidence, must depend on circumstances which at present are not known. The plaintiff excused himself from examination in Court on a plea of ill-health, which may have been false. But it was supported by certificates from the Civil Surgeon of Rajshahye. The Subordinate Judge believed it, and he issued an order for a commission to examine the plaintiff, which, as appears from a petition in the record, the defendant prayed to have reversed. On the subject of Tarini their Lordships have already made observations.

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But all their Lordships wish to do now is to avoid prejudice to a proper inquiry by anything falling from either the High Court, or this Committee, in the course of what they consider to be a premature attempt to make a final decision. Whatever weight may be attributed to the reasons given by the High Court for the disallowance of any item of the charge, they are inapplicable to a decree for account. The defendant is the plaintiff's agent, and has drawn from his treasury substantial sums of money to be applied in the plaintiff's business on the defendant's responsibility. On proof of those facts there is a clear case for an account, in which the defendant must discharge himself in some way from the money he has drawn. In taking that account, any relevant papers in the plaintiff's treasury may be called, for, evidence may be got as to particular items, it may be ascertained whether, as to any item, the plaintiff has already got the benefit of it in his account with Tarini, the appearance of the word "adai" may be accounted for, and its effect determined. Their Lordships are not expressing an opinion that in a suit for account, it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule.

Their Lordships are of opinion that the High Court should have remanded the suit to the Subordinate Judge to take a general account of all dealings and transactions between the [159] plaintiff and the defendant in the character of the plaintiff's dewan, only not disturbing any settled account, if such there be. And inasmuch as the defendant has taken the course of denying his receipts, his fiduciary position and his accountability *in toto*, a defence which the High Court say is shown to be false by a mass of evidence adduced by the plaintiff, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. If he had been truthful and honest, he would have submitted at once to a decree for account, and thus have saved great delay and expense. Their Lordships will now humbly advise Her Majesty to make such a decree, and the defendant will be ordered to pay the costs of this appeal.

Appeal allowed with costs. Suit remanded.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

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FULL BENCH.

Before Sir. W. Comer Petheram. Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice O'Kinealy.

BHABA PERSHED KHAN, MINOR, BY HIS GUARDIANS, RAMSAKHI DABI CHOWDHRAIN AND ANOTHER (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants.*)*
[14th August, 1886.]

Minor, Suit on behalf of—Objection to description of minor—Permission to sue, Proof of—Civil Procedure Code, ss. 440, 578*—Act XL of* 1858, *s.* 3.

Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet, there is, nevertheless, nothing in the nature of the sanction provided by s. 3 of Act XL of 1858 which takes it out of the general rule of evidence, that sanction may be proved by express words or by implication.

Where on a construction of the plaint and the pleadings, it is found that the minor is the real plaintiff, the mere fact of his not having been properly described in accordance with s. 440 of the Civil Procedure Code is no ground for setting aside a decree passed in the suit.

[F., 9 A. 508 (509); 166 P.R. 1889.]

[**160**] THIS case was referred to a Full Bench by Wilson and Ghose, JJ., on the 6th April 1886, with an opinion, of which the following is the only portion material to this report:—

"The question which we desire to refer to a Full Bench arises in this way.

"The suit purported to be brought by 'Ramsakhi Dabi Chowdhrain, of Putia, mother and principal *ussies* (executor) and Boroda Churn Surma Khan, deputy executor of Bhaba Pershad Khan Chowdhry, minor, plaintiffs.' The plaint began by saying that 'we Ramsakhi And Boroda Churn on behalf of the said plaintiff Bhaba Pershad Khan, minor, state as follows.' It alleged the title to the land to be in the minor, and it said: 'we the executors on behalf of the minor, the plaintiff,' pray for a decree 'declaring the right of the minor, and awarding the minor plaintiff possession' with other relief.

"The written statement raised the contention that 'as Bhaba Pershad Khan, the minor, has not been made a plaintiff under the provisions of law, and as the plaintiffs have neither stated what kind of *ussies* (executors) there are, nor filed any document to show the same, the plaint is inadmissible.'

"The Subordinate Judge, who tried the case in the first instance, said as to this: 'Defendant did not deny that plaintiff was the guardian of the minor, and if she had denied the fact, plaintiff might prove it by producing the certificate of guardianship. If she is the constituted guardian of the minor, she need not describe herself as the next friend of the minor, and the suit can proceed at her instance. It appears that defendant does not seriously contend that plaintiff is not the guardian, and raises the plea merely for the sake of doing it: If she had any reasonable doubt

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*Appeal from Appellate Decree No. 536 of 1885, against the decree of J. F. Stevens, Esq., District Judge of Mymensingh, dated 19th December 1884, reversing the decree of Baboo Parboti Coomar Mitter, First Subordinate Judge of Mymensingh, dated 30th June 1883.

as to the representative character of plaintiffs, she would no doubt have applied under s. 442 of the Civil Procedure Code to have the plaint taken off the file, and would never have remained satisfied with making an equivocal statement in the written statement. From the plaint it appears that the suit has been brought for the benefit of the minor, and if plaintiff is not the constituted guardian as stated by her, she can be allowed to proceed with the suit as the next friend of the minor, though she has not described herself as the next friend, inasmuch as it [**161**] is not equitable to throw out the plaint at this stage for a formal defect. For the above reasons I hold that the suit is maintainable at plaintiff's instance.' The District Judge on appeal says as to the point now in question—

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"There can, I think, be no doubt that the suit was bad as not being brought in accordance with s. 440 of the Code of Civil Procedure, and I must express my great surprise that when this objection was brought to the notice of the Subordinate Judge, he did not return the plaint for rectification of the error. The objection was raised at the earliest possible stage, and should have been at once disposed of. Further, no certificate under Act XL of 1858 was filed by the plaintiff ; nor was permission given to her to sue for the minor under s. 3, Act XL of 1858. All that appears on the record is a vague affidavit by the plaintiff's general agent to the effect that such a certificate was obtained from the Judge of Rajshahye and '*has been filed in some case or other*,' so cannot be found. This is not at all sufficient. If there was such a certificate in existence, it should either have been produced, or if it could not be found, a duplicate should have been procured and produced. I would call the Subordinate Judge's attention to the cases of *Mrinamoyi Dabia* v. *Jogodishuri Dabia* (1); and *Russick Das Bairagy* v. *Preonath Misree* (2).

"There can be no doubt that the minor was not described in the plaint according to the form indicated in s. 440 of the Civil Procedure Code, but at the same time it is clear that the suit was one on behalf of the minor and for his benefit. The Court of first instance apparently regarded it as such, and accordingly allowed the suit to proceed. There is some inconsistency between the cases bearing upon this matter, and which have been noticed by us in our reference in Special Appeal No. 1512 of 1885, and we therefore think it right to refer to a Full Bench the following question:—

"Where a suit is brought by a next friend on behalf of a minor, and for his benefit, and where the Court of first instance allows it to proceed, whether the objection that the minor was not properly described according to s. 440 of the Civil Procedure [**162**] Code, or that the next friend was not a certificated gurdain under Act XL of 1858, or that no express permission was granted to him by the Court to sue on behalf of the minor, is fatal to the suit?"

Baboo *Srinath Das* (with him Baboo *Kishori Mohun Roy*), for the appellants.—Reading the whole plaint it is clear that the minor is the real plaintiff in the case, and there is no relief claimed except of the minor. The form of the title of the plaint is not material. A Court may in its discretion authorize a next friend without a certificate of guardianship to institute a suit on behalf of a minor. It is not necessary that the Court should record its permission in a separate proceeding. In this case it is apparent on the face of the proceedings that the Court gave the permission. Permission so appearing is sufficient in law—*Goono Monee*

(1) 5 C. 450.
(2) 10 C. 102.

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Debia v. *Ram Kumol Sandle* (1); *Kumal Chunder Sen* v. *Surbessur Doss* (2); *Aukhil Chunder* v. *Tripoora Soonduri* (3), *Alim Buksh Fakir* v. *Jhalo Bibi* (4); *Kedar Nath* v. *Debi Din* (5); *Jogi Singh* v. *Kunj Behari Singh* (6); *Girish Chunder Mookerjee* v. *Miller* (7).

Baboo *Mohesh Chunder Chowdhry*, for the respondent.—In order to make a person a party to a suit one must comply with the form prescribed by the law. Section 440 of the Civil Procedure Code lays down the form of the title in a suit on behalf of a minor. In this case the title of the suit is so framed that the minor does not appear as the real plaintiff. The title of the plaint is equivocal. This suit ought not to have been allowed to proceed, as the real plaintiff was not before the Court. Suppose the suit is dismissed on the merits, would not the minor on attaining majority be entitled to say that he was not a party to the suit? Permission of the Court is necessary under s. 3 of Act XL of 1858 to enable a next friend to bring a suit on behalf of a minor. The permission should be formally recorded in a separte proceeding which was not done in this case. The suit is bad. [**163**] *Mrinomoyi Dabia* v. *Jogodishuri Dabia* (8); *Russick Das Bairagy* v. *Preonath Misree* (9).

Baboo *Sreenath Das* in reply.—In *Russick Das Bairagy* v. *Preonath Misree* (9) an opinion was expressed against my contention; but the case was decided upon another point.

The following opinion was delivered by the Full Bench:—

OPINION.

The learned Judges, who heard this case in Special Appeal, have held on the construction of the plaint that the minor was the real plaintiff. They have, however, referred the following question to the Full Bench:

Where a suit is brought by a next friend on behalf of a minor and for his benefit, and where the Court of first instance allows it to proceed, whether the objection that the minor was not properly described according to s. 440 of the Civil Procedure Code, or that the next friend was not a certificated guardian under Act XL of 1858, or that no express permission was granted to him by the Court to sue on behalf of the minor, is fatal to the suit.

In regard to the first portion of this question, we are of opinion that the fact that the Judge allowed the suit to proceed is evidence that the Court trying the case allowed the institution of the suit, and the referring Judges have found to that effect.

In regard to the next part of the question, namely, whether the objection that the minor was not properly described according to s. 440 of the Code of Civil Procedure, is fatal to the suit, we are of opinion that it is not. In all cases the question to be decided is whether on a construction of the plaint and the pleadings the minor is really a party to the suit or not, and if he be, any irregularity in this description is provided for by s. 578 of the Code which declares: "No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise not affecting the merits of the case or the jurisdiction of the Court."

In regard to the third portion of the question, namely, whether the objection that no express permission has been granted by the [**164**] Court

(1) 17 W. R. 144. (2) 21 W. R. 298. (3) 22 W. R. 525.
(4) 12 C. 48. (5) 4. A. 165. (6) 11 C. 509.
(7) 3 C. L. R. 17. (8) 5 C. 450. (9) 10 C. 102.

on behalf of the minor, is fatal to the suit; this, if answered in the affirmative, would mean that no evidence, except evidence of express permission, would be admissible to show that the Judge had sanctioned the institution of the suit. We think there is nothing in the nature of the sanction given under s. 3, Act XL of 1858, which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. We are, therefore, unable to hold that the want of express permission is fatal to a suit. At the same time we must say that, according to the practice in the Mofussil Courts, every order is entered in the order-sheet attached to the record, and the proper and regular manner of proving permission would be by the production of the order-sheet or a certified copy thereof.

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J. V. W.

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14 C. 164=11 Ind. Jur. 254.

APPELLATE CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

JASPATH SINGH *v.* QUEEN-EMPRESS.* [21st December, 1886.]

Charge to jury—Criminal Procedure Code (Act X of 1882), s. 298—Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts and accepted in others.

A jury, after retiring, returned to the box, and after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held*, that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believed those facts.

Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereunder.

[R., Rat. Unrep. Crl. Cases 736=6 Bom. L. R. 258; Rat. Unrep. Crl. Cases 452.]

[165] JASPATH SINGH and Dino Nath Sen were charged under ss. 304 and 326 of the Indian Penal Code.

At the trial before the Sessions Judge, amongst a large number of witness for the prosecution, five spoke to the fact that Jaspath Singh struck the blow (which caused the death of one Tara Chand, deceased) at the direction of Dino Nath Sen. As to the effect of the evidence the Judge, in charging the jury, amongst other things, said: "There are five alleged eye-witnesses of the occurrence, and the question for you to decide is, do you believe these witnesses; if you do believe them there can be no doubt that there is ample proof against the accused; if, however, you do not believe the witnesses, and consider that the real facts have been suppressed, as suggested by the prisoner's counsel, and that there had been a mutual fight, you ought to acquit; but it is only if the real facts have been

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* Criminal Appeal No. 762 of 1886, against the order passed by H. Beveridge, Esq., Sessions Judge of Howrah, dated the 13th of September 1886.

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misrepresented in important matters that you would be justified in throwing over the solid body of evidence adduced."

As regards the law, the Judge charged as follows:—

"If you believe the evidence it can hardly be doubted that the offence is one of culpable homicide; it is well known that the head is a dangerous part of the body to strike especially with a *latti*, the man who struck the deceased must have intended to kill him, or at least knew that it was likely that he would do so; he would therefore be guilty under one of the clauses of s. 304. You may, however, form a different opinion, and may, if you like, find the prisoners guilty under s. 326. If you have any reasonable doubt you must give the prisoners the benefit of that doubt."

The Jury eventually acquitted both prisoners of the charges under ss. 304 and 326 of the Penal Code; but thought that Jaspath Singh had committed some offence, although they were uncertain as to the section of the Penal Code under which the offence (if any) fell; thereupon the Judge handed to the jury a copy of the Penal Code, leaving them to apply it to the case against Jaspath Singh. The Jury, after retiring, returned and said they were of opinion that Jaspath Singh was guilty of an offence under s. 325 of the Penal Code.

The Judge thereupon, notwithstanding the fact that he had **[166]** never questioned the jury as to the doubts which they had inferentially expressed and had not explained the law as set out in s. 325 to them, sentenced Jaspath Singh to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Mr. *Ghose*, for the appellant, contended that the jury having acquitted on the charges under ss. 304 and 326, the Judge should have accepted that verdict; that the conviction under s. 325 was unsustainable on the evidence, and that the Judge was wrong in leaving the jury to find out from the Penal Code the section under which the appellant, Jaspath Singh, was to be found guilty.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

JUDGMENT.

The judgment of the Court was delivered by

PETHERAM C.J., (BEVERLEY, J., concurring).—I think that this appeal must be dismissed, and for the reason that this is a finding of the jury with which this Court has no power to interfere, and that if the verdict of the jury is correct, and I must take it to be correct, because, as I have just said, I have no power under the circumstances to interfere with it, the punishment which has been inflicted on the prisoner for killing this man is not too great.

The case comes before us in a way which discloses a state of things as to the mode in which trials by jury are conducted in this country, that is much to be deprecated, and in what I say now I am speaking for myself alone—I do hope that Judges in explaining the law to juries in cases in which juries are to act will take more pains in explaining the sections of the Code, and not leave the Code to the juries for them to find out the meaning of it themselves.

I think that in this case there is a possibility, I will not say probability, that there has been a miscarriage of justice, and if there is, as I think there is this possibility, it arises from the fact that the Judge did not sufficiently explain the law to the jury, and my reason for thinking that there is a possibility of a miscarriage of justice in this case, is, that the Judge in his charge to the jury shows that he had come to the

conclusion that the evidence for the prosecution was to be taken as a whole, and that the only thing for the jury to do, if they disbelieved [167] it as a whole, was to acquit the prisoner. The jury did not take that course. They found a verdict which showed that they disbelieved the evidence for the prosecution in certain parts as to which they thought the witnesses were committing perjury, and they say that story is untrue, but they accepted that evidence in other parts, and convicted one of the prisoners upon it. The charge of the Judge shows that that was unsafe, and, speaking for myself, I quite agree with him. I think it absolutely unsafe to take the story of certain witnesses which is shown to be prejured as to a portion and to accept their statements and act upon it. Therefore I think that in this particular case, on the Judge's own view, there is a miscarriage of justice, but as I said before I am not able to interfere on that ground, because the Code gives us no power to interfere with the verdict of a jury in cases where there is evidence to go before them, and in this case there was evidence to go before them.

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Then the question is, how far that state of things arose from the fact of the law being insufficiently explained to the jury by the Judge. As the charge was originally drawn against these two men, it was a charge of inflicting injury which either amounted to homicide or grievous hurt, and there was no question before the Judge as to there being any provocation on either of those charges, and the Judge charged the jury from the point of view that they would convict on one of those charges taken simply, and practically his charge amounted to this:—These are the two matters in respect of which these men are being tried, and it will be for you to say whether you believe the evidence for the prosecution. If you do, you must convict the prisoners, but if, on the other hand, you do not believe that evidence, you must acquit them—; and the only matter before the jury was the question of these two substantive charges taken *simpliciter* without any question of mitigating circumstances. It appears, so far as the prisoner before us is concerned, that the jury came in an uncertain state of mind, and they told the Judge that they could not say under what section the offence came. Now, upon that, I think the duty of the Judge was to have asked the jury what doubt they had as to the crime which had been committed, and if he had done that, he would have found that it was not [168] a doubt as to whether the offence amounted to culpable homicide or grievous hurt, but a doubt under a totally different section which was not explained to them, as to whether if this man had inflicted hurt he did it under circumstances of grave and sudden provocation. If the Judge had asked that question he would have carried out his duty, and he would have been able to explain to the jury how it is that, in questions of this kind, the substantive offence would be affected by the qualifying clause of the next section. But he did nothing of the kind; instead of doing that, he simply gives the Penal Code to the jury in order that they may read it themselves and apply it in the best way they could. In doing that, I can only say, and I must say it here, that I think that the Judge did not do his duty. I think that it is the duty of a Judge to explain the law to the jury, and to tell them what offence the facts would prove against the prisoner if they believed them, and it is then for the jury to say whether, within the definition given by the Judge, the facts as proved constitute the offence. If the Judge had done that, I do not think that the complications would have arisen which have arisen in this case, and I think this case is a good illustration to show how very important it is that Judges should not leave the Code to the jury in this kind of way for them to read

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and interpret it for themselves, but as I said before they must explain the law to the jury and tell them, not under what section they are to convict the accused, but in some kind of popular language which they can understand of what offence they are to convict him, whether it be homicide or grievous hurt, or any other. It is for the Judge to construe the law; it is for the jury to find the facts, and I hope that, in future, Judges, in these jury trials, will be careful not simply to leave the Code to the jury but be at the pains to explain it themselves. For these reasons, having in mind that there was evidence of the crime of which the prisoner has been convicted, that the question of fact was for the jury, and that there was no appeal from their verdict. I think that this appeal must be dismissed.

T. A. P. *Appeal dismissed.*

14 C. 169=11 Ind. Jur. 256.

[169] CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

RAJA BABU (*Petitioner*) *v.* MUDDUN MOHUN LALL (*Opposite Party.*)*
[27th November, 1886.]

Criminal Procedure Code (*Act X of* 1882), *s.* 145—*Possession—Title—Symbolical possession.*

A Magistrate, trying a case under s. 145 of the Criminal Procedure Code, in determining the question of possession, took into consideration the question of title. *Held*, that he had a right to discuss the question of title, if in his opinion it was material upon the question of possession; and that the mere fact that he had considered and discussed the question of title, would not invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession.

Semble.—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession.

[**Expl.**, 14 C. 361 (363).]

THIS was a rule obtained on the 29th October, 1886, by Raja Babu and others, calling upon Muddun Mohun Lall and others to show cause why an order, dated the 21st September, 1886, passed by the Deputy Magistrate of Monghyr, declaring Muddun Mohun and his party to be in possession of a certain orchard, should not be set aside.

The facts of the case were that Muddun Mohun Lall had obtained a decree against one Sital Pershad, the father of Raja Babu, for Rs. 4,000 on the 8th August, 1884; and on the 17th September, 1884, had applied for execution, and attached the orchard above referred to, the sale being fixed for the 16th March, 1885. The sale was postponed, and the orchard eventually sold to Muddun Mohun Lall some time in 1885; this sale was confirmed on the 16th May, 1885. Sital appealed to the High Court against the order confirming the sale, but his appeal was dismissed. On the 19th January, 1886, the Subor-[170] dinate Judge issued an order for the delivery of the orchard to Muddun Mohun, and on the 24th January he was given symbolical possession.

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* Criminal Revision No. 461 of 1886, against the order passed by Baboo Mohendro Nath Gupto, Deputy Magistrate of Monghyr, dated the 21st of September 1886.

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On the 5th January, 1886, Raja Babu put in a petition before the Magistrate alleging that on the 4th March, 1884, he had, in execution of a decree obtained by some third party against Sital Pershad, purchased the orchard in the name of one Nursing Sahai, and he prayed that possession of the orchard might be given to him, he already having been in legal possession. This application was, however, rejected; on the 26th January Nursing Sahai applied unsuccessfully for possession on his own account.

On the 25th March, disturbances having taken place between the parties, the Joint-Magistrate stepped in and required both parties to show cause why they should not be bound down to keep the peace; proceedings under s. 145 of the Criminal Procedure Code were also initiated, Raja Babu setting up the facts alleged in his petition of the 5th January—the case under s. 107 resulting in Sital Pershad, Raja Babu and his servants being bound down to keep the peace; and the case under s. 145 resulting in Muddun Mohun Lall being declared to be in possession of the orchard. Raja Babu then moved the High Court in both cases; and the order under s. 107 was set aside as against him, the order under s. 145 being also set aside, on the ground that no evidence as to possession of the orchard had been taken on his behalf.

On the 20th June, 1886, in consequence of further disturbances between the parties, the Deputy Magistrate directed the police to make enquiries, the police reporting that Raja Babu was in possession, and that Muddun Mohun Lall had attempted to dispossess him. The Deputy Magistrate, after himself visiting the spot, took up the case on the petition of Raja Babu under s. 145, and after entering into the question as to whether the first purchase had been made benami, and as to whether symbolical possession had or had not been given by the Court peon to Muddun Mohun Lall, held on the 21st September, 1886, that Muddun Mohun Lall was entitled to retain possession of the orchard.

[171] Raja Babu then obtained the present rule calling upon Muddun Mohun to show cause why the order of the 21st September should not be set aside.

Mr. *Bonnerjee* (with him Mr. *Twidale*) appeared to show cause, stated the facts out of which the case arose, and contended that the Magistrate had sufficient evidence before him showing who was in possession at the time of enquiry, irrespective of the other matters touched upon in his judgment, to justify him in coming to the decision given.

Mr. *Woodroffe* (with him Mr. *Amir Ali*) appeared for Raja Babu in support of the rule, and contended that the Deputy Magistrate had enquired into the question as to whether the orchard had or had not been purchased benami, whereas he ought to have confined his attention to the point of actual possession; that the Deputy Magistrate had further made his order on the strength of the symbolical possession given by the Civil Court, and cited *Juggobundhu Mookerjee* v. *Ram Chunder Bysack* (1) as showing that symbolical possession was no possession as against third parties, and was no evidence of actual possession; that the Deputy Magistrate, in accordance with *Ambler* v. *Pushong* (2), should have alone decided who was at the time of the institution of the proceedings under s. 145 in possession. That all the proceedings held by the Deputy Magistrate had been vitiated by the manner in which the case

(1) 5 C. 584. (2) 11 C. 365.

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had been tried, because (*a*) the Deputy Magistrate had in his order discussed the question of benami, and determined that no formal possession was given until after the sale to Muddun Mohun Lall, (*b*) because he had discussed the question as to whether possession was delivered to Muddun Mohun Lall by the Court peon; and, (*c*) because the evidence in the enquiry showed that Raja Babu was in actual possession, the evidence on Raja Babu's side having been given by the police, whereas the evidence on the other side was that of the retainers of Muddun Mohun Lall. He further contended that, if possession was with Raja Babu from the 8th March, 1884, to the 24th June, 1886, the presumption of law was that possession remained in him until it was altered, but that the Magistrate had, by his order of the 21st September, found that Sital Pershad was [**172**] in possession; he had therefore tried a question not in his power and had drawn inferences from that. The learned counsel further referred to *In re. Kali Krishto Thakur* (1).

ORDER.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—This was a rule which was obtained to set aside an order dated the 21st September in this year, declaring the possession of a particular person to some property under s. 145 of the Code of Criminal Procedure.

The Magistrate appears to have been set in motion by a police enquiry which was held in consequence of there being a likelihood of a breach of the peace in the neighbourhood, and having been so set in motion, he proceeded to enquire, as it was his duty to do under the secton, who was in possession of this property, for the purpose of maintaining him in possession until the parties could get their rights decided by Civil Court.

This rule was obtained, so far as I recollect, upon the ground argued to-day by Mr. *Woodroffe*, that the Magistrate had failed to try the question of possession at all, and that he had confined his attention to the question of title; and no doubt upon the face of his judgment, it appears that, to a great extent, he considered who was the person entitled by law to the enjoyment of this property, and it was pressed before us that he had considered that to such an extent that he had lost sight of the real question before him, and which he had a right to try, namely, who was in possession at the time, and had a right to be maintained in possession under this particular section of the Code.

That being the case, it is for us to consider whether the Magistrate had materials before him on which he was justified in coming to the conclusion, which he undoubtedly came to, that the person in whose favour he has made the order was in the actual possession of this property. It is true that in arriving at the conclusion he has considered who had title, and the last authority cited by Mr. *Woodroffe*, shows that, if he thought that material upon the question of possession, he had a right to consider it and to discuss it, and the mere fact that he considers and [**173**] discusses it, does not invalidate his decision on the question of possession, provided there is evidence as to who is in possession.

Then on the question, whether there was any evidence of possession, the evidence is, that this person whom he found to be in possession of this particular piece of property purchased it at execution, when it was put up for sale at his instance under a decree of Court after the regular

(1) 7 C 46.

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forms of attachment and advertisement had been gone through. The advertisement was made in the way sales are advertised in this country, that is, the notification of the sale was stuck up in the Court-room, and the sale took place on the date fixed in the notification, and after the purchase had been made, the form was gone through of giving possession to the purchaser. This is proved. No doubt, it may be said that this is a mere symbolical possession, but in the absence of anything else, the question is whether, under such circumstances, a Judge is justified in finding possession, if he is satisfied that possession was thus taken. We think he is, even supposing there was no other evidence. When it is proved that a property was purchased at an execution sale, and that subsequently the peon of the Court went through the form of giving possession to the purchaser, we think that is some evidence that the purchaser took possession. It may be that the customs of the country are such that very slight evidence would suffice to rebut that, and the Magistrate had to find on the facts whether there was evidence of the slightest character; but in this case, the Magistrate says there was other evidence on which he comments; and upon that evidence, and the other evidence to which I have alluded, he comes to the conclusion that this man took possession under his purchase, and that he had been in possession since that date, and having come to that conclusion he makes an order confirming his possession.

As I said before, the only question we can consider is whether there was evidence on which the Magistrate could come to that conclusion. We think there was, and therefore his order cannot be disturbed, and consequently this rule must be discharged.

T. A. P. *Rule discharged.*

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14 C. 174.

[174] CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr Justice Beverley.

MOTEERAM (*Petitioner*) *v.* BELASEERAM (*Opposite Party*).*
[7th December, 1886.]

Criminal Procedure Code (Act X of 1882), *s.* 370 (*cl. i*)—*Summary Procedure—Conviction, Reasons for.*

The meaning of s. 370 (cl. *i.*) of Act X of 1882 is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly. A sentence of a fine of Rs. 10, and imprisonment in default of payment of the fine, is not a sentence of imprisonment within the meaning of the section.

[**R.**, 31 C. 983 (986).]

IN this case the accused was tried summarily before a Presidency Magistrate for an assault, and convicted, the Magistrate passing the following order: "The charge of assault is proved against the accused under s. 352 of the Penal Code. He is fined Rs. 10 or one week's rigorous imprisonment."

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* Criminal Revision No. 473 of 1886, against the order passed by Syed Ameer Hossein, Khan Bahadur, Officiating Presidency Magistrate of Calcutta, dated the 21st September, 1886.

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CRIMINAL REVISION.

14 C. 174.

The prisoner obtained a rule calling upon the Magistrate to show cause why this order should not be set aside, on the ground that, under s. 370 of the Criminal Procedure Code, the Magistrate should have given reasons for the conviction.

Mr. *Handley*, in support of the rule.

Baboo *Boidonath Dutt, contra.*

ORDER.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—We think that this rule must be discharged. These proceedings were held under s. 370, and the only matters which the Presidency Magistrate is bound to record are the matters provided in that section. The first question and the real question in this case is whether, in a sentence of this kind, the Magistrate was bound to record any reasons at all. The sentence is a sentence of a fine of Rs. 10, and, in default of payment of the fine, a short term of imprisonment is imposed. The question is, whether that is a sentence of imprisonment within the meaning [175] of s. 370 (cl. *i*). In our opinion it is not. We think that it is a sentence of a fine, and that the latter part of the sentence is a mere mode of compelling payment of the fine, and that the meaning of that section is that, where the offence was sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate was bound to record his reasons so as to enable the party to bring the matter up to this Court. But in petty cases which the Magistrate thought would be met by a fine of a few rupees the Legislature thought that his decision ought to be recorded shortly, and if the parties wanted to bring it up they could do so in some other form. For these reasons we think the Magistrate's order was quite sufficient under s. 370, and that the rule must be discharged.

T. A. P. *Rule discharged.*

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14 C. 175.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF NEAZ *v.* MONSOR AND ANOTHER.*
[20th December, 1886.]

Cattle Trespass (*Act I of* 1871), *s.* 22—*Joint fine—Fine and compensation.*

Proceedings under s. 22 of the Cattle Trespass Act are *quasi*-civil in their nature; a Magistrate being at liberty under that section to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought.

An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under that section which does not specify the proportionate amount payable by each, is good.

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* Criminal Reference No. 222 of 1886, made by F. W. J. Rees, Esq., Sessions Judge of Tipperah, dated the 6th of December, 1886, against the order passed by Moulvi Buzlool Karim, Esq., Deputy Magistrate of Brahmanbariah, dated the 18th of September, 1886.

IN this case the Deputy Magistrate of Brahmanbariah found that two persons, Monsor and Dengoo, had illegally impounded 19 head of cattle belonging to the complainant, thereby causing him to pay a sum of Rs. 7-2 for the release of the cattle; the Magistrate therefore convicted them under s. 22 of Act I of 1871 (The Cattle Trespass Act), directing them to repay the sum of Rs. 7-2 to the complainant as a fine, and also Rs. 20 as [176] compensation; the order containing no direction as to the proportion in which the sums referred to should be paid by Monsor and Dengoo.

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The Sessions Judge, considering the order to be illegal on the ground that Monsor and Dengoo had been fined jointly Rs. 27, sent up the record of the case to the High Court under s. 438 of the Criminal Procedure Code.

No one appeared at the hearing for either party.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

ORDER.

In this case we are of opinion that under s. 22 of Act I of 1871 the order made by the Deputy Magistrate was a legal order. The matter in which that order was made was not a regular criminal proceeding, but a *quasi*-civil proceeding, in which a Magistrate is authorized to assess and enforce in a summary manner compensation for an injury for which a civil action might be brought. Under these circumstances we think that, in the present case, the so-called accused are jointly and severally liable for the compensation and costs awarded, and we see no reason to interfere.

T. A. P. *Order upheld.*

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14 C. 176.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

KRISTO NATH KOONDOO AND OTHERS (*Plaintiffs*) *v.* T. F. BROWN AND OTHERS (*Defendants*).* [20th December, 1886.]

Landlord and Tenant—Use and Occupation—Re-entry—Forfeiture—Demand of rent—Statute 32, *Hen. VIII, c.* 34—*Waiver—Registration of power of attorney—Evidence Act I of* 1872, *ss.* 3, 57.

A covenant in a lease reserved to the lessor, on default of payment of rent, a power of re-entry; there being no mention in such covenant of a similar power being also reserved to his "heirs, successors or assigns."

The lessor sold his rights in the property leased to third persons, and such third persons endeavoured to re-enter under the covenant. *Held*, that although re-entry was reserved only to the lessor, yet his vendees could take advantage of the covenant, the operative part of the Statute 32, Hen. VIII, c. 34, being wide enough to admit of this, notwithstanding the wording of the preamble.

[177] *Held*, further, that the forfeiture having been waived by subsequent demands for rent, and there being no legal demand for rent on the last day on which rent at a date subsequent to the waiver fell due, the vendees were not entitled to make use of their right of re-entry.

A registered power of attorney admitted under s. 57 of the Evidence Act without proof, the Registering Officer being a Court under s. 3 of the Act.

[**Diss.**, 17 C. 903 (905); **R.**, 9 Bom. L.R. 401 (403); 16 C.P.L.R. 99 (102); 16 C.P.L.R. 145 (150).]

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* Original Suit No. 116 of 1884.

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On the 16th December, 1874, one Gungapersaud, who was the owner of a certain house and premises No. 8, Dhurrumtollah Street, in Calcutta, leased the said house and premises to one Thomas Fletcher Brown for 15 years, from the 1st of January, 1875, at a rental of Rs. 210 per month. The lease contained a covenant by T. F. Brown that he would, during the said term, pay the rent at the times and in manner therein mentioned; and further contained the following clause that "if the said monthly rent thereby reserved or any part thereof should not be paid on the days and times and in manner therein mentioned, or if any of the covenants or agreements therein contained on the part of the said Thomas Fletcher Brown should not be by him well and truly observed, performed, &c., then it should be lawful for the said Gungapersaud into and upon the said property or any part thereof in the name of the whole to re-enter, and the same to have again, re-possess and enjoy as if the said identure had never been made, anything therein contained to the contrary notwithstanding." Under this lease Thomas Fletcher Brown entered into possession of the premises.

On the 9th August, 1878, Gungapersaud sold the said house and premises to one Gobind Chunder Koondoo and one Kristo Nath Koondoo, their heirs, representatives and assigns. T. F. Brown attorned to the purchasers, and subsequently, after the death of the said Gobind Chunder Koondoo, to the present plaintiffs, who were Kristo Nath Koondoo, and the heirs of Gobind Chunder Koondoo.

In April 1882, T. F. Brown disposed of his business, which was that of a horse-dealer, on the premises No. 8, Dhurrumtollah St., to a Limited Company, which was duly registered under the Companies' Act, 1866, he himself becoming the manager of the Company. From that time up to 13th September, 1885, T. F. Brown regularly paid rent to the plaintiffs. Subsequent rent was not paid, though it appeared that bills were drawn out but [**178**] not presented, and the plaintiffs thereupon gave notice to T. F. Brown that they claimed to be entitled to re-enter on the premises.

On the 3rd December, 1885, a petition was presented for the compulsory winding up of the Company, and on the 10th December one David Cowie was appointed liquidator with power to carry on the business of the Company, and under this order the liquidator entered into possession.

On the 26th January, 1886, the plaintiffs wrote to T. F. Brown, calling upon him to quit the premises. No answer was however received from T. F. Brown, but the official liquidator wrote stating that he was in possession of the premises, warning the plaintiffs that if they attempted to re-enter, the attempt would be resisted, and the plaintiffs held responsible for all consequences. The plaintiffs therefore not having ever recognized the Company or the Official Liquidator as their tenants brought their suit against T. F. Brown, the Company and the Official Liquidator for the following purposes:

(1) To have it declared that they were entitled after the 15th November, 1885, to re-enter on the premises.

(2) For possession.

(3) For rent from T. F. Brown.

(4) For such sum as the Court might think fit for use and occupation of the premises as against the Official Liquidator.

The Company put in a written statement staing that, although they had taken no under-lease from T. F. Brown, yet they had entered into possession of the premises in pursuance of an agreement, dated 22nd

February, 1882 between T. F. Brown and one Henry Glass Smith, purporting to be a trustee for the Company then in course of formation; that they had not received any notice to quit; and that the original leave by Gungapersaud contained no provision for the re-entry of any persons other than Gungapersaud. 1886 DEC. 20. —— ORIGINAL CIVIL. —— 14 C. 176.

The Official Liquidator merely alleged that he was in possession under the order of Court appointing him Official Liquidator.

T. F. Brown did not enter appearance.

At the hearing, the following issues were raised:

(1) Whether the plaintiffs were entitled to take advantage of the clause of re-entry in the lease.

[**179**] (2) Whether Brown's tenancy had been determined, and if so, how and when.

(3) Whether, if the lease was determined, there had been any waiver.

(4) Did Cowie ever have possession, and if so in what capacity.

Mr. *Kennedy* and Mr. *Bonnerjee*, for the plaintiffs.

Mr. *Kennedy*.—The covenant for re-entry can be sued upon by the plaintiffs, the purchasers from the original lessor. The condition is one without naming any assign, and is such as could be taken advantage of by any assign. See *Greenaway* v. *Hart* (1), which shows that a condition which does not point to entry being reserved to the person to whom the rent is reserved, is valid. The Court there held that the rent, although reserved to the lessor's heirs and assigns, should go to the person who was entitled to the reversion—placing therefore on the covenant the same construction as if the words " heirs and assigns " had been omitted It could never have been the intention that, if Gungapersaud died, the rent was not to be payable at all. The reservation of rent shows that it is payable to the person entitled to the reversion. The forfeiture here took place on the 15th November, 1885. A person may perform a condition although he is not the person named. See s. 325, Coke on Littleton, p. 205 (*b*). The effect of the Statute 32, Hen. VIII, Cap. 34, is to transpose the assignee in the place of the assignor, and to give him all the rights which the assignor would have had.

Isteed v. *Stonely* (2) is in point. Section 109 of the Transfer of Property Act, although not applying as the lease is prior to the Act, shows what the law now is.

The Official Liquidator, it is said, is only a servant, but the cases of *In re Paragussa Steam Tramroad Co.* (3) and *Grand Trunk Railway, Official Manager of* v. *Brodie* (4), show that the Official Liquidator is responsible for costs and rent, although he may be entitled to an indemnity from the Company. If he is [**180**] a servant, and he appears, he is liable —see Cole on Ejectment, 124.

[Mr. *Pugh*.—As regards this point see *In re Wearmouth Crown Glass Co.* (5).]

At this stage of the proceedings Mr. *Kennedy*, after proving that the conveyance of the 9th August, 1878, was executed by one Mohesh Doss, tendered a power-of-attorney authorizing Mohesh Doss to sign for the vendor, and submitted that, under ss. 3 and 57 of the Evidence Act it was not necessary to prove the power as it had been registered, the

(1) 14 C. B. O. S. 340. (2) Anderson's Rep. Case CXLVIII, 82.
(3) L. R 9 Ch. App. 355. (4) 9 Hare 823 (837)=3 DeGex M. & G. 146.
(5) L. R. 19 Ch. D. 642.

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registering officer being a Court within the meaning of s. 3 of the Evidence Act.

This was objected to by Mr. *Pugh*, but the Court after argument admitted the power.

Mr. *Pugh* and Mr. *O'Kinealy* for the Company and the Official Liquidator.

Mr. *Pugh*.—The plaintiffs have sued Brown for the whole rent and the Liquidator for use and occupation; this cannot be done, neither are they entitled to take advantage of the power of re-entry given to Gungapersaud. The covenant for re-entry does not run with the reversion; previous to the Statute of Henry VIII, it did not run with the reversion even if the assigns were named. I may take it, the covenant runs with the land and not with the reversion—see Comyn's Digest *title* "Condition," p. 129; *Spencer's Case* (1). The Statute of Henry does not bear out the contention of the other side. It only applies to leases under seal, and to such as contain the word "assigns." It applies to leases made between the lessor, his heirs and successors, and the grantee, his executors and assigns. The word "successor" includes "assigns." There are therefore two conditions under which the Act applies: (*a*) The lease must be under seal; (*b*) the word "assigns" must be used; as to the first of these conditions—see *Smith* v. *Eggington* (2). The present lease is under seal, and the first condition has been complied with but the preamble to the Statute equally limits the words of the Statute to leases containing the word "assigns," and that condition has not been complied with. As to what persons are assigns [181] within the meaning of the Statute see *Spencer's Case* (3); *Greenaway* v. *Hart* (4).

[TREVELYAN, J.—In the present case rent is only payable to Gungapersaud.] Yes, but rent comes under another category—see William Saunders, 248 (note *a*.)

Suing upon the contract the plaintiffs cannot re-enter; their object is not to get the rent, but to break up the lease. Non-payment of rent does not work a forfeiture; until the lessor takes steps to *demand* rent there can be no forfeiture. Supposing they were entitled to the benefit of the covenant for re-entry, they should have made a formal demand for rent according to law. See *Duppa* v. *Mayo* (5); *Wheeldon* v. *Paul* (6); *Hill* v. *Kempshall* (7).

The lease is not void but voidable—see *Roberts* v. *Davey* (8); *Davenport* v. *The Queen* (9). Then as regards waiver, a subsequent demand for rent is a waiver of the forfeiture; and they are out of Court as regards ejectment, as in the third para of their plaint they claim rent up to the time of the filing of the suit, and they also claim it under the lease—see *Dendy* v. *Nicholl* (10).

Mr. *Kennedy*, in reply.

JUDGMENT.

TREVELYAN, J.—The main object of this suit is to obtain possession of the premises in which the business of T. F. Brown and Company, Limited, was generally carried on. At the date of the institution of this suit

(1) 1 Sm. L. C. (7th ed), 83.
(2) L. R. 9 C. P. 145 (156).
(3) 5 Coke, 16=1 Sm. L. C. 69.
(4) 14 C. B. O. S. 340.
(5) 1 Wm. Saund. 287. A (note).
(6) 3 C. P. 613.
(7) 7 C. B. 975.
(8) 4 B. & Ad. 664.
(9) L. R. 3 App. Cas. 128.
(10) 4 C. B. 376.

those premises were in the possession of the Official Liquidator of that Company.

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On the 16th of December, 1874, Gungapersaud the then owner of the premises, leased them to Mr. T. F. Brown, who is a defendant in this case, for a term of 15 years, commencing on the 1st of January 1875 at a monthly rent of Rs. 210.

By a subsequent verbal agreement Mr. Brown undertook to pay an additional rent of Rs. 2 a month.

On the 9th of August 1878 Gungapersaud conveyed to Gobind Chunder Koondoo and the plaintiff Kristo Nath Koondoo, their [182] heirs, representatives and assigns all his interest in the property in question.

Mr. Brown then paid the rent to these two Koondoos. On the 13th of April, 1879, Gobind Chunder Koondoo died leaving four sons who are the plaintiffs in this suit. Mr. Brown then paid the rent to Kristo Nath Koondoo and the sons of Gobind Chunder Koondoo.

In April, 1882, Mr. Brown formed his business into a limited company, but the plaintiffs recognized the company as their tenants.

No rent since that, which fell due on the 15th of September, 1885, has been paid.

The plaintiffs now claim possession of the premises under the proviso for re-entry contained in the lease. They also claim rent from the defendant Brown, and damages for use and occupation against the defendant Cowie, who is the Official Liquidator. The issues raised by Counsel were as follows:—

(1) Are the plaintiffs entitled to take advantage of the proviso for re-entry contained in the lease?

(2) Has the tenancy of T. F. Brown under the lease been determined, and if so, at what time, and by what means?

(3) Whether, if the lease was in fact determined, forfeiture was not waived?

(4) Did Mr. Cowie enter into possession otherwise than as Official Liquidator of the Company?

On the first issue I think that I must find in favour of the plaintiffs. The proviso for re-entry contained in the lease is as follows: "Provided also and in addition to the remedy by distress lastly herein reserved to the said Gungapersaud, it is hereby agreed that if the said monthly rent hereby reserved, or any part thereof, shall not be paid on the days and times and in the manner hereinbefore mentioned, or if any of the covenants and agreements herein contained on the lessee's part shall not be by him well and truly observed, performed and kept according to the true intent and meaning of these presents, then and thenceforth it shall be lawful for the said Gungapersaud into and upon the said message and premises or any part thereof in the name of the whole to re-enter, and the same to have [183] again, re-possess and enjoy as if this lease had never been made or executed, anything herein contained to the contrary thereof in anywise notwithstanding."

It is contended that Gungapersaud alone could take advantage of this provision, and that his heirs, representatives and assigns, as they are not named, cannot exercise any power of re-entry.

The question turns upon the terms of Statute 32, Henry VIII, Cap. 34. It is not an easy one, but after giving to it a great deal of consideration it seems to me that, although the power of re-entry is reserved only to Gungapersaud by the lease, his heirs and assigns can take advantage of such a condition. I think there is no doubt that the words of the

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operative part of the Statute are wide enough to cover the present case. There is no doubt also that the words of the preamble are limited to the case where the deed gave the remedy to the heirs and assigns.

It is almost impossible to deduce from the cases any very clear rule as to how far a preamble cuts down a Statute, but I think the tendency of the cases is not given effect to the preamble unless it be quite clear that the Legislature can have only had in contemplation the particular mischief to which the preamble relates, and the words of the operative part are ambiguous. In many cases it has been held that the remedy provided in the Statute has been intended to be more extensive than was necessary to get rid of the mischief to which the preamble relates.

Mr. *Pugh* relies on the authority of certain cases which have held that this Statute applies only to leases under seal, and he contends that the operative portion of this Statute must be confined entirely to the cases mentioned in the preamble. In those cases, and in others to which I have referred, the question seems to have been taken as settled and to have been decided without argument. I take it that the original reason for this decision must have been that, at the time of the Statute, the law required the leases referred to in the preamble of the Statute to be under seal. If this be so, these cases are of no assistance to me in the present question.

Unless I see any good reason to the contrary I ought to give full effect to the operative part of the Statute.

[**184**] The plaintiffs are, I think, under the Statute, entitled to the benefits of the proviso for re-entry. The next question is as to the forfeiture.

In order that there may be a forfeiture, there must, under the authorities, be a demand of the rent on the last day and not on any other day before or afterwards. I have looked carefully through the evidence and cannot find that there is any evidence sufficient to satisfy the requirements of the law. The evidence is this: Mr. Brown says: "The Liquidator did not pay the rent, and they applied to me for rent. They received cheques all along from the Company for the rent. He did not pay and I have paid no rent since." He afterwards says: "Subsequently they refused to receive rent from the Liquidator."

Mothura Nath Sircar, the head gomastah of the plaintiffs, says:

"I did not go there after January to demand rent. Bills are usually made out at the end of every month. The bills were made out after the month of January, but bills were made out in August. I drew the bills for September, October, November, and December at Rs. 212 a month. I did not make out any other bills because we did not get any money. We don't get money without making out bills." This is the whole evidence on the subject. It shows, I think, a demand of rent for each month up to and including December. As by a subsequent demand of rent the breaches on account of the preceding month were waived, the only question is whether there was such a demand of December's rent as to work a forfeiture. I do not think there is any evidence from which I can hold that the requirements of the law have been fulfilled. I must therefore decide the second issue against the plaintiffs, and must dismiss the suit with costs on scale No. 2 as against the defendants other than Mr. Brown; there must be a decree against Mr. Brown for six months' rent at Rs. 212 per month, *i.e.*, for Rs. 1,272.

T. A. P. *Suit decreed against 1st Defendant.*

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[185] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

RUTNESSUR SEIN AND OTHERS (*Decree-holders*) *v.* JUSODA AND ANOTHER (*Judgment-debtors*).* [6th December, 1886.]

Execution of decree—Decree on Mortgage Bond—Costs against judgment-debtors personally.

Certain plaintiffs were the holders of the following decree obtained on a mortgage bond : " It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree ; interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs."

On the judgment-debtors making default the decree-holders applied for execution, the Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree ; and this order was upheld by the District Judge on appeal.

Held, that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged.

[**Diss.**, 2 C.P.L.R. 94 (96) ; **F.**, 13 C.W.N. 742 (743)=4 Ind. Cas. 545; **Appl.**, 10 A. 179 (181) ; **R.**, 2 O.C. 103 (109) ; 12 C.P.L.R. 78 (81) ; 3 N.L.R. 97 (100) ; 11 O.C. 377; **D.**, 35 C. 431=12 C.W.N. 364 (365)=8 C.L.J. 152.]

IN a suit brought for foreclosure on a mortgage by conditional sale, the plaintiff obtained the following decree: " It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 claimed and costs Rs. 312, total Rs 2,862, within two months from the date of the signing of the decree. Interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs."

The defendants, judgment-debtors, made default in making the payment directed, and the decree-holders then applied that [**186**] the mortgage might be foreclosed; and a final decree for foreclosure was passed. Upon the plaintiffs, decree-holders, applying to be put into possession of the property, the question arose as to whether they were entitled to the costs as well as to possession of the land. The Subordinate Judge held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal.

On appeal by the plaintiffs, decree-holders, to the High Court—

Mr. *Bell* and Babu *Hari Mohun Chuckerbutty* appeared for the appellants.

Babu *Guru Das Banerji*, for the respondents.

Mr. *Bell* contended that the decree for costs was a personal decree against the defendants, quite independent of the debt of Rs. 2,550 secured by the mortgage. The Transfer of Property Act had altered the procedure

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* Appeal from Order No. 342 of 1886, against the order of W. H. Page, Esq., Judge of Dacca, dated the 3rd of June, 1886, affirming the order of Baboo Moti Lal Sirkar, Subordinate Judge of that District dated the 26th of November, 1885.

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with regard to suits on conditional sales, but it had made no alteration with regard to the costs of the suit. Under the former procedure a notice of foreclosure was first served, and if the money due was not paid within the year, the mortgagee then brought a suit for possession, and if successful he received his costs as a matter of course. Section 86 of the Transfer of Property Act authorizes the Court to award costs of suit, and these costs are a personal decree against the debtor. The Court cannot give a personal decree for the money lent, because if the money is not paid the mortgagee has to take the mortgaged property in satisfaction of his debt, but the debt only is discharged, not the costs of the suit, which the mortgagee has been compelled to incur owing to the mortgagor's default.

Dr. *Guru Das Banerji*, for the respondents contended that the decree merely said that, if the decretal money was not paid, the debtors would lose their right of redeeming the property mortgaged, and possession could be given to the plaintiffs, but it contained no provision as to costs. This was the interpretation put upon the decree by the Judge who had originally passed it. It must be assumed that he knew the meaning of his own decree, and he says that costs were not awarded. The decree is for a total sum of Rs. 2,862, which comprises principal and interest and costs; and the costs must be considered as a charge upon [**187**] the property equally with the mortgage debt; and if the debtor is not personally liable for the mortgage debt, he is not personally liable for the costs, which are included in the decree with the original debt.

Mr. *Bell* was not called upon to reply.

The following judgments were delivered by the Court (Petheram, C.J., and Beverley, J.).

JUDGMENTS.

Petheram, C.J.—I think that this appeal must be allowed.

This is an action to recover certain mortgage money, and the only question in the case is whether the plaintiffs, in addition to recovering the mortgage money from the property, are entitled to recover the costs of the suit from the debtors personally, that is to say, whether they can get execution against any other property of theirs after the mortgage property has been exhausted. In my opinion the only question is, whether the decree, as given by the Judge who tried the case, intended to give the costs against the debtors personally, because I am clearly of opinion that, under s. 220 of the Code of Civil Procedure, the Judge had jurisdiction to decree the costs against the debtors personally if he thought fit to do so. Therefore, as I said before, the question is, whether upon a construction of the decree which was made by him we are to hold that he has decreed the costs against the debtors personally.

I think that he has. The decree proceeds to assess the amount which was due for principal and interest, and the amount due for costs, and then to make an order that the mortgagor shall pay the whole, that is to say, the debt and costs. By the terms of the security it is admitted that the Judge had no right under that security to give judgment against the debtors personally for the amount of the principal and interest, but by virtue of s. 220 he had jurisdiction to give judgment against them personally for the cost. Reading the decree as a whole it declares, as I said before, that this man shall pay the whole of both sums of money. A declaration that he shall pay the whole means that he shall pay it out

of any property of his; the liability to pay is not limited to any particular property.

The only question is, having decided that this is an order [188] against the debtors to pay the whole, whether such an order is capable of execution. Now, it may be that, so far as the principal and interest are concerned, if it were sought to put the decree in execution to recover those sums against the debtor personally, there might be an answer, because, looking to the terms of the mortgage security, the property and not the individual was made liable; but this is not an application to execute the decree for the mortgage money and interest, but for the costs only ; and inasmuch as the decree stands for the whole sum, and as the legal difficulty does not exist to bar execution for the costs which would exist with reference to the mortgage money and the interest, because the Judge had power under s. 220 of the Code of Civil Procedure to direct that the defendants should pay this money personally, I see no reason why the plaintiffs should not be allowed to execute the decree for this sum. The Judge has refused to allow them to execute the decree for this sum. I think that he is wrong, and therefore this appeal must be allowed, and the plaintiffs, the mortgagees, must be allowed to execute their decree for costs amounting to Rs. 312 against the defendants personally or against any other property of theirs.

The appellants will have their costs in all the Courts.

BEVERLEY, J.—In addition to what has fallen from my lord the Chief Justice, I wish to add that, in my opinion, the plaintiffs are entitled to execute their decree for costs under s. 87 of the Transfer of Property Act. I think we must take it that the decree in this case was amongst other things, a decree for costs, the exact sum being named, and the real question before us is, whether the personal liability to pay those costs is discharged by the decree absolute for possession of the property. Now the 4th clause of s. 87 says, that the foreclosure will only discharge the debt secured by the mortgage, and therefore it seems to me it was not intended that the foreclosure should discharge the decree for costs.

I accordingly concur in allowing this appeal.

T. A. P. *Appeal allowed.*

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[189] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

THE SHAMNUGGER JUTE FACTORY CO., LD., AND ANOTHER (*Plaintiffs*) *v.* RAM NARAIN CHATTERJEE AND OTHERS. (*Defendants*).* [20th April, 1886.]

Company—Trading by a Company under its Memorandum of Association—Memorandum of Association—Ultra Vires—Mandatory injunctions, when to be granted—Judicial discretion—Injunction—Damages.

The doctrine that a Company can do nothing which is not expressly or impliedly warranted by its memorandum of Association, or other instrument of incorporation, must be reasonably understood and applied. A Company, therefore, in carrying on the trade for which it is constituted, and in whatever may be fairly

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* Appeal from Appellate Decree, No. 1164 of 1885, against the decree of J. P. Grant, Esq., District Judge of Hooghly, dated 20th April, 1885, reversing the decree of Baboo Kristo MoMhun Mookerjee, Third Sub-Judge of that district, dated the 29th March, 1884.

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regarded as incidental to, or consequential upon, that trade, is free to enter into any transaction not expressly prohibited by its Memorandum of Association.

In granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant.

There is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction.

[F., 30 C. 901 (903); **Ap.**, 11 C.L.J. 189=5 **Ind.** Cas. 171 (173); **Appr.**, 29 C. 500 (502); 14 C. 236; **R.**, 16 C. 252 (266); 18 B. 702 (713); 23 B. 103 (118); 3 N.L.R. 114 (121); 14 C.P.L.R., 76 (78); 113 P.L.R. 1901=91 P.R. 1901; 10 M.L.T. 473=22 M.L.J. 62 (68)=12 Ind. Cas. 635; 4 C.L.J. 198 (205); 15 C.W.N. 188 (190)=7 Ind. Cas. 124 (126); **D.**, 78 P.W.R. 1910=6 Ind. Cas. 1006; 36 M. 11 (15)=21 M.L.J. 742=10 M.L.T. 121=(1911) 2 M.W.N. 89=11 Ind. Cas. 642.]

This was a suit brought by the Shamnugger Jute Factory Company, Limited (a joint stock company registered in Scotland, under 25 and 26 Vict., c. 89), and Raja Gopal Bose, against Ram Narain Chatterjee, James Luke and others, for a declaration as to their title to certain lands on the right bank of the river Hooghly; and for an injunction restraining the defendants from building a jute factory on these lands, which were, as the plaintiff Company alleged, agricultural and horticultural.

The Memorandum of Association stated the objects of the Company to be as follows:—

"The acquiring by purchase, lease, or otherwise, of such lands and hereditaments, including railways in India and elsewhere, as may be required for the objects herein appearing or any of them."

[**190**] "The erection, pulling down, rebuilding, fitting up, making, maintaining and working of factories, warehouses, stores, buildings, railways, wharves, jetties, tramways and machinery, and apparatus whatsoever, on any part of the lands and hereditaments so purchased or otherwise acquired as aforesaid for carrying on the business of the Company."

"The carrying on in all branches of the trade or business of cultivators and dealers in jute, cotton, flax, hemp and other similar materials of a vegetable, fibrous and textile substance and their products, including their cultivation, transmission, purchase, preparation, pressing, cleaning, manufacturing, dyeing, spinning, weaving, or otherwise operating upon them, and the sale or other disposal of the same, either in a raw, manufactured, or other state, in India or elsewhere, and the carrying on of any trades or business of a like nature, and of general, mercantile, or other business on commission or otherwise, and of trade or business in any manner collateral, incident to, or connected with any of the trades or businesses aforesaid."

"The building, leasing, selling, chartering and navigating of steamships, sailing vessels, boats and other crafts."

"The selling, leasing, under-letting, sub-letting, charging, mortgaging, or otherwise dealing with and disposing of all or any lands and hereditaments, buildings, sites for buildings, machinery and works erected and executed, or in process of completion by the Company or their agents on such terms as the Company may think fit."

"The execution of all such additional or extended objects and purposes as the Company may, from time to time, by special resolution, determine and resolve upon, and the doing of all such other things as are collateral

incidental, or conductive to the attainment of the above objects or such additional objects or purposes."

On the 29th of July, 1883, the plaintiff-Company obtained, in the name of a servant, one Raja Gopal Bose, a putni pottah from the defendant, Raj Narain Rai, purporting to give a two-and-a-half-anna share of a fourteen-anna share in mouzah Telinipara and another share in mouza Digrah, the lease containing the words "the cultivable and waste land and churs you shall take possession of." They also on the 31st of July, 1883, obtained from the [**191**] defendant No. 3, one Denobundhu Mukerji, a putni lease of similar shares in mouzahs Telinipara and Digrah; this lease did not, however, mention any chur lands, but did make mention of the general words "alluvion and diluvion." The plaintiff-Company thus, on the face of the pottahs, became putnidars of an undivided five-anna share of a fourteen-anna share in mouzah Telinipara, with a share in mouzah Digrah. The remaining shares in the fourteen annas of Telinipara remained in the defendants in the following proportion: Defendant No. 5, Peari Mohun Mukerjee, the putni-holder of a five-anna share; the defendants Nos. 6, 7 and 8 being the zamindars of the remaining six annas share. Subsequently to the dates of the plaintiff-Company's pottahs, defendants Nos. 5, 6, 7 and 8 purchased the zemindari interest in the shares covered by these pottahs.

On the 30th of September, 1883, and 4th of November, 1883, defendants Nos. 5, 6, 7 and 8 granted to James Luke a *mokurari* pottah over 119 bighas of the lands in mouzahs Digrah and Telinipara, on the chur lands of the latter of which James Luke commenced to build a jute mill. In consequence of this course taken by the defendants, the plaintiff-Company brought a suit to have their title to the lands declared, and for an injunction restraining the building of the jute mill, having, before the defendants commenced to build, given formal notice to them that they objected to their building on the lands.

The defendants alleged that the plaintiff-Company had no right to the chur lands of Telinipara, their putni leases relating merely to the *usli* lands of Telinipara and Digrah; that James Luke had obtained a *mokurari* lease, which included therein the chur lands; that the object of the plaintiff-Company in instituting the suit was to obstruct and delay as long as possible the establishment of a rival mill on the lands.

The case was heard by the Third Subordinate Judge of Hooghly, who granted the injunction prayed for. On appeal the District Judge held that the taking of the putni leases was *ultra vires* on the part of the Company under their Memorandum of Association, and set aside the order for an injunction, but awarded money damages to the plaintiffs. Against that decree the plaintiffs appealed to the High Court.

[**192**] The Advocate-General (Mr. *Paul*) and Mr. *Handley* (instructed by Messrs. *Morgan & Co.*,) for the appellants.

Mr. *Woodroffe* and Mr. *Bell*, for the respondent Peari Mohun Mookerjee.

Mr. *Gasper*, for the respondent Luke.

Baboo *Biprodas Mukerji* and Baboo *Pran Nath Pandit*, for the other respondents.

The *Advocate-General*.—The chief questions arising in the appeal are:—

(1) Whether the chur lands, on which Luke had commenced to build, formed part of the lands included in the plaintiff-Company's putni leases?

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(2) Whether the taking by the plaintiff-Company of these putni leases was *ultra vires* on the part of the plaintiff-Company, as being beyond the scope of their Memorandum of Association?

(3) Whether, under the circumstances, the acts which the defendant Luke contemplated doing, and has now done, amounted to a wrong, giving a right of action to the plaintiff-Company?

(4) Whether a mandatory injunction should issue, or whether the plaintiff should be left to the remedy in the form of damages given them by the Court below, or to claim for partition?

The words of the leases clearly included the chur lands ; the pottah would have been useless to the plaintiffs if the chur lands had not been included. The plaintiffs' putni gave them not only a right to collect rent but to possession where there were no ryots.

As to the second point, *viz.*, *ultra vires*, the case of *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (1) shows that no outsider could call in question a transaction by a public Company on the ground of *ultra vires*, even if he had sustained damage or loss by the transaction ; and the fact of the defendants being landlords did not make them any the less strangers—*The Ashbury Railway Carriage and Iron Co.* v. *Riche* (2). [Wilson, J.—That was a case of contract ; and it was decided that what was done was *ultra vires* of the Company, and not merely of the Directors.] *The Attorney-General* v. *G. E. Railway.* **[193]** *Co.* (3) lays down that an act is not *ultra vires* unless prohibited. This case was affirmed on appeal (4). It is admitted that, if a rival mill is established, some damage will result—we say to the extent of Rs. 50,000 a month for the first three or four months. I say no stranger has a right to question the Company's powers—see also *London and N. W. Railway Co.* v. *Price* (5). In our case possession was taken of the land leased, and therefore I submit (*a*) that the question does not arise in the case, and (*b*) if it does, the taking of the lands was incidental to the object of the undertaking. [Wilson, J.—I would refer you to the case of *Mulliner* v. *Midland Railway Co.* (6), which apparently lays down that the Company could not part with their land, and that a stranger could interfere to prevent them.] I distinguish that case by saying that nothing passed in that case.

As regards transactions outside a Company's proper enterprise, I would refer to *In re the Port Canning Land Investment Reclamation Company* (7) and the case of *Ingraham* v. *Speed* (8) cited in Brice on *Ultra Vires*, p. 197, which latter case shows that railways cannot acquire land to prevent competition, but that is not the present case. [Wilson, J.—In the case before Phear, J., suppose the rice had been stolen ; could no one have been prosecuted for it? It seems to be the same with land assuming it was improperly acquired.] As to what are transactions incidental to the main business of a Company, see Brice, p. 191.

Raja Gopal had a good title even if the factory had not. If the Company could not take a lease through Raja Gopal, then Raja Gopal holds freed from the trust. Partition would be no relief at all. [Wilson, J.—Can a putnidar claim partition?] No he cannot ; and the Board of Revenue have just decided that there can be no partition of this very estate. [Wilson, J.—As to compensation ; if compensation was granted the plaintiffs would then be entitled to a share in the mill.] As to whether

(1) L. R. 15 Eq. 167. (2) L. R. 7 H. L. 653. (3) L. R. 11 Ch. D. 449.
(4) L. R. 5 Ap. Cas. 478. (5) L. R. 11 Q. B. D. 485.
(6) L. R. 11 Ch. D. 612. (7) 7 B. L. R. 583. (8) 30 Missls. 410.

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we are entitled to an injunction or damages see *Krehl* v. *Burrell* (1), [**194**] also *Smith* v. *Smith* (2). When the lower Court discharged the rule for a temporary injunction, the defendant was warned that he would go on with the work at his own risk. As to one co-owner's power to forbid any thing being done to the common property altering its nature without consent, see *Jankee Singh* v. *Bukhorree Singh* (3), which case was confirmed in *Indurdeonarain Singh* v. *Toolseenarain Singh* (4) ; see also *Gurudas Dhur* v. *Bijoy Govind Bural* (5) ; *Holloway* v. *Mahomed Ali* (6). There is a case which says that, where no injury has been done by such change, the Courts will not interfere ; see *Lala Biswambhar Lal* v. *Rajaram* (7). Here injury has been done, but I submit Sir Barnes Peacock was wrong, for an injunction is founded on a legal right. [Wilson, J.—Surely Sir Barnes Peacock's judgment means that there was no injury, and that the maxim "*de minimis non curat lex*" applies.] See also *Sheopersad Singh* v. *Leela Singh* (8) ; *Rajendro Lall Gossami* v. *Shama Churn Lahori* (9) ; *Stalkartt* v. *Gopal Panday* (10).

Mr. *Gasper*, for the respondent Luke.—The plaintiffs sue as putnidars and not as mill owners ; the land has not been damaged by our buildings; it is better for them to collect and recover rent from a mill owner than from a number of ryots. An injunction should not be granted unless injury is proved ; see *Noyna Misser* v. *Rupikun* (11) ; *Lala Biswambhar Lal* v. *Rajaram* (7) ; *Massim Mollah* v. *Panjoo Ghoramee* (12) ; *Nicholl* v. *Tarinee Churn Bose* (13) ; *Mohima Chunder Ghose* v. *Madhub Chunder Nag* (14) ; Kerr on Injunctions, p. 51. Partition is their remedy—see *Gokool Kishen Sen* v. *Issun Chunder Roy* (15).

Mr. *Woodroffe*, for the respondeint Peari Mohun Mookerjee.—The plaintiffs are in no way injured by the mill, nor is their position altered. Section 54 of the Specific Relief Act [**195**] lays down the law as to when perpetual injunctions may be granted. There is a distinction between legal and equitable waste. Between co-owners the Courts will only interfere in cases of equitable waste, and then only when no other remedy is adequate. In cases of trespass no injunction will be granted, unless the trespass is done in execution of a right. There can be no trespass in respect of co-owners, as they have proprietary rights in the whole of the land—*Hole* v. *Thomas* (16) ; and the cases cited on pp. 306 and 307 of Collett's Specific Relief Act ; also *Smallman* v. *Onions* (17) ; *Goodwyn* v. *Spray* (18) ; *Jacob* v. *Seward* (19) ; *Balavantrav Oze* v. *Ganpatrav Jadhav* (20); also *Job* v. *Potton* (21); *Bailey* v. *Hobson* (22). All co-sharers may do what they like with their own, subject to the maxim "*sic utere tuo ut alienum non lœdas.*" The plaintiffs have a solvent tenant in Luke, and he is ready to pay rent. Some material injury must be shown before an injunction will issue—*Curriers Co.* v. *Corbett* (23) ; *Durrell* v. *Pritchard* (24) ; *Doherty* v. *Allman* (25) ; *Isenberg* v. *E. I. House Estate Co.* (26) ; Kerr on Injunction, 51. As to the considerations

(1) L. R. 7 Ch. D. 551. (2) L. R. 20 Eq. 300. (3) S. D. A. (1856) 761.
(4) S. D. A. (1857) 765. (5) 1 B. L. R. A. C. 108=10 W. R. 171.
(6) 16 W. R. 140=12 B. L. R. 191 (note)
(7) 3 B. L. R. App. 67=13 W. R. 337 (note).
(8) 2 B. L. R. 188. (9) 5 C. 188. (10) 12 B. L. R. 197.
(11) 9 C. 609. (12) 21 W. R. 373. (13) 23 W. R. 298.
(14) 24 W. R. 80. (15) 18 W. R. 12. (16) 7 Ves. 589.
(17) 3 Bro. Ch. Cas. 620. (18) 2 Dickens' Rep. 667.
(19) L. R. 4 C. P. 328; and on appeal L. R. 5 Eq. and Ir. App. 464 (474).
(20) 7 B. 336 (339). (21) L. R. 20 Eq. 84. (22) L. R. 5 Ch. App. 180.
(23) 4 DeGex. J. & S. 764. (24) L.R. 1 Ch. App. 244. (25) L. R. 3 App. Cas. 709.
(26) 3 DeGex. J. & S. 263.

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on which the question of injunctions or damages depend, see *Aynsley* v. *Glover* (1); and *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (2). On the question of *ultra vires*, see Lindley on Partnership, 251; *Attorney-General* v. *G. E. Ry. Co.* (3); *Mulliner* v. *Midland Ry. Co.* (4); *Ashbury Ry. Carriage Co.* v. *Riche* (5).

The *Advocate-General* (Mr. *Paul*) in reply cited *Twort* v. *Twort* (6), as showing that an injunction for waste as against tenants in common had been granted.

JUDGMENT.

[196] The judgment of the Court (WILSON and PORTER, JJ.) (omitting a statement of the facts) after deciding that the chur lands did form part of the lands included the plaintiff-Company's putni leases, ran as follows:

The next question argued was whether the taking of these putni leases was *ultra vires* on the part of the plaintiff-Company. The District Judge has answered this question in the affirmative (here followed certain passages from the judgment of the District Judge). The learned District Judge has not found in express terms for what purpose the pottas were taken; but we think what he intended to find appears with sufficient clearness. If we rightly understand the District Judge, what he finds is that the Company, being largely dependent for the work of its mill upon the supply of labour drawn from the other side of the river and from the neighbourhood of the lands in question, took these putnis in order to prevent, if they could, the erection of a rival mill upon these lands, which would naturally cut off their labour-supply. We have to say whether this transaction was *ultra vires* on the part of the Company (here followed the objects for which the Company was formed as set out in the Memorandum of Association).

The general principles of law applicable to this question were not disputed. They are authoritatively laid down by the House of Lords in the *Ashbury Railway Carriage & Iron Co.* v. *Riche* (5) and *Attorney-General* v. *Great Eastern Railway Company* (7). For the present purpose we think the result may be sufficiently stated by saying that the powers of a Company depend upon its Memorandum of Association or other instrument of incorporation, and it can do nothing which that document does not warrant expressly or impliedly. A Company, therefore, formed to carry on one trade cannot engage in another. But, on the other hand, this doctrine must be reasonably understood and applied. And a Company, in carrying on the trade for which it is constituted, and in "whatever may be fairly regarded as incidental to, or consequential upon, that trade," is free to enter into any transaction not expressly prohibited.

In the present case we take the finding to be that the Company [197] took the putnis, not for the purpose of engaging in some new business, but for the purpose of endeavouring to secure the continuance of the supply of labour for its jute business. The maintenance of a supply of labour must, we think, be regarded as incidental to, or consequential upon, the carrying on a manufacture of this nature. It would be a serious thing to

(1) L. R. 18 Eq. 544. (2) L. R. 6 Ch. D. 758. (3) L. R. 11 Ch. D. 449.
(4) L. R. 11 Ch. D. 611. (5) L. R. 7 H. L. 653. (6) 16 Ves. 128.
(7) L. R. 5 App. Cas. 473.

lay down that an Assam Tea Company could not import labour or contract for the supply of labour, or take land for dwellings for labourers, or to grow food for them. Could it be said that this Company could not buy land across the river for a landing ghat for its work-people, or to make a road for them to the river bank? Might it not buy land to prevent some one building a wall which would bar the road to the river for the labourers? And it is difficult to see a difference in principle between doing this and buying an interest in land in order to try and prevent the lands being used for a purpose which, if carried out, would practically divert the labour-supply. It is what a prudent man, aiming only at carrying on the business profitably, would try to do, and, if so, can it be said that it is not reasonably incidental to, or consequential upon, the business of the Company? We are unable to agree with the District Judge in thinking that the taking of these putnis was *ultra vires* on the part of the Company under the Memorandum of Association.

It is unnecessary for us to express an opinion on the further question considered in the Court below, and argued before us, whether the question of *ultra vires* can be raised in this form and under the circumstances, by persons in the position of the defendants, or whether, even if this purchase were *ultra vires*, the title of the plaintiff-Company must not be held good as against the defendants, until the transaction be set aside at the instance of some one having a better right to do so than the defendants.

The next question is, whether, under the circumstances, what the defendants contemplated doing, and have now done, amounts to a wrong towards, and gives a right of action to, the plaintiffs. To see what the question is here precisely, it is necessary to see what the facts found are. The case put in the plaint was that the lands in question were agricultural and horticultural. [**198**] This was denied, and the fourth issue was "what is the nature of the lands in dispute? Are they agricultural or horticultural lands? Can the defendants convert them into building or manufacturing purposes?" The finding of the first Court is at the close of its judgment: "It is in evidence that the chur lands were used by tenants for agricultural and horticultural purposes. This being so, Mr. Luke has legally no right to convert them into building purposes without the consent of the plaintiff-Company, who own an undivided five annas share." Mr. Gasper, one of the learned counsel who argued this case for the defendants, and who appeared also before the District Judge, told us that he urged the District judge to reverse the finding of the first Court as to the land being agricultural or horticultural. The District Judge does not say in terms what his view on this point was. But he mentions the allegations on the one side and the other, and refers to the issues. And then he goes on to state "the question in appeal." The meaning of this, we think, is that he rejects Mr. Gasper's contention on this point, and affirms the finding of the first Court. We take it, therefore, to be found that the lands in question were agricultural or horticultural lands, and there is no doubt that a jute mill has been built upon them. On the other hand, there is a distinct finding by the District Judge that the plaintiffs have sustained no injury. He says: "There is nothing to prevent plaintiffs from continuing to collect their share of the rent, the existence of the mill notwithstanding. Thus they have suffered no injury." And it is obvious that the value of the land has been largely increased.

It was pressed upon us on behalf of the defendants, chiefly on the authority of English cases, that no exercise of rights of ownership by one

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co-owner is a wrong towards, or gives a right of action to, another co-owner, unless what is done amounts to a destruction of the subject-matter, or an actual eviction of the co-owner, or waste attended by substantial damage. On the other side, it was contended, chiefly on the authority of Indian decisions, that every act of one part owner of land by which he permanently alters the character and condition of the land, as by building upon it, excavating a tank, or changing the nature of the cultivation, is a wrong to the other part owners and gives [**199**] them a right of action. Had it been necessary to determine what the true rule of law is on this subject in India, we should have had to examine with care the decided cases which bear upon the matter. But it is unnecessary to do so, for this reason. The District Judge has given damages to the plaintiff, and the defendants' counsel elected not to urge their objections to the awarding of damages or to the quantum awarded, if our opinion were against them on the questions already considered.

The remaining question is an important one, whether a mandatory injunction should issue, or whether the plaintiffs should be left to the remedy in the form of damages which has been given to them by the District Judge, or to claim partition. On the part of the plaintiffs it was contended that where a part owner of land permanently alters its character, as by building on it, at any rate where he does so after notice of objection from his co-owners (as the defendants certainly did in this case) an injunction ought to go as a matter of course. It was contended, on the other hand, that in every such case the Courts must exercise a judicial discretion, and particularly must compare the possible injury on the one side and the other, the injury to the plaintiffs if the injunction is refused, and that to the defendants if it is granted. The question is obviously important to the parties to this suit, because if the plaintiffs have the absolute right which they claim, merely by reason of their part ownership and without regard to any other circumstance, they are not bound to give their reasons, but may use their rights as putnidars of Telinipara to protect their interests as owners of the Shamnugger Factory on the other side of the river ; whereas, if the Court is to exercise a judicial discretion, it can only take into account the injuries they have sustained or may sustain as putnidars of Telinipara. The granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act. But those sections have never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. It is necessary, therefore, to inquire [**200**] on what principle the Courts have acted in England and in India.

In England injunctions have been sought for the protection of various kinds of proprietary rights, such as to restrain the infringement of easements, to protect the interests of landlords against their tenants, and of tenants in common against their co-tenants. And the principle is well settled that, in granting or withholding an injunction, the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. The doctrine is very clearly explained in *Doherty* v. *Allman* (1). And the fact that the plaintiff

(1) L. R. 3 App. Cas. 709.

has given notice of objection to what is threatened before it has been carried out does not make the injunction a thing of course. This appears from the case just cited, and from *Isenberg* v. *East Indian House Estate Co.* (1). English Courts have certainly not shown any special facility in granting injunctions between co-tenants; such injunctions are of very rare occurrence. In this country, as might be expected, questions of this nature arise much more frequently between co-owners than in England, and the decided cases are numerous. We do not think it necessary to examine the whole series of cases in detail. It is enough to say that there are many cases in which an injunction has been granted; and in some cases very general language has been used as to the right of a part owner to restrain his co-owner. It is enough to refer to *Jankee Singh* v. *Bukhooree Singh* (2); *Inderdeonarain Singh* v. *Toolseenarain Singh* (3); *Gurudas Dhur* v. *Bijoy Gobind Bural* (4); *Holloway* v. *Mahomed Ali* (5); *Stalkartt* v. *Gopal Panday* (6).

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But we are not aware of any decision which establishes the broad proposition contended for by the plaintiffs, that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely, and without reference to [201] the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction.

On the other hand, a rule in conformity with the English decisions has been acted upon in a number of cases—*Lala Biswambhar Lal* v. *Rajaram* (7); *Dwarkanath Bhooyea* v. *Gopeenath Bhooyea* (8); *Sree Chand* v. *Nim Chand Sahoo* (9); *Crowdy* v. *Inder Roy* (10); *Massim Mollah* v. *Panjoo Ghoramee* (11); *Nicholl* v. *Tarinee Churn Bose* (12); *Mohima Chander Ghose* v. *Madhub Chunder Nag* (13); *Rajendro Lall Gossami* v. *Shama Churn Lahori* (14); *Nocury Lall Chuckerbutty* v. *Bindabun Chunder Ckuckerbutty* (15).

We think that the granting of an injunction is a matter in the judicial discretion of the Court, and that the District Judge took a correct view of the law applicable to the case.

We think also that having regard to the facts of the case, he exercised his discretion rightly in refusing the injunction asked for. The appeal will, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

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(1) 3 DeGex. J. & S. 263. (2) S. D. A. (1856) 761.
(3) S. D. A. (1857) 765. (4) 1 B. L. R. A. C. 108=10 W. R. 171.
(5) 12 B. L. R. 191 (*note*)=16 W. R. 140. (6) 12 B. L. R. 197.
(7) 3 B. L. R. App. 67=13 W. R. 337 (*note*). (8) 12 B. L. R. 189 (*note*).
(9) 5 B. L. R. Ap. 25=13 W. R. 337. (10) 18 W. R. 408.
(11) 21 W. R. 373. (12) 23 W. R. 298. (13) 24 W. R. 80.
(14) 5 C. 188. (15) 8 C. 708.

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APPELLATE CIVIL.

14 C. 201.

14 C. 201.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

PREM CHAND NUSKUR AND ANOTHER (*Defendants*) *v.* MOKSHODA DEBI (*Plaintiff*).* [17th January, 1887.]

Bengal Tenancy Act (VIII of 1885), s. 188—Co-sharers, Suit by.

Section 188 of the Bengal Tenancy Act applies only to such matters as a landlord is, under the Act, authorized or required to do; there is nothing in that Act which requires or authorizes a landlord to sue thereunder for arrears of rent.

One of several joint landlords is competent to sue for the entire rent due from a tenant making his co-sharers parties to the suit.

[**F.**, 15 C. 47 (50); **R.**, 19 C. 593 (602); 4 C. W. N. 508 (513); 7 C.W.N. 908 (910); 2 N.L.R. 45 (47); 17 C. 160 (162); 17 C. 538 (540); 26 C. 727 (730)=3 C.W.N. 586; 68 P.L.R. 1901; 29 C. 54 (58)=5 C.W.N. 763; 9 C.W.N. 34 (40); 5 C. L.J. 235 (237) (**F.B.**)=2 M.L.T. 155; 4 N.L.R. 45 (48); 3 Ind. Cas. 29; 55 C. 331 (335) (**P.C.**)= 10 Bom. L.R. 66=7 C.L.J. 139=12 C.W.N. 249.]

[**202**] THIS was a suit for arrears of rent of thirty-one bighas of paddy and homestead lands held jointly by the defendants Nos. 1 and 2 under the plaintiff, and two other persons, defendants Nos. 3 and 4.

The plaintiff, on account of the refusal of defendants Nos. 2 and 4 to join with her as plaintiffs in the suit, made them *pro-forma* defendants bringing the suit for the arrears due to all the co-sharers, and praying for a decree (*a*) for the entire rent; and (*b*) for the amount due to her as her share therein, together with costs and damages.

Defendants Nos. 1 and 2 alleged in their written statements that they were unaware that the plaintiff had a right to claim a share of rent from them; that they were unaware whether the plaintiff was a co-proprietor with the *pro-forma* defendants, or that she had ever been in receipt and enjoyment of the rents jointly with the latter; and submitted that the suit being for fractional shares of rent would not lie under s. 188 of Act VIII of 1885.

The Munsiff held that the suit would not lie, and that the plaintiff should first sue to establish her right as a co-proprietor, as this right had been virtually denied; but that even had this been done, the suit would not lie, there being no agreement, either express or implied, by the defendants to pay the rent in fractional shares: that moreover s. 188 of the Rent Act provided that the joint landlords could not sue separately to recover their rent, but must either sue jointly or through a manager; he therefore dismissed the suit.

The plaintiff appealed to the District Judge, who held that s. 188 merely laid down that, when persons are joint landlords, any act which they were required or authorised to do under the Tenancy Act must either be done by them acting jointly or acting through a joint manager. But that, as under that Act, a landlord was neither authorised nor required to sue for rent, the suit was not liable to be dismissed under that section. He therefore allowed the appeal.

The defendants appealed to the High Court, making the plaintiff and *pro-forma* defendants respondents in the appeal.

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* Miscellaneous Appeal No. 356 of 1886, from the decision of C. B. Garrett, Esq., District Judge of the 24-Pergunnahs, dated 31st July, 1886, reversing the decision of Baboo Triguna Prosunno Bose, Munsif of Alipore, dated 22nd June, 1886.

[203] Baboo *Taruknauth Paulit*, for the appellants, referred to ss. 54, 93 and 188, Act VIII of 1885, and contended that rent suits were contemplated by the Act. 1887 JAN. 17.

Baboo *Gurudas Banerji* and Baboo *Surendra Nath Matilal*, for the respondents, were not called upon. APPELLATE CIVIL.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows: — 14 C. 201

JUDGMENT.

In this case the plaintiff states that she is one of three land-lords of the defendants, tenants, and she sues for the entire rent due from the tenants, making her co-sharers defendants also because they refused to join in the suit.

The Munsiff dismissed the suit, holding that it was barred under s. 188 of the Bengal Tenancy Act, but on appeal the District Judge has set aside that decision, on the ground that s. 188 does not apply.

In our opinion the view taken by the District Judge is correct, S. 188 applies only to anything which the landlord is, under the Bengal Tenancy Act, required or authorised to do. We can find nothing in the Act which authorises a landlord to bring a suit against a tenant for recovery of arrears of rent. The terms of the section should, in our opinion, be strictly construed, for we cannot assume that the Legislature intended to alter the practice of our Courts as established by numerous decisions for years, past (1). The appeal is, therefore, dismissed with costs.

T. A. P. *Appeal dismissed.*

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14 C. 204 (F.B.).

[204] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice O'Kinealy.

SURESH CHUNDER WUM CHOWDHRY, BY HIS MOTHER NITOBASHINI CHOWDHRAIN (*Defendant No.* 2) *v.* JAGUT CHUNDER DEB (*Plaintiff*).* [14th August, 1886.]

Minor, Suit against—Error in the frame of a suit against a minor defendant, effect of—Guardian "ad litem" how appointed—Sanction of Court without formal order, Effect of—Minor defendant—Service of summons—Civil Procedure Code (Act XIV of 1882), *ss.* 100 *and* 443.

The plaintiff in a suit described one of the defendants thus: "N.C., guardian on behalf of her own minor son, S.C." Upon the presentation of the plaint the Court directed the plaintiff to produce an affidavit to the effect that the mother of the minor defendant was his guardian, and an affidavit having been made that the "minor defendant," was under the guardianship of the mother, ordered the

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* Appeal from Appellate Decree, No. 1512 of 1885, against the decree and judgment of J. Kelleher, Esq., District Judge of Sylhet, dated 20th April 1885, reversing those of Babu Ram Coomar Pal, Subordinate Judge of that District, dated 20th November 1884.

14 C. 203 (N).

(1) [NOTE.—This view of s. 188 of Act VIII of 1885 was taken in the case of *Umesh Chunder Roy* v. *Nasir Mullick*, Civil Reference No. 20A of 1887, decided by PETHERAM, C. J., and CUNNINGHAM, J., on the 7th February 1887, in which the decision in the case of *Prem Chand Nuskur* v. *Mokshoda Debi* was followed.] [This case is also followed in 15 C. 47 and 4 C. W. N. 508.—ED.]

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suit to be registered and summons to be issued on the defendants. N. C. then filed a written statement, alleging that she held the land in suit on behalf of the minor.

Held, that having regard to the orders of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, could not without proof of prejudice invalidate a decree against him in the suit.

Held, also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit, when it appeared on the face of the proceedings that the Court had sanctioned the appointment.

Held, (O'KINEALY, J., dissenting) that the fact that an order appointing a guardian *ad litem* at the instance of the plaintiff was made *ex parte* was not necessarily fatal to the suit, unless it could be shown that the minor had in any manner been prejudiced thereby.

Per MITTER, J. (PETHERAM, C.J., concurring) that, although the matter of the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor, or his friends and relatives in whose care he may be failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit.

[205] *Per* PRINSEP and WILSON, JJ.—No order appointing a guardian *ad litem* for an infant defendant, on the application of the plaintiff, should be made *ex parte*, and no such order should be made until the Court is satisfied that the infant has been duly served, and there has been an opportunity for making an application on behalf of the infant.

Per WILSON, J.—*Quære*. Whether service on a guardian *ad litem* is good service under the Code.

Per O'KINEALY, J.—Having regard to the provisions of s. 443 of the Civil Procedure Code, no *ex parte* order made at the instance of the plaintiff for the appointment of a guardian *ad litem* is valid, without notice to the minor in the mode prescribed by s. 100, and any decree in the suit under the circumstances is absolutely void as against the minor.

[**F.**, 20 C. 11 (14); 9 C.P.L.R. 50 (51); 67 P.R. 1897; 26 C. 267 (272); **Appr.**, 16 C. 40 (60) (**P.C.**); 30 C. 1021 (1032)=7 C.W.N. 774 (**P.C.**)=5 Bom. L.R. 882; **R.**, 13 M. 480 (483); 12 M. 90 (91); 3 M.L.J. 264 (266); 1 L.B.R. 38 (39); 24 A. 383 (394)=22 A.W.N. 76 (**F.B.**); 5 C.L.J. 434 (438); 35 P.R. 1912=15 P. W.R. 1911=211 P.L.R. 1911=11 Ind. Cas. 317; **D.**, 14 C. 754 (756).]

THIS case was referred to a Full Bench by WILSON and GHOSE, JJ., with the following opinion:—

The point on which we reserved our judgment was this: The description of the second defendant in the plaint is: "Nitobashini Chowdhrain, guardian on behalf of her own minor son Suresh Chunder Wum Chowdhry." A written statement was filed by Nitobashini, who, in her verification, described herself as "defendant." In the body of the written statement she sets out the title of the minor and speaks of herself as owning and holding possession on behalf of the minor. No objection was raised to this mode of suing in the first Court or in the lower appellate Court, and a decree has been made in the plaintiff's favour. Suresh Chunder, the minor, has appealed, and the eleventh ground of appeal is that, he not having been made a party in the proper form, and no order having been recorded appointing his mother guardian *ad litem*, the suit against him ought to have been dismissed.

We find that the suit was throughout regarded by the Court, and by all those who took part in it, as one against the minor, and that the Court sanctioned the representation of the minor by his mother as guardian *ad litem*, though no order was drawn up on the subject.

The cases which deal with the question how far the omission to comply with the provisions of the Code of Civil Procedure as to the

form in which infants are to sue and be sued, vitiates the suit, when the objection is raised in appeal, seem to us to be scarcely reconcilable. We refer particularly to the following [**206**] cases—*Mrinamoyi Dabi* v. *Jogadishuri Dabi* (1); *Russick Das Bairagy* v. *Preo Nath Misser* (2); *Durga Churn Shaha* v. *Nilmoni Das* (3); *Guru Churn Chuckerbutty* v. *Kali Kishen Tagore* (4); *Jogi Singh* v. *Kunj Behari Singh* (5); *Alim Buksh Fakir* v. *Jhalo Bibi* (6); *Komul Chunder Sen* v. *Surbessur Doss Gupto* (7); *Greesh Chunder Mukerjee* v. *Miller* (8); *Aukhil Chunder* v. *Tripoora Soonderee* (9); *Kedar Nath* v. *Dabi Din* (10).

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As similar questions frequently arise, we think it well to refer to a Full Bench the question whether under the circumstances the decree ought to be set aside as against the appellant on either of the grounds mentioned in his eleventh ground of appeal.

The case then came up before the Full Bench.

Baboo *Jogesh Chunder Roy* for the appellant.—The minor is not a party to the suit, and consequently is not bound by the decision. The frame of the suit being bad, the final decision is bad. The minor must be properly on the record as party, otherwise he will not be bound. The guardian must be legally appointed. In the case of a minor plaintiff the Court is not required to appoint a guardian. This is the case of a defendant. No appointment was made.

The following authorities were cited: *Durga Pershad* v. *Keshopershad Singh* (11) ; *Guru Churn Chuckerbutty* v. *Kali Kishen Tagore* (4) ; *Jungee Lall* v. *Sham Lal Misser* (12); *Russick Das Bairagy* v. *Preo Nath Misser* (2); *Gourah Koeri* v. *Gujadhur Pershad* (13).

Mr. *Woodroff* (with him Baboo *Aukhil Chunder Sen*) for the respondent.—The minor is either a party to the suit or he is not. If he is then this reference is unnecessary; if he is not a party to the suit, he is not entitled to be heard. Having regard to s. 578 of the Civil Procedure Code, the objection is not tenable [**207**] in appeal. The present case is distinguishable from *Durga Churn Shaha* v. *Nilmoni Das* (3); here the Court gave direction in the filing of the plaint that the provisions of ss. 453 and 456 should at once be complied with. Having proceeded in the suit throughout it is not open to the minor to impugn the decree at this stage.

The following authorities were cited: *Sherafutoolah Chowdhry* v. *Abedoonissa Bibee* (14); *Komul Chunder Sen* v. *Surbessur Doss Gupto* (7); *Janki* v. *Dhurm Chand* (15); *Greesh Chunder Mookerjee* v. *Miller* (8).

The opinions of the Full Bench were as follows:

OPINIONS.

Mitter, J.—The plaintiff filed the plaint in this suit on the 13th May, 1885, to recover possession of 4 hals, 1 kader, 4 joists and 3 reks of land appertaining to pottahs Nos. 56891 and 161, which he purchased in execution of a decree as the property of one Sham Pershad. The suit was brought against Tarini, defendant No. 1, and three other persons. The second defendant is described in the plaint as Nitobashini Chowdhrain, guardian on behalf of her minor son, Suresh Chunder Wum Chowdhry.

(1) 5 C. 450. (2) 10 C. 102. (3) 10 C. 134. (4) 11 C. 402.
(5) 11 C. 509. (6) 12 C. 48. (7) 21 W. R. 298. (8) 3 C. L. R. 17.
(9) 22 W. R. 525. (10) 4 A. 165. (11) 8 C. 656. (12) 20 W. R. 122.
(13) 5 C. 219. (14) 17 W. R. 374. (15) 4 A. 177.

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The plaintiff alleged that defendant No. 1 and the husband of Nitobashini Chowdhrain and father of the minor Suresh Chunder, *viz.*, Durga Churu, dispossessed him. All the defendants are stated in the plaint as living in commensality, *i.e.*, are members of a joint family. On the 14th May the Subordinate Judge directed the plaintiff to produce within one day an affidavit to the effect that the mother of the minor defendant is his guardian. He, the Subordinate Judge, evidently understood from the plaint that the defendant No. 2 was the minor Suresh and not his mother Nitobashini, and the pleader who presented the plaint was evidently also of the same view. On the plaintiff making an application with the required affidavit, the Court on the 15th May passed the following order:—The plaintiff having with an application produced the affidavit regarding the minor defendant being under the guardianship of his mother, and the said papers being brought up with the plaint, it is ordered that the suit be registered [**208**] and the summons be issued upon the defendants, &c., &c. The defendants, other than the defendant No. 2, filed a written statement disclaiming their connection with the land in suit and denying having dispossessed the plaintiff. Nitobashini Chowdhrain filed a written statement alleging that a portion of the land in suit appertained to pottah No. 165, and had been the property of her co-wife; that on her death it devolved upon her husband under the law of inheritance, and that since the death of her husband she has been in possession of it "on behalf of the minor defendant."

The Court of first instance dismissed the suit. On appeal the District Judge awarded a decree in favour of the plaintiff for a portion of the land claimed, finding that it appertains to the plaintiff's estate and not to the defendants' estate. The minor Suresh Chunder, represented by his mother as guardian, has preferred this second appeal.

The question that has been referred to us is, whether, under the circumstances, the decree ought to be set aside as against the appellant on either of the grounds mentioned in his eleventh ground of appeal. That ground is as follows:—

"That the minor Suresh Chunder Chowdhry not being made a defendant in proper form, and no order having been recorded by the Court appointing his mother Nitobashini Chowdhrain guardian *ad litem*, the suit ought to have been dismissed."

As to the first branch of this ground, it appears to me that the suit was substantially brought against the minor. This appears from the orders of the Court referred to above and from the allegations made in the plaint and the written statement. The dispossession, it is alleged in the plaint, was by defendant No. 1, and the father of the appellant, and I gather from the judgment of the lower Courts that evidence was adduced to the effect that the father of the appellant was in possession of the disputed land. On the death of the father of the appellant, the appellant, and not his mother, would represent the interest of the deceased person in the property in dispute. In the written statement filed by Nitobashini it was claimed as the property of the minor. An issue was framed with reference to the question of title set up respectively by the plaintiff and Nitobashini [**209**] Chowdhrain on behalf of the minor appellant, and the District Judge has found that issue in favour of the plaintiff. Under these circumstances I agree with the learned Judges who have referred the case, "that the suit was throughout regarded by the Court and by all those who took part in it as one against the minor." That being so, the appellant ought not, in my opinion, to

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succeed on the ground that there was merely an error of form in describing him as defendant when he has not been prejudiced by that error. Section 578 of the Civil Procedure Code says that no decree shall be reversed on account of an error of this description.

The second branch of the eleventh ground of appeal is that no order was recorded by the lower Court appointing Nitobashini Chrowdhrain as guardian *ad litem* of the appellant. Now it seems to me that the Court, on the affidavit of the plaintiff being filed, applied its mind to the question whether the mother was a fit person to act as guardian *ad litem*, and I agree with the learned Judges who have referred this case, that it "sanctioned the representation of the minor by his mother as guardian *ad litem*, though no order was drawn up on the subject." If we are satisfied that the Court applied its mind to the consideration of the question of the representation of the minor, the mere omission to record a formal order sanctioning the representation by a particular person would not be a valid ground to reverse a decree; it would be a defect coming within the purview of s. 578 of the Civil Procedure Code already referred to.

I have said all that is necessary to answer the question referred to us. But another question has been argued before us. It is this, whether the appointment by the Court of the mother of the appellant as his guardian without any notice to him is void, and whether on the ground of this error the decree against the minor is liable to be reversed. The answer to this question will mainly depend upon the examination of the provisions of Chapter XXXI of the Code of Civil Procedure, that is, the chapter dealing with the subject of suits by and against minors. I find that the provisions of this chapter have been taken from the rules framed by this Court, regulating the practice in its Original Side on the 10th June 1874, and published in the [**210**] *Calcutta Gazette of* 1874, page 1008. Of the rules adopted by this Court on that date, Nos. 8 to 35 bear upon this subject.

The first section of the Chapter, *viz*:—

Section	440	has been	taken from	Rule	No.	8
,,	441	,,	,,	,,	,,	10
,,	442	,,	,,	,,	,,	9
,,	443	,,	,,	,,	,,	11
,,	444	,,	,,	,,	,,	12
,,	445	,,	,,	,,	,,	13
,,	446	,,	,,	,,	,,	14
,,	447	,,	,,	,,	,,	15 & 16
,,	448	,,	,,	,,	,,	17
,,	449	,,	,,	second part of	No.	18,

the first part being omitted.

Nos. 19 and 20 have not been incorporated into the Act.

Section 450	has been	taken from	the first part	of	No. 21
451	,,	,,	,, second	,,	,, 21
452	,,	,,	,, third	,,	,, 21
453	,,	,,	,, fourth	,,	,, 21
454	,,	,,	Rule		,, 22
455	,,	,,	,,		,, 23

Rule No. 24 has not been taken at all.

Section 456, as it stood in the Code of 1877, was taken from Rule No. 25. In the Code of 1877, the words "or by the plaintiff" to be now found in the section in question, which were added to it in 1882, were omitted.

Section 457 has been taken from Rule No. 26.

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The Rules Nos. 27 and 28 were not incorporated in the Act. These Rules are as follows:—

"27. If no application for the appointment of a guardian *ad litem* be made on behalf of a defendant [or respondent to any application] who is an infant [or a person of unsound mind not so found by inquisition], the plaintiff, or applicant, may, if default be made by the defendant [or respondent] in appearing to the suit, or answering the application, apply by summons at chambers that a guardian *ad litem* may be appointed, and the Judge on being satisfied that such defendant [or respondent] is an infant [or a person of weak or unsound mind not so proved by inquisition], so that he is unable of himself to protect his interests in the suit, or application, may assign a guardian of such [**211**] defendant [or respondent] by whom he may appear to and defend such suit, or answer such application."

"28. No such order is to be made, unless it appears to the Judge, on the hearing of the application for the appointment of a guardian *ad litem*, that a copy of the summons was duly served, and that notice of such application was, after the time within which the defendant or respondent was required to appear or answer, and at least four clear days before the hearing of such application, served upon the person with whom or under whose care such defendant or respondent was at the time of serving the summons; and in case of such defendant, or respondent, being an infant not residing with, or being under the care of, his father or guardian, that notice of such application was also served upon the father or guardian, if any, of such infant, unless the Court or a Judge, at the time of hearing the application, shall think fit to dispense with such last-mentioned service."

" Section 458 has been taken from Rule No. 30
,, 459 ,, ,, ,, ,, ,, 29
,, 460 ,, ,, ,, ,, ,, 31
Rules Nos. 32 and 33 were not taken.
Section 461 has been taken from Rule No. 34
,, 462 ,, ,, ,, ,, ,, 35"

Thus all these sections have been taken from these rules, some of which were not incorporated into the Act. Of this latter class, the omission of Rules Nos. 27 and 28, extracted above, is essentially material for the decision of the question now before us. These rules laid down rigid rules as to the stage of the suit at which, and the conditions under which, the plaintiff was authorized to move the Court for the appointment of a guardian *ad litem* of a minor defendant. The Legislature intentionally rejected these rigid rules, and in their stead substituted the words " or by the plaintiff " in s. 456, which words were omitted from this section in 1877, when the Code was originally passed, evidently from an oversight. It seems to me clear from the above comparison of the sections of the Code with the aforesaid rules, that the Legislature, instead of adopting the Rules Nos. 27 and 28, which definitely laid down the stage of the suit at which, and the conditions under which, the plaintiff was to be allowed to move [**212**] the Court for the appointment of a guardian *ad litem* of a minor defendant, has left the matter to the discretion of the Court.

Although it has been thus left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made unless the minor or his friends and relatives, in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit. The

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observance of this rule in the matter of the exercise of the discretion vested in the Court is likely to protect the interests of the minor more effectually than a departure from it. There might be cases in which a departure from it would seriously prejudice the interests of the minor, and, if such prejudice be established, the Appellate Court would be warranted in reversing the decree against the minor on this ground alone. But in this case it has not been shown that the minor has been prejudiced at all. There is nothing in the record which would go to show that the appellant has arrived at an age to form any opinion regarding the appointment of his own guardian. If he has not, it is the mother who, as his natural guardian, would have exercised her judgment for him in order to form an opinion on the subject. On the other hand, if the appellant be of an age to exercise his judgment in this matter, he has, in the exercise of it, chosen his mother as his guardian in preferring this appeal. Furthermore, in the grounds of appeal filed in this case, it has not been urged that the minor has been in any way prejudiced by the appointment of his mother as his guardian *ad litem* without any notice being given to him. In this case, therefore, no prejudice has been established.

Another objection has been started, *viz.*, that the summons in this case was not served upon the minor defendant at all. If the appointment of the mother as his guardian *ad litem* was not invalid, this question would not arise. The defendant having appeared and defended the suit through his guardian, it is too late now for him to take any objection regarding the service of the summons.

Petheram, C.J.—I concur.

Prinsep, J.—I have had the advantage of seeing the written judgment which my learned colleagues propose to deliver, and [**213**] concur generally with Wilson, J. I cannot undertake to form any opinion regarding the intention of the Legislature in the direction indicated by Mitter, J., or to say whether the omission to incorporate Rules 27 and 28 in the Code of Civil Procedure was intentional or accidental. If a person, who is made a defendant, has not been formally adjudicated a minor under Act XL of 1858 by the appointment of a guardian, a summons should, in my opinion, be issued for his appearance, otherwise he can have no opportunity of showing that he is not a minor. The Court cannot properly " be satisfied of the fact of his minority so as to appoint a proper person to be guardian for the suit " (s. 443) until the defendant shall have had an opportunity of appearing. Any evidence otherwise obtained must necessarily be *ex parte*, even if the affidavit of the plaintiff be so far corroborated by one standing in some relationship to the defendant and willing to act as guardian for the purposes of the suit. For it may so happen that the defendant may be able to show that he is not a minor, and his friends or relations, residing in the same house with him, if they have received proper notice through a summons issued against the defendant, might be able to show that the person appearing before a Court is not a proper person to be so appointed. But, though I am of opinion that this procedure should be followed, I am unable to hold that a neglect to follow it is necessarily fatal to the suit. It is rather an irregularity, and should not vitiate all subsequent proceedings, unless it can be shown that the minor has been prejudiced either by an improper person being appointed as guardian *ad litem*, or by some misconduct on the subsequent conduct of the case arising from the manner in which the appointment has been made, such as has affected the trial of the suit in the interests of the minor. At the same time I think it very necessary that the lower Courts should

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be more precise in their proceedings so as to make them strictly in conformity with the law; for it is notorious that it rarely happens that a minor, whether plaintiff or defendant, is properly described in the proceedings; and consequently, much valuable time and money is needlessly spent in the Courts of Appeal in determining [214] the exact position which such a person really occupies in the case. Such irregularities have been repeatedly noticed by this Court, and I trust that the prominence now given to them will have the desired result.

Wilson, J.—In order to make an infant effectively a defendant to a suit, so as to bind him by a decree in the suit, three things must in any judgment appear: First, that on the face of the plaint it purports to be against the infant; secondly, that the infant has been duly represented by a guardian; thirdly, that he has been duly summoned, or that something has occurred to dispense with service of summons. In the present case, I agree with Mitter, J., that the first condition has been complied with. I read the body of the plaint in the same sense as he does, and that being so, I do not think the fault in the form of the title is fatal, though I do think such defects are most mischievous, inasmuch as they give rise to such uncertainty as has arisen in this case, and often prolong litigation, or afford grounds for an appeal to determine a point on which no doubt should possibly exist.

The real difficulty in the case is as to the other two conditions—service and representation of the infant. The procedure adopted was this. The plaintiff in his plaint named the infant's mother as his guardian. When he presented his plaint the Judge required an affidavit as to guardianship, and when the required affidavit was produced, an order was made that the plaint should be registered and summons issued. The Judge intended by this order, as is found, to sanction the representation of the infant by his mother; but no formal order to that effect was drawn up. The summons was then served upon the mother. I do not think the absence of a formal order appointing the guardian is fatal, whereas here the record shows that the Judge has arrived at a judicial determination upon the point. But the procedure followed seems to me open to grave objection. The procedure for obtaining the appointment of a guardian *ad litem* is contained in s. 456 of the Procedure Code. "An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor, or by the plaintiff. Such application must be [215] supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed. Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, provided that he has no interest adverse to that of the minor."

That section, I think, contemplates that an application by a plaintiff is to be made at such a stage of the proceedings that the infant has at least an equal opportunity of applying. I am of opinion that no order appointing a guardian *ad litem* for an infant defendant, on the application of the plaintiff, should be made *ex parte*, and that no such order should be made, until the Court is satisfied that the infant has been duly served, and that there has been an opportunity for making an application on behalf of the infant. But, though not without much hesitation, I have come to the conclusion that the fact of the order having been made *ex parte*, and having been made before service of summons, is not necessarily fatal; but

that those defects fall within the terms of s. 578. I have arrived at this conclusion substantially for the reasons stated by MITTER, J.

The question as to service of summons is one of some difficulty. There are no special provisions as to the service of summons upon infants, and therefore the same rules appear to apply as in the case of adults. There should be personal service under s. 75 of the Procedure Code, or service in some of the ways provided in the following sections, if the circusmtances are such as to render any of those sections applicable, or failing service in these ways, there should be an order under s. 82, directing the mode in which service is to be effected. I should hesitate to say that service on a guardian *ad litem* is good service under the Code. But if the appointment of the guardian, however irregular, was not a nullity, it follows, I think, that the guardian had power to waive, and by appearing and defending did waive, all objections arising from want of service or defect in the service of summons. At the same time I think it right to say that in my opinion such a procedure as has been adopted in this case is liable to lead to the gravest consequences. It is not generally very difficult [**216**] to make out a plausible case on affidavit, when there is no fear of cross-examination and no chance of contradiction, and the Judge has nothing but the Affidavit itself to look to. And under this procedure it would be quite possible that a plaintiff might succeed in making the Court believe, at the time he presented his plaint, that his own nominee was a fit guardian for an infant defendant, and might then carry on the litigation to the end, without the infant or any one really interested in his welfare ever hearing of it.

In the particular case before us, I think it is fairly clear that the interests of the infant were as well protected as if the proceedings had all been in order. I therefore concur in answering the questions referred to us in the negative.

O'KINEALY, J.—In this case Jugut Chunder Deb sued several defendants for possession of land. The second defendant was described in the plaint as Nitobashini Chowdhrain, guardian on behalf of her own minor son, Suresh Chundra Wum Chowdhry. The third defendant was described as Ichhamoyi Chowdhrain, widow of the late Ram Cumar Wum Chowdhry. On the back of the plaint there is an order directing plaintiff to produce an affidavit to show that Nitobashini was the guardian of Suresh Chunder Wum Chowdhry. On the 14th of May an affidavit was filed, in which it was stated that the lady had charge of the minor as guardian, and that her interest was in no way hostile to his. On the 15th the Judge, having before him both the plaint and the affidavit, directed that the plaint should be registered, the defendants summoned, and the 18th June fixed for the hearing of the case. On the 22nd May summons was issued against the defendants as they were described in the plaint, and subsequently the Nazir made a return that the defendants Nos. 2 and 3 being purdanashim ladies did not appear, and therefore he affixed the summons to their house. The case proceeded on this footing to trial, and now it is contended in appeal that the minor is not bound by the suit.

After a plaint has been filed, the first duty of the Court is, under s. 64 of the Code of Civil Procedure, to issue a summons, calling on the defendant to appear and answer the claims on a day specified therein, either in person or by pleader duly [**217**] instructed, or accompanied by some person able to answer all material questions. The only exception to this rule is where the defendant appears on the presentation of the plaint, and admits the plaintiff's claim. Consequently it appears to me

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that the duty of the Judge on receiving the plaint was to issue a summons on the defendant. If the defendant was the minor, he should have been summoned. If the defendant was Nitobashini alone, she should have been summoned. From the return it appears that the lady was treated as a party in the case, for the Nazir reported that because she was a purdanashin she could not be served. No summons was issued or served on the minor defendant. Subsequent to the issue of summons. the Court must, in the case of a minor, proceed under s. 443 to satisfy itself of the fact of minority ; and when it is so satisfied, to appoint a proper person as guardian to put in a defence.

In this case the Judge issued no summons on the defendant, minor ; came to no finding that he was a minor ; made no order appointing the lady his guardian, but contented himself by directing that summons should issue on the defendants. It thus seems that in no one single respect has the first Court complied with the provisions of the Procedure Code. The minor had no notice of the action. The case was allowed to go on against him without any decision as to whether he was a minor or not, and he had no voice in the determination of whether he was a minor, or whether the lady was a proper guardian for him.

One of the elementary rules of pleading is that no decree or order finally deciding a question between parties should be made absolute, *ex parte*, without previous notice to the party affected by it. In the case of *Ferguson* v. *Mahon* (1), Lord Denman, C.J., refused to recognize a decree of the Irish Court of Common Pleas, on the ground that the defendant had no notice of the action. In that case the defendant pleaded "that he was not at any time arrested upon, or seved with, any process issuing out of the said Court of Common Pleas in Ireland" * * * * "nor did he, defendant, at any time appear in the said Court to answer the plaintiff in the said action," and Lord [218] Denman held that the judgment appearing to have been obtained behind the back of the defendant, it could not be made the foundation of an action in England. In *Buchanan* v. *Bucker* (2), Lord Ellenborough, C. J., said: "It was contrary to the first principles of reason and justice that in either Civil or Criminal proceedings a man should be condemned before he was heard, and further that if such a practice were passed, it was an evil practice, and could not be sanctioned." This opinion though subsequently modified in regard to artificial modes of citation, seems, so far as the question of no notice is concerned, to be the present law. The doctrine, therefore, that a decree against a person in a cause, who has never been summoned and has had no opportunity to defend himself, is not binding on him, does not rest upon any technical pleas or rules of English pleading, but, as it is put in the different decisions, upon the ground that it is opposed to natural justice. If that be so, it appears to me impossible to say that the Subordinate Judge, by allowing the case to be carried on, without determining the status of the so-called minor defendant, without ever hearing him or giving him notice of the claim, and thus acting in contravention of the clear spirit of the Code, could have passed any order or decree that would bind the minor.

It may be urged that under s. 453 an application may be made *ex parte*, and there is nothing in the Code prohibiting the Court from deciding that a person is a minor without giving him notice to show cause. Section 443 declares that the Court shall be satisfied of the fact of the minority,

(1) 11 A. and E. 179. (2) 1 Camp. 62.

and I take it that the Court is to be satisfied of that fact in the way in which it is to be satisfied with regard to other questions that may arise in the case and is governed by the ordinary Procedure. In other words, before the Court comes to a decision *ex parte* on any such question, it must, in the words of s. 100, be "proved that the summons was duly served," and it lies upon those who contend that the procedure which may be followed under s. 453 is not the ordinary procedure of the Courts, but is a procedure which is declared by the Courts of England to be against natural justice, to show authority for it.

[**219**] I am, therefore, of opinion that both on principles of justice and on the Procedure Code itself, no guardian should be assigned on the application of the plaintiff, unless it has been proved to the satisfaction of the Court that the defendant is a minor; that summons has been duly served on him; and that he has had notice of the application. It seems, therefore, to me impossible to support the decree of the lower Court, and I think that all proceedings against the minor, after the filing of the plaint, should be set aside, and the plaintiff should, if he wishes to proceed against the minor, do so by a new trial and in a regular manner.

K. M. C.

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14 C. 219.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

IN THE MATTER OF THE INDIAN COMPANIES' ACT, 1882, AND IN THE MATTER OF T. F. BROWN & COMPANY, LIMITED.
[2nd September, 1886.]

Companies' Act (Act VI of 1882), *s.* 162—*Extraordinary power of the Court under the Companies' Act—Examination of witness—Costs.*

Certain persons connected with a Company then in course of liquidation, who were also some of the defendants in a pending suit brought by the Company (and revived subsequent to the order for winding up by the Official Liquidators) for an account and for the recovery of certain sums alleged to have been paid to the promoters of the Company, having been examined under an order obtained under s. 162 of the Companies' Act, 1882, applied through their counsel for costs incurred on such examination: *Held*, that no order as to such costs could be made.

THE Official Liquidator of T. F. Brown and Co., Ld., in liquidation, having applied under s. 162 of the Companies' Act for the examination of Mr. Barrow, Mr. Thomson, and others in the pending suit of *T. F. Brown & Company, Limited* v. *Barrow and others*, and an order having been passed thereon directing Messrs. Brown and Thomson to attend Court for the purpose of being examined, these two gentlemen were duly examined on the 13th and 28th August, 1886. At a day subsequent to the close of their examination—

Mr. *Bonnerjee*, on behalf of Mr. Barrow and Mr. Thomson, applied for the costs occasioned by the examination; the [**220**] matter then stood over for argument. On a subsequent day the matter came on for argument.

Mr. *Pugh*, for the Official Liquidator.—A separate application should be made for costs. There are no cases directly in piont; but a witness, although entitled to the attendance of Solicitor and Counsel—see *Breech*

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Loading Armoury Co., In re Merchants Company (1)—is not entitled to costs of employing them. *Ex parte Waddell* (2). In the case of *In re Cambrian Mining Company* (3), no order was made as to the costs of the witness examined. The cases of *The Bank of Hindustan, China and Japan* (4), and *The Lisbon Steam Tramways case* (5), refer only to costs of the particular motions then being heard. So also *In re Financial Insurance Company* (6) ; *In re Contract Corporation, Ex parte Carter* (7) a case of a roving enquiry, only costs of motion were allowed—*In re Land Credit Company of Ireland, Trower and Lawson's case* (8) there is no mention of their being entitled to costs, but costs were to have been given against them if they refused to attend. See also the cases of *Ramnidhy Koondoo* v. *Rajah Ojoodhyaram Khan* (9) ; *In the matter of Nursey Kessowji* (10). [Trevelyan, J.—In the case of *In re Hurruck Chund Golicha* (11) costs of an incidental enquiry were added to the claim.] Yes, but the witness in that case was supporting the insolvent.

Mr. *E. T. Roberts* (with him Mr. *Bonnerjee*), for Barrow and Thomson.—The evidence taken has disclosed nothing more than appeared in the pleadings of the pending suit. Nothing having therefore been gained by employing this procedure, costs should be allowed. The Code of Civil Procedure gives absolute discretion to the Court in the matter of costs, and this is a proper case to exercise such discretion in our favour. The case of *In re Hurruck Chand Golicha* (11) is somewhat in our favour.

ORDER.

[**221**] Trevelyan, J.—The question which I reserved for consideration was as to how I should dispose of the costs of the examination of the witnesses who had been examined, and the reason why I reserved the consideration of this question was that Mr. *Pugh*, who appeared for the Official Liquidator, asserted that there was no report of any case in any book, as far as he remembered, or any record in this Court, or any case in England, where any witness examined under this section, or a similar section of the Companies' Act in England, or any witness examined under the similar section of the Insolvency Act, could be given costs for attendance of counsel or attorney. I have not been able to find any case, with the exception of, perhaps, the case, cited during the argument, of *Hurruck Chund Golicha*. On examination I do not think that that is an authority on this question. Since the adjournment granted for the purpose of ascertaining whether such an order had ever been made, I have not been referred to any case where any such order has ever been made under the Companies' Act or the Bankruptcy Act, and I am not quite certain that this Court has any power whatever to make any such order. But *prima facie* a witness in any proceeding is only entitled to his ordinary expenses, although he might in some of those proceedings be entitled to appear by counsel or attorney as the case might be, and be examined by them. It does not follow from that that the other side is to pay him the costs of appearing by counsel and attorney. There is nothing very extraordinary in the facts of this case. The Official Liquidator wished to get certain information from these gentlemen (Messrs. Barrow and Thomson), who were connected with the Company which was under liquidation.

(1) L. R. 4 Eq. 453. (2) L. R. 6 Ch. D. 328 (332). (3) L. R. 20 Ch. D. 376.
(4) L. R. 10 Eq. 675. (5) L. R. 2 Ch. D. 575. (6) 36 L. J. Ch. 687.
(7) 40 L. J. Ch. 15. (8) L. R. 14 Eq. 8. (9) 11 B. L. R. App. 37.
(10) 3 B. 271. (11) 5 C. 605.

Inasmuch as there is no precedent for witnesses getting such costs, I think that this is not a case in which such an order ought to be made.

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Application refused.

Attorney for Official Liquidator: Messrs. *Sanderson & Co.*
Attorney for opposite party: Mr. *Orr.*

T. A. P.

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[222] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

GOKOOL NATH GUHA AND ANOTHER (*Defendants*) v. ISSUR LOCHUN ROY (*Plaintiff*), AND ISSUR LOCHUN ROY (*Plaintiff*) v. GOKOOL NATH GUHA AND ANOTHER (*Defendants*), AND SHAM DAS ROY (*Defendant*) v. ISSUR LOCHUN ROY (*Plaintiff*).*

[8th September, 1886.]

Hindu Law—Will—Construction—Charitable Gifts—Void Gifts—Gifts void for uncertainty.

A testator by his will directed that his executors should "get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brick-built baitakhana house, inclusive of the building and garden thereto" in which he had constantly resided:

Held, that the direction was not void for uncertainty, and that under the circumstances 3 per cent. of the testator's moveable estate was a proper sum to allow for the cost of erecting the temple;

Held, also, that a direction to the executors to "perform all the acts properly and *bona fide*, to the best of their respective information and judgment, and according to the provisions of this will," did not give the trustees an absolute discretion to fix the amount proper to be expended on the erection of the temple.

The testator further declared that "the said executors or any of" his "heirs and representatives" should "not be able to make any kind of gift, sale or alienation, or create any incumbrance on the" said baitakhana house, "and none of" his "heirs" should "be able to claim it in his own right: but that the executors" should "be competent to allow" the testator's "brother Issur Lochun Roy and" his "sister's son Shama Das Roy to use the said baitakhana and rooms, &c."

Held, that this clause did not operate to dedicate the baitakhana house to the idol Shiva, nor to vest it in the executors, but that on the death of the testator it descended to his heir-at-law, freed from any prohibition against alienation.

The testator further directed that his executors should "keep in deposit Government promissory Notes of Rs. 9,500 (nine and half thousand rupees) for the preservation and suitable repairs of" the baitakhana "house in proper [223] time, and for the daily and periodical worship of the said god Shiva, for his sheba (worship) and for the repairs of the temple;" the expenses of these acts to be defrayed out of interest of the Rs. 9,500.

Held, that (there ahving been no dedication of the baitakhana house to the idol) the sum of Rs. 9,500 must be apportioned, one moiety going to the heir at law to whom the baitakhana house had descended, and the other to the executors for the repairs of the temple and worship of the idol.

The testator further declared that, "if after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be able to spend the same in proper and just acts for" the testator's "benefit."

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* Appeals from Original Decrees, Nos. 9, 303, and 311 of 1885, against the decree of Baboo Ram Gopal Chaki, Rai Bahadur, Subordinate Judge of Moorshedabad, dated the 29th December, 1885.

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Held, that the direction contained in this clause was void for uncertainty.

Held, also, that such direction did not amount to a valid precatory trust. *Mussoorie Bank* v. *Raynor* (1) cited.

Where Government Securities in certain specified amounts are bequeathed by will, the interest thereon which has accrued due before the testator's death does not pass to the legatees.

[R., 37 C. 128 (169) = 10 C.L.J. 355=14 C.W.N. 18=3 Ind. Cas. 642 (654) (F.B.).]

THIS was a suit for the construction of the will of one Rai Rajib Lochun Roy Bahadur, for an injunction, account, a receiver and other relief. The plaintiff was the heir-at-law of the testator. The plaint stated that the testator died on the 9th Assin, 1288 (24th September 1881) having previously made and published his last will and testament bearing date the 30th of Bysack, 1288 (11th May 1881) of which he appointed the defendants Gokool Nath Guha and Boykunt Nath Sen Baral executors, who obtained probate of the will from the Court of the Judge of Moorshedabad on the 25th of October, 1881. The plaintiff then charged that many of the provisions of the will were invalid, that the will did not dispose of a large portion of the testator's properties, and that he was entitled thereto as the testator's heir-at-law. The material paragraphs of the plaint are as follows:—

8. The provisions contained in paragraph 17 of that Will, to the effect that within the baitakhana house in Saidabad, inclusive of the building and the garden attached thereto, in which the testator had continued to have his fixed abode, *i.e.*, in a proper place within that house and the compound, the said executors shall get a Shiva's temple erected at a reasonable cost, and [**224**] shall get the god Shiva consecrated therein, and that for the proper preservation and repairs of the said house in due time, and for the daily and periodical worship of that idol, Shiva, and for the repairs of the temple, the said executors shall keep in deposit Promissory Notes of the value of Rs. 9,500, and continue to perform these acts as described with the amount of interest thereof are indefinite, vague and not expressive of any definite intention (uncertain), and are therefore invalid under the law. And the said sum of Rs. 9,500 is to be reckoned as falling within the undisposed of property of the testator, and the plaintiff is entitled to get it.

9. Paragraph 18 of the Will provides that the said executors or the testator's heirs and representatives shall not be competent to make gift or sale or any kind of alienation of the baitakhana house described in paragraph 17, nor will they be able to create any encumbrance therein, and that none of the testator's heirs will be able to claim it on his own right, but the executors will be able to allow the said baitakhana house, &c., to be used by brother Issur Lochun Roy and the nephew (sister's son) Sham Das Roy. By this provision of the Will, the said property was not disposed of or vested, and so the said property is to be reckoned as the testator's undisposed of property, and the plaintiff is entitled to get it. The direction contained in respect of the use of that property is invalid and cannot be given under the law.

10. The direction contained in paragraph 19 of that Will with regard to the surplus money being spent by the executors in proper and just acts for the testator's benefit is also not definite or clear or expressive of any definite intention (certain), and therefore that direction is invalid, and the defendant's executors are bound to make over to the plaintiff by adjusting account of the testator's estate.

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(1) 9 I.A. 79=4 A. 500.

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11. There is a direction contained in the Will that the executors shall recover and include in the testator's Tehvil (fund) the money which was due to the testator from Premanund Mohunt Thakoor of Srikhand in Zillah Burdwan. By that the money due from the said Mohunt is undisposed of, and as this has not been the subject of any provision, the plaintiff is entitled to that also.

12. By that Will no provision has been made with regard to the interest of all the testator's Promissory Notes due up to the time of the testator's death. This is to be reckoned as undisposed of property, and the plaintiff is entitled thereto.

13. The executors have not yet raised the Shiva's temple or consecrated the Shiva as mentioned in paragraph 17 of the Will, and the plaintiff does not believe that all the directions given in the Will have been fully carried into effect. If the Shiva's temple be erected, and the Shiva be consecrated on the strength of the above indefinite and invalid provisions, and if the defendants do anything in accordance with the provisions of paragraph 19 of the Will, there will be serious loss to the plaintiff.

[225] 14. The plaintiff is entitled to the whole residue of the entire estate of the testator, with the exception of the gifts, legacies and charges mentioned in the Will, which are in accordance to law.

The defendants contended that the Will was valid, and denied that the plaintiff was the heir-at-law of the testator, on the ground that, during the lifetime of the latter, the plaintiff was a *purnavishikta lingi.* The defendant Sham Das Roy, the son of the testator's uterine brother, claimed to be the testator's heir-at-law.

The Subordinate Judge settled the following issues: (1) Was plaintiff *purnavishikta* or *lingi* during the lifetime of the testator, and is he in consequence disqualified from inheriting his property according to the Hindu Law? (2) Are the directions contained in clauses 17th, 18th, 19th and 21st of the Will null and void for vagueness, uncertainty, and indefiniteness? (3) Did the testator leave any and what portion of the property referred to in the aforesaid clauses undisposed of? (4) Are the executors, *i.e.*, defendants Nos. 1 and 2, liable to render accounts? (5) Have the executors full discretion to determine the reasonable cost for the erection and dedication of the Shiva temple and the consecration of the Shiva? (6) If not, what sum should be considered by the Court reasonable for the same, and from what fund should that cost be paid? (7) To what relief, if any, is the plaintiff entitled upon a proper construction of the aforesaid clauses of the Will?

On these issues the Subordinate Judge decided: (1) That the plaintiff was not a *purnavishikta*, and that even if he had been, that would not debar him from inheriting the property of the testator; (2) and (3) "That the directions contained in the 17th clause about the erection of a Shiva temple at a reasonable cost upon a suitable space within the compound of the baitakhana house of the testator as well as for the consecration of the Shiva indicate a definite intention on his part and are not void for uncertainty, and that the further direction to the executors to keep in reserve Government Securities of Rs. 9,500 is void only in respect of half the amount, the interest of which was impliedly intended to be appropriated to the occasional necessary repairs of the baitakhana house, but is perfectly valid [226] as creating a lawful bequest in respect of the other half, the interest of which was by a necessary implication intended to be applied for the daily worship of the Shiva and the

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repairs of the Shiva temple. That the expressions used in the 18th clause of the Will with regard to the baitakhana house do not indicate the least intention on the part of the testator to in any way dispose of the same, and evidently fail to create a valid testamentary disposition of it ; that the attempt made by the testator to disinherit his heirs was void and inoperative, being an attempt to override the law and to restrict the course of lawful succession, and that the discretion given to the executors regarding the use of the house by the plaintiff and defendant No. 3 is also inoperative ; that the attempt to create a residuary bequest of the surplus, referred to in the 19th clause, must fail by reason of uncertainty in the object and subject of the bequest, as well as of want of a definite intention on the part of the testator ; and that by the 21st clause of the Will the testator did not intend to make any sort of bequest in respect of the debt which was supposed to be due from Premanund Thakoor of Srikhand." (4) That the executors being responsible to the heir for the undiposed of portion of the testator's estate, were bound to render accounts ; (5) and (6). That the reasonable costs for the erection of the Shiva temple and the consecration of the Shiva was a matter to be determined by the Judge, and he fixed 3 per cent. of the value of the testator's moveable property as a reasonable sum. The Subordinate Judge also found that the interest on the testator's promissory notes due at the time of the testator's death passed to the persons to whom those notes had been bequeathed, and he directed that Rs. 2,843-10-6, being 3 per cent. of the testator's moveable estate, should be allowed to the executors for defraying the cost of the building of the Shiva's temple.

The following authorities were referred to in the judgment of the Subordinate Judge:—Mayne's Hindu Law, ss. 506, 517 ; *Dwarka Nath Bysack* v. *Burroda Pershad Bysack* (1) *Surbomungola Dabee* v. *Mohendranath* (2) ; Succession Act, ss. 76, 82. *Ramtonu Mullick* v. *Ram Gopal Mullick* (3) ; 2 W. & T.L.C., 3rd ed., 283.

[227] Both the plaintiff and defendants appealed to the High Court. The 17th, 18th and 19th clauses of the Will are set out in the judgment of the High Court. The 21st clause is as follows:—

21. " To the best of my information and belief, I am not indebted to any body in any way for any amount of money. The executors shall recover the money which is due to me from Premanund Mohunt Thakoor of Srikhand in Zillah Burdwan, and include the same within my estate and tehvil."

Mr. *Woodroffe*, Baboo *Guru Das Banerji*, and Baboo *Omer Nath Bose*, for the appellants in appeals Nos. 9 and 311.

Mr. *Evans*, Baboo *Rash Behary Ghose*, and Baboo *Mokund Nath Roy*, for the respondent in appeals Nos. 9 and 311.

Baboo *Basanto Coomer Bose*, and Baboo *Mokund Nath Roy*, for the appellant in appeal No. 303.

Baboo *Sri Nath Dass*; Baboo *Guru Das Banerji*, and Baboo *Omer Nath Bose*, for the respondents in appeal No. 303.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was delivered by:—

JUDGMENT.

PRINSEP, J.—These three appeals arise out of a suit which was brought by the plaintiff Issur Lochun Roy, in respect of the proper construction of the Will of his elder brother Rai Rajib Lochun, Rai Bahadur,

(1) 4 C. 443. (2) 4 C. 508. (3) 1 Knapp's P. C. 245.

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of which Will probate was taken out in 1881 by defendants Nos. 1 and 2, the executors. The plaintiff who instituted his suit on the 19th March, 1884, alleged that certain provisions of the Will were void for uncertainty, and that he as heir-at-law was entitled to the whole residue of the estate of the testator which, upon a proper construction of the Will, might be found to have been undisposed of. Defendant No. 3 is the son of a sister of the testator, and was made a defendant after the institution of the suit.

In answer to this suit, the defendants alleged that the plaintiff by becoming a *purnavishikta lingi* in the testator's lifetime had rendered himself incapable of succeeding as heir, and that the preferential heir was defendant No. 3. They further maintained that the provisions of the Will were good and effectual.

On the question of heirship, the lower Court found that it was not proved that the plaintiff had become a *purnavishikta lingi*, and that even assuming that he had become a *purnavishikta*, he [228] was not thereby disqualified to succeed as heir. On this point the appeal has not been pressed, and it is therefore unnecessary to say more in this place.

The clauses of the Will as to which the parties are at issue are the 17th, 18th and 19th, which run as follows: —

17. "After performing all the acts above mentioned, the said executors shall get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brick-built baitakhana house, inclusive of the building and garden attached thereto, in which I have been continuously living as my fixed place of residence, and which is situated in Saidabad, Division Sujagunge, within this district of Moorshedabad and east of the Bhagirati, west of the public road, south of the lane and north of another lane and of Ramtonu Mistry's Ghat, and they shall get the god Shiva consecrated therein. And the said executors shall keep in deposit Government Promissory Notes of Rs. 9,500 (nine and half thousand rupees) for the preservation and suitable repairs of that house in proper time, and for the daily and periodical worship of the said god Shiva, for his sheva (worship), and for the repairs of the temple, and the acts specified in these paragraphs will be continued to be performed with the amount of interest derived therefrom."

18. "The said executors or any of my heirs and representatives shall not be able to make any kind of gift, sale or alienation, or create any encumbrance on the baitakhana house situated in Saidabad and within the boundaries described above in paragraph 17, and none of my heirs shall be able to claim it in his own right. But the executors shall be competent to allow my brother Issur Lochun Roy and my sister's son Sham Das Roy to use the said baitakhana and rooms, &c."

19. "If after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be able to spend the same in proper and just acts for my benefit."

In respect of these clauses the findings of the lower Court are to the effect that the provision for the erection of a Shiva's temple in the compound of the baitakhana was good and valid, and that such a temple should be erected by defendants Nos. 1 and 2 at a cost not exceeding 3 per cent. of the personal estate of the testator; that a moiety of the sum of Rs. 9,500 should be set apart for the daily worship of the idol and for the repairs of the temple; that the baitakhana house was undisposed of by the terms of the Will, and that therefore the plaintiff succeeded to it as upon an intestacy as well as to the other moiety of the sum of Rs. 9,500; that the residuary bequest sought to be created by the 19th clause

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was void for uncertainty, and that the [229] plaintiff succeeded to the residue as heir. The lower Court further held that the interest which had accrued at the time of the testator's death on the Government Promissory notes which were to be distributed by the executors in payment of various legacies went to the legatees and not to the residue. Defendant No. 3 was made to bear his own costs; the costs of the plaintiff and defendants Nos. 1 and 2 being payable out of the estate. None of the other findings of the lower Court are material for the purposes of these appeals.

Appeal No. 9 of 1885 is preferred by the executors who question the correctness of the lower Court's construction of cls. 17—19 of the Will.

Appeal No. 303 of 1885 is preferred by the plaintiff against those portions of the lower Court's decree which have reference to the *Shivaloy*, to the accrued interest on the Government Securities, and to the costs of defendants Nos. 1 and 2.

Appeal No. 311 of 1885 is preferred by defendant No. 3 and has reference to his right to use the baitakhana house under cl. 18 of the Will, and to the question of his costs.

It will be convenient to dispose of the three appeals together. The first question relates to the provision for the erection by the executors of a Shiva's temple at a reasonable cost in a suitable place within the compound of the baitakhana.

For the executors it was contended that cl. 17, read with cl. 13 of the Will, conferred on them an absolute discretion as to the reasonableness of the cost, and that the lower Court was not justified in limiting the amount to 3 per cent. of the personal estate. Clause 13 provides that the executors "shall perform all the acts properly and *bona fide* to the best of their respective information and judgment, and according to the provisions of this Will."

For the plaintiff it was contended that the entire provision regarding the erection of this temple was void for uncertainty.

In the course of the argument, it transpired that the stone for the temple in question had been brought from Benares, and that, before the institution of this suit, the executors had already spent a sum which does not fall far short of that allowed by the lower Court for the purpose of erecting the temple. The plaintiff, it is [230] to be observed, did not bring his suit till two years and a half after the death of the testator. It was accordingly very properly intimated by his counsel that, in the event of our reversing the decree of the lower Court on this point, he would not press for a refund of the money already laid out upon the work.

We are not disposed, however, to interfere with the finding of the lower Court on this point. We think that the testator's intention was sufficiently indicated in the Will. He directed that a *Shivaloy* should be erected at a reasonable cost on a suitable site, within the compound of the baitakhana. The locality and nature of the building were described, and we think that the Court has fixed a very reasonable and proper scale of expenditure for the erection of the temple in question. The next question relates to the baitakhana house ; and on this question we also agree with the finding of the lower Court that cl. 18 of the Will neither operates to dedicate the house to the idol Shiva nor to vest it in the executors. All that the clause in question says is that neither the executors nor any of the testator's heirs and representatives shall be at liberty to alienate or encumber it. But it remains undisposed of under the Will, and therefore goes to the heir-at-law, and the provision that none of the testator's heirs

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"shall be able to claim it in his own right" is inoperative. So also is the further provision enabling the executors to allow defendant No. 3 to use the house. The house being undisposed of under the Will, the plaintiff as heir-at-law became entitle to it on the testator's death, and the executors have no power or authority to allow defendant No. 3 to occupy it.

As regards the fund of Rs. 9,500 which the testator set apart for the preservation and repair of the baitakhana house, for the worship of the idol and for the repair of the temple, the lower Court held that the fund in question should be divided into moieties, one of which was to be applied to the worship of the idol and the repair of the temple, and the other, which was intended for the repair of the baitakhana, to fall into the residue. It is contended on behalf of the executors that the testator had three objects in view, that is to say: (1) the repair of the baitakhana; (2) the worship of the idol; and (3) the repair of the temple; and that the bequest being good as to the [231] two latter, two-thirds of the fund should have been appropriated for those purposes.

The plaintiff, on the other hand, contends that the whole bequest is bad, and that the Court was not justified in holding it to be good as regards one portion and bad as regards another. We have already held that the provision as to the erection of a *Shivaloy* is sufficiently definite to constitute a valid bequest, and we think it clear that the testator intended to make provision for its preservation and repair and for the worship of the idol. And we think that these objects are distinct from the repair of the baitakhana, which we have held was undisposed of by the Will. It is quite clear, we think, that the testator had two things in his mind in setting apart this sum of Rs. 9,500 from the rest of his estate. These two things were: (1), the support of the idol; and (2), the preservation of the baitakhana. The question is whether the entire sum can be apportioned between these two objects, and if so, in what proportion the sum should be divided. We are of opinion that the sum ought to be divided in order that the testator's intention may be carried out and a fund provided for the support of the idol. But a difficulty arises when we come to consider in what proportion the sum should be divided. The Will affords no indication of the sum which the testator wished to set apart for each of the objects he had in view. The lower Court has adopted the rough and ready solution of dividing the sum equally between the two objects abovenamed, and we are not prepared to say that that solution was wrong. We think it may fairly be said that, when a fund is provided for two objects, and there is no indication to show how much is intended for each, it may be presumed that, in the absence of anything to the contrary, the intention was that they should benefit equally, *i.e.*, that half the fund was intended for one object and half for the other. As regards the contention that the *Shivaloy* should benefit to the extent of two-thirds of the fund, we are unable to recognize any clear distinction between the worship of the idol and the repair of the temple so as to be able to say that a separate sum should be set apart and appropriated to either object. We consider that "the preservation and suitable repairs of the house" was one thing and the "daily and periodical [232] worship of the said god Shiva, his sheba and the repairs of the temple" another thing. And we are not prepared, therefore, to disturb the decree of the Sub-Judge on this point. We think he exercised a very proper discretion in the

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matter, and that neither the plaintiff nor the defendants have any cause to be aggrieved at the manner in which the fund has been allotted.

We now come to clause 19 of the Will, which deals with the residue of the moveable estate.

It is contended on behalf of the executors that that clause creates a good and valid trust reposed in them to expend the residue of the personalty on "proper and just acts" for the benefit of the testator. We are of opinion, however, that the lower Court was right in holding that the bequest contained in this clause fails on account of vagueness and uncertainty.

It is true that the Courts in this country do recognise and will enforce charitable and religious trusts, and that in doing so they are not necessarily fettered by the same considerations which influence the Court of Chancery in England in dealing with such bequests. But it is obvious that, before any Court can deal with a trust of this kind, it must be in a position to form some definite idea of the object which the testator had in his mind. In the present case we think that there is no sufficient indication of the testator's wishes, and that the bequest must fail in consequence of the impossibility of ascertaining his intention. The words of the clause in question run as follows: "If after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be competent to spend the same in proper and just acts for my benefit." Now what did the testator mean by his "benefit"? Did he mean his spiritual benefit, or his posthumous fame, or what? This, in the first place, is wholly uncertain. But even supposing that there were no vagueness in this part of the clause, and that the *spiritual* benefit of the testator was intended, what are the "just and proper acts" which the testator considered would be for his spiritual benefit, and which he intended should be performed. There is absolutely nothing to indicate the nature of these acts—whether acts of benevolence were intended, or acts of charity or religious service. The expression is wide enough to cover [233] anything from digging a tank or founding a scholarship, to performing a shradh or feeding Brahmans. We think then that, on the ground of vagueness and uncertainty, this bequest must be held to fail, and that the lower Court has rightly held that the plaintiff is entitled to take the residue.

We are of opinion that the bequest contained in this clause must also fail on another ground, as being in the nature of a precatory trust; and such trusts, it has been frequently held, must be definite both as to the subject and as to the object of the gift. In the case of *Mussooree Bank* v. *Raynor* (1) their Lordships of the Privy Council said: "These rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain." We are not prepared to hold in this case that words giving the executors authority to dispose of an indefinite surplus in an indefinite manner are words sufficiently imperative to constitute a precatory trust.

As regards the accrued interest on the Government Securities, the learned counsel for the executors is unable to support the finding of the lower Court. The Sub-Judge has relied on s. 82 of the Indian Succession Act, but it appears to us that he has not only misinterpreted that section

(1) 9 I.A. 79=4 A. 500.

but overlooked s. 309 *et seq* which deal with the matters in question. Whether or not the legatees are entitled to the interest on the Government securities from the date of the testator's death, it is settled law that they are not entitled to any interest which accrued due before his death, and the finding of the Sub-Judge on this point must therefore be set aside. The testator died leaving several pieces of Government Promissory Notes, and his Will directed his executors to give certain persons such notes in various specified amounts. He did not give legacies of special notes, so that to adopt any rule, such as that allowed by the lower Court, would enable the executors to favour some of the legatees so as to give them notes with the largest outstandings of unrealized interest. On general principles, therefore, the Judge should have been induced to refuse such a claim.

1886 Sep. 8. — Appellate Civil. — 14 C. 222 = 11 Ind. Jur. 334.

[234] On the subject of costs, it is pressed upon us that none of the defendants are entitled to have their costs paid out of the estate in consequence of the nature of the defence set up as regards the plaintiff's status. We are unable to see that defendant No. 3 is entitled to any costs at all. As regards the executors, we observe that certain costs amounting to Rs. 478 were disallowed in the lower Court, and as regards them there is no appeal. It is said that the estate was unnecessarily put to great expense on account of the execessive issue of commissions, but there is nothing before us showing the costs incurred on this account. We therefore see no sufficient reason to interfere with the order of the lower Court as to costs. Each party will pay his own costs in this Court.

P. O'K. *Appeal dismissed.*

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14 C. 234.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Agnew.

FONINDRO DEB RAIKUT (*Decree-holder*) v. RANI JUGODISHWARI DABI (*Claimant*) AND RAJESSUR DASS (*Judgment-debtor*).*
[29th November, 1886.]

Execution of decree—Resistance to execution—Application against a claimant resisting execution how treated—Order under Civil Procedure Code, s. 331, Nature of.

An application in furtherance of execution of a decree for possession against a person who resists execution, claiming the property as his own, is an application within s. 331 of the Civil Procedure Code, and should be treated as a plaint.

[**Diss.**, 9 Bom. L.R. 936 (938); **Appl.**, 16 M. 127 (130); **R.**, 13 C.W.N. 724 (727) = 1 Ind. Cas. 725.]

FONINDRO DEB in execution of his decree proceeded to take possession of a family dwelling-house, but met with resistance from Rani Jugodishwari Dabi, a third party, who claimed the property as her own. In consequence of the obstruction the decree-holder applied to the Court in the execution department, and the District Judge rejected the application on the ground that, inasmuch as the Rani was no party to the suit or decree, and claimed to hold the property in her own right, she was not bound by the decree. Fonindro Deb having appealed to the High Court, it was objected on the part of the Rani, respondent, that the order was not appealable.

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*Appeal from Order No. 221 of 1886, against the order of J. Whitmore, Esq., District Judge of Rungpore, dated the 16th April 1886.

1887 Nov. 29. — APPELLATE CIVIL. — 14 C. 234.

Baboo *Bhogabati Churn Ghose*, for the appellant.

[235] Baboo *Kali Mohun Dass* and Baboo *Grish Churn Chowdhry*, for the respondents.

The following was the judgment of the Court (PRINSEP and AGNEW, JJ.):—

JUDGMENT.

The appellant obtained a decree for possession of certain property, and in execution proceeded against a family dwelling-house said to have been occupied by Jugodishwari Dabi, who was not the judgment-debtor in the suit in which the decree was obtained. Obstruction was made, and, upon this matter coming before the District Judge, he dismissed the application for execution against this property on the ground that the lady was no party to the suit or decree. Against this order the decree-holder has appealed. A preliminary objection is taken that no appeal lies against this order of the District Judge. The matter, as represented to us, comes under s. 331 of the Code, and the order of the District Judge is practically a refusal to number and register the claim as a suit between the decree-holder as plaintiff and the claimant as defendant. The decree-holder complains that by this proceeding he has lost the opportunity of proving that the claimant is not entitled to protection under s. 331. The law declares that proceedings in a case under s. 331 are to be conducted in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V of the Code. Chapter V provides for matters relating to the institution of suits. The refusal of the District Judge to number and register the claim as a suit is therefore of the same effect as the refusal to register a plaint; or, in other words, it amounts to rejecting a plaint. Regarding the case from this point of view, the order of the District Judge would be appealable as being within the definition of a decree under s. 2 of the Code. The matter raised must, therefore, be tried in the manner provided for by s. 331. We accordingly set aside the order of the District Judge and direct that he do proceed in accordance with the law.

K. M. C. *Case remanded.*

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14 C. 236.

[236] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Agnew.

JOY CHUNDER RUKHIT (*Defendant*) *v.* BIPPRO CHURN RUKHIT (*Plaintiff*).* [19th November, 1886.]

Co-sharers—Right to deal with joint property—Excavation of tank on joint property—Discretion of Court in granting injunction—Specific Relief Act (I of 1877), *s.* 55

Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as) for instance, where a tank has been excavated, a plaintiff must show

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*Appeal from Appellate Decree, No. 652 of 1886, against the decree of Baboo Dwarka Nath Bhattacharjee, Subordinate Judge of Tipperah, dated the 18th of December 1885, affirming the decree of Baboo Mohendro Nath Dass, Munsif of Gouripura, dated the 16th of February 1885.

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that he has sustained, by the act he complains of, some injury which materially affects his position. *Lala Biswambhar Lal* v. *Rajaram* (1) applied in principle ; *Shamnagar Jute Factory Co.* v. *Ram Narain Chatterjee* (2) approved. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order of that nature.

[**F.**, 30 C. 901 (903) ; **Ap.**, 11 C.L.J. 189=5 Ind. Cas. 171 (173) ; **Appr.**, 9 A. 661 (665) ; **R.**, 4 C.W.N. 788 (789) ; 91 P.R. 1901=113 P.L.R. 1901 ; 7 O.C. 336 (337) ; 4 C.L.J. 198 (205) ; 15 C.W.N. 188 (190)=7 Ind. Cas. 124 (126).]

THE plaintiff brought this suit to have his right declared to the half share of 2 kanis 9 gundas of land in three plots, which he alleged to be held jointly by himself and the defendant, and for an order directing the defendant to fill up a tank excavated thereon by the defendant, and to bring the land into its former state.

Several defences were raised, the only contention material to this report being that the land was not the joint property of the plaintiff and defendant, but had been allotted to the defendant on a partition, and that the defendant had excavated the tank with the plaintiff's consent, and without any opposition on his part.

Both the lower Courts found that the land was the joint property of the parties, and that the tank had been excavated without the consent of the plaintiff.

The Court of first instance in its judgment said: "I find it as a fact in this case that the plaintiff did take reasonable steps in time to prevent the excavation of the tank in dispute in this [237] case. The plaintiff did tell the defendant not to excavate the tank on the joint property, and he did tell the defendant when the tank was commenced to be excavated. The question is, is the Court, under the circumstances of this suit, warranted in exercising its discretion to interfere and direct the filling up of the tank? The land on the eastern portion of the plot No. 2, whereon the tank has been excavated, was not fit for cultivation ; there was an excavation on the east of the plot No. 2, but the portions of the plots Nos. 1 and 3, whereon part of the tank has been excavated, were fit for cultivation. The defendant has, by causing the tank to be excavated, taken in a manner exclusive possession of the space whereon the tank has been excavated. The plaintiff will not be able to gain any income out of the tank."

The Court of the first instance decreed the suit, and ordered that the plaintiff do recover joint possession of the land ; and that the defendant should, within four months, fill up the tank and bring the land to its former condition.

On appeal by the defendant this decree was confirmed.

The defendant appealed to the High Court.

Baboo *Rashbehari Ghose*, for the appellant.

Baboo *Trilockya Nath Mitter*, for the respondent.

The following cases were cited in argument: *Gurudas Dhar* v. *Bijoy Gobind Bural* (3); *Lala Biswambhar Lal* v. *Rajaram* (1) ; *Holloway* v. *Mahomed Ali* (4); *Sheo Persad Singh* v. *Leela Singh* (5); *Stalkartt* v. *Gopal Panday* (6) ; *Massim Mollah* v. *Panjoo Ghoramee* (7) ; *Tarinee Churn Bose* v. *Ramjee Paul* (8) ; *Mohima Chunder Ghose* v. *Madhub*

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(1) 3 B.L.R. App. 67. (2) 14 C. 189.
(3) 1 B.L.R.A.C. 108=10 W.R. 171. (4) 16 W.R. 140=12 B.L.R. 191 note.
(5) 12 B.L.R. 188. (6) 12 B.L.R. 197. (7) 21 W.R. 373.
(8) 23 W.R. 298.

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Chunder Nag (1); *Gokool Kissen Sen* v. *Issur Chunder Roy* (2); *Dwarka Nath Bhooyea* v. *Gopee Nath Bhooyea* (3); *Sreechand* v. *Nimchand Sahoo* (4); *Crowdy* v. *Inder Roy* (5); *Rajendro* [238] *Gossami* v. *Shama Churn Lahuri* (6); *Noyna Misser* v. *Rufikun* (7); *Nocury Lall Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (8); and *Shamnagar Jute Factory Co.* v. *Ram Narain Chatterjee* (9).

The judgment of the Court (PRINSEP and AGNEW, JJ.) was as follows:—

JUDGMENT.

The parties to this suit are joint proprietors in some land. The defendant, in spite of the protest of the plaintiff, has dug a tank in a portion thereof. The plaintiff now sues to have his title declared in the land so occupied, and he asks for an order directing the defendant to fill up the tank that has been dug, so as to restore the land to its former condition.

The plaintiff has obtained a decree in both the lower Courts.

It has been contended before us, as it has been found by the lower Courts, that the conduct of the defendant in proceeding to excavate the tank in spite of the protest in itself justifies the order passed. The learned pleaders who have argued this case with great care have cited a great number of cases bearing on the subject commencing from *Gurudas Dhar* v. *Bijoy Gobind Bural* (10); and *Lala Biswambhar Lal* v. *Rajaram* (11); down to that of *Nocury Lal Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (8). We are also referred to a case recently decided by Wilson and Porter, JJ. (Second Appeal 1164 of 1885), on the 20th of April last, *Shamnagar Jute Factory Co.* v. *Ram Narain Chatterjee* (9), in which the cases cited before us were also considered. We fully adopt the opinion expressed by the learned Judges in that case. The result of the cases cited before us seems to be in accordance with the principle laid down by Sir Barnes Peacock in the case of *Lala Biswambhar Lal* v. *Rajaram* (11), which is to the effect that before the Court will proceed in the manner asked by the plaintiff in this case, he must show that he has sustained some injury by the act complained of. We understand the term "injury" to mean something substantial, something that materially affects the position of the parties. In the present case, the first Court describes the [239] injury caused to the plaintiff in the following terms: "The land on the eastern portion of plot No. 2, whereon the tank has been excavated, was not fit for cultivation. There was an excavation on the east of the plot No. 2, but the portions of the plots Nos. 1 and 3, whereon part of the tank has been excavated, were fit for cultivation. The defendant has by causing the tank to be excavated taken in a manner exclusive possession of the space whereon the tank has been excavated. The plaintiff will not be able to gain any income out of the tank." The lower appellate Court expresses no opinion on this point, but we may take it that it was not disputed by the defendant, and that it correctly represents the result of the excavation of the tank. The fact found that a portion of the land on which the tank was excavated was fit for cultivation does not, in our opinion, properly describe any injury of a substantial nature to the plaintiff, such as would justify the order of the lower Courts, in putting the

(1) 24 W.R. 80. (2) 18 W.R. 12. (3) 12 B.L.R. 189 note.
(4) 5 B.L.R. Ap. 25=13 W.R. 337 note. (5) 18 W.R. 408.
(6) 5 C. 188. (7) 9 C. 609. (8) 8 C. 708.
(9) 14 C. 189. (10) 1 B.L.R.A.C. 108=10 W.R. 171
(11) 3 B.L.R. App. 67.

defendant to the expense of re-filling the tank. The proper remedy in the present case seems to be for the parties to partition the land so as to hold exclusively that which represents their respective shares. With regard to the ground on which the lower Courts gave the plaintiff a decree, and which has been pressed on us in this Court, we would refer to the judgment of Mr. Justice Wilson in *Shamnagar Jute Factory Co.*, v. *Ram Narain* (1), in which he says: "But we are not aware of any decision which establishes the broad principle contended for by the plaintiff that one co-owner is entitled to an injunction restraining another from exercising his rights absolutely, and without reference to the amount of damages to be sustained by the one or the other from the granting or withholding of the injunction;" and the same principle would apply to the case now before us in which the Court is asked to compel the defendant to undo the effect of an act committed by him without the consent of the co-owner. Under such circumstances we think that the order of the lower Courts should be set aside and the suit dismissed with costs in all the Courts.

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J. V. W. *Appeal allowed.*

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14 C. 240.

[240] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Agnew.

ABDUL HUQ MOZOOMDAR AND ANOTHER (*Objectors*) v. MOHINI MOHUN SHAHA AND ANOTHER, MINORS, BY THEIR MOTHER AND GUARDIAN SURBOJOYA (*Decree-Holders*) AND ANOTHER (*Auction-Purchaser*).* [2nd December, 1886.]

Civil Procedure Code, s. 311—"*Any person whose immoveable property has been sold,*" *Interpretation of.*

The words "any person whose immoveable property has been sold," in s. 311, are sufficiently wide to include a person who is neither the decree-holder, nor the judgment-debtor, nor the auction-purchaser, but who alleges that the property sold in execution is his.

[**Overruled,** 15 C. 488 (**F.B.**); **F.,** 12 A. 440 (**F.B.**) = 10 A. W. N. 103; **R.,** 19 M. 167 (168); 23 B. 450 (452).]

IN execution of a decree obtained by Pyari Mohun Podder against Rahaman Bibi and others, certain immoveable property alleged to belong to the judgment-debtors was sold and purchased by Haran Chunder Ghose. Before the sale was confirmed, the appellants Abdul Huq Mozoomdar and another objected to it on the ground that the property sold was theirs, and was in their possession at the time of the attachment and sale, and they applied under s. 311 of the Civil Procedure Code to have the sale set aside. The decree-holders and the auction-purchaser opposed the application. The Subordinate Judge was of opinion that, upon the facts disclosed in their application, the objectors could not be said to have sustained any injury by reason of any material irregularity in publishing or conducting the sale, which is the only ground on which a sale could be set aside under s. 311, as their right and title to the property, if their case was true, would be wholly unaffected by it; and he dismissed the application,

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* Appeal from Order, No. 306 of 1886, against the order of Baboo Kedaressur Roy, Rai Bahadur, Second Subordinate Judge of Burrisal, dated the 29th of May 1886.

(1) 14 C. 189.

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adding that, if the objectors were dispossessed by the auction-purchaser, they might come in under s. 335 of the Code.

The objectors appealed.

Baboo *Chunder Cant Sen*, for the appellants.

Baboo *Rashbehari Ghose* and Baboo *Baikant Nath Doss*, for the respondents.

[241] The following cases were referred to in argument.—*Bhagabuti Churn Bhattacharjee* v. *Bisheswar Sen* (1) and *Panye Chunder Sircar* v. *Hurchander Chowdhry* (2).

The judgment of the High Court (PRINSEP and AGNEW, JJ.) was as follows:—

JUDGMENT.

The question raised in this appeal is whether the appellants, who claim to hold the property which has been sold in execution of a decree against a third party, are entitled to object to the sale in execution of that decree under s. 311 of the Code. Section 311 allows the decree-holder, "or any person whose immoveable property has been sold," in execution of decree, to make such an objection. The appellants allege that their immoveable property, held under a title created by a *tumlik-nama*, has been sold. The Subordinate Judge has refused the application, stating that the applicants can object under s. 335 of the Code when the auction-purchaser attempts to take possession. They may have this remedy, but the question is whether they cannot also object within the terms of s. 311. We are of opinion that the words, "any person whose immoveable property has been sold," are sufficiently wide to include a person in the position of the appellants. We accordingly direct that the Subordinate Judge do proceed to hear the objections raised as provided by s. 311.

The costs will abide the result.

K. M. C. *Case remanded.*

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14 C. 241.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

RUDRA PERKASH MISSER AND ANOTHER (*Defendants*) *v.* KRISHNA MOHUN GHATUCK (*Plaintiff*).* [26th November, 1886.]

Transfer of Property Act, s. 6, cl. (d)—Property—Actionable claim—Transferable Claim—Civil Procedure Code, s. 266—Execution of decree—Attachment.

Under the Transfer of Property Act, property includes an actionable claim.

There was sold in execution of a decree the judgment-debtor's right to get by division a quantity of land which had been reserved by him [242] for his own use in a deed of gift; but which, at the time of the execution sale, was in the possession of the donee of the estate, the land never having been appropriated by measurement as provided in the deed. In a suit brought by the auction-purchaser, decree-holder for the area of the land reserved, by measurement and division: *Held*, that the claim of the judgment-debtor to the land was a transferable claim, and therefore capable of being attached and sold in execution under s. 266 of the Civil Procedure Code.

[R., 16 A. 315 (317) (F.B.)]

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* Appeal from Original Decree No. 71 of 1886, against the decree of Baboo Dwarka Nath Mitter, Rai Bahadur, Second Subordinate Judge of Bhagalpore, dated the 28th of December, 1885.

(1) 8 C. 367. (2) 10 C. 496.

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Shib Perkash Misser, the father of a Mitakshara family, by a deed of the 30th July 1883, made a gift of the entire ancestral estate to his minor son, Rudra Perkash, with the exception of 150 bighas of land which he reserved for himelf by a clause in the deed in these terms: "Bighas 150 by measurement in Mouzah Phulbaria or any other mouzah shall remain in my possession for *zerat* (cultivation); the measurement and demarcation shall be made as soon as possible, and the said land should remain in my possession without payment of any rent for cultivation." By an order of the District Judge under s. 12 of Act XL of 1858, the Collector took charge of the estate on behalf of the minor. The 150 bighas of land, however, were neither marked out nor appropriated by the grantor under the provision contained in the deed of gift. On the 19th October 1882, Krishna Mohun Ghatuck brought a suit against Shib Perkash for the recovery of a sum of Rs. 5,000 due on a rukka, and in execution of his decree for the amount purchased "the judgment-debtor's right to get by division or separation 150 bighas of land by measurement in Mouzah Phulbaria or in any other mouzah within the jurisdiction of the Sub-Registrar of Tegra for the purpose of cultivation," and obtained the sale certificate on the 28th March 1884; but having failed to get possession of the land from the Court of Wards, he brought a suit for that purpose on the 24th November 1884. For the defence it was contended that the suit was not maintainable, inasmuch as the agreement to give 150 bighas of land in Phulbaria or other village was void by reason of uncertainty under s. 29 of the Contract Act; that s. 21, cl. (*c*) of the Specific Relief Act stood in the way of its enforcement; and that the right to the land was one which, having regard to the provisions of s. 6, cl. (*d*) of the Transfer of Property Act, did not fall within the meaning of property which could be [**243**] attached and sold under s. 266 of the Civil Procedure Code. The Subordinate Judge was of opinion that the land, though not ascertained, was ascertainable, and that what was sold was not merely a contingent or possible right or interest, but a tangible right of which Shib Perkash was the owner, his property in the 150 bighas remaining untouched by the deed of gift. He accordingly decreed the plaintiff's claim, leaving the question open as to the subsequent devolution of the land in dispute on the death of the judgment-debtor.

On appeal to the High Court similar objections were taken.

Baboo *Golap Chunder Sircar*, Baboo *Saligram Singh* and Baboo *Kishori Lall Gosswami*, for the appellants.

Baboo *Sree Nath Das* and Baboo *Jogesh Chunder Dey*, for the respondent.

The judgment of the Court (Wilson and O'Kinealy, JJ.) was as follows:—

JUDGMENT.

It appears in this case that a person of the name of Shib Perkash Misser, in the year 1873, executed a deed of gift in favour of the first defendant, who was then his only minor son, with a reservation of certain benefits in favour of any afterborn son. The second defendant is a son who was afterwards born. The grantor retained for himself an interest in these terms: "From this date the guardian and manager for the time being shall pay me a monthly allowance of Rs. 400 for my maintenance and necessary expenses out of the profits of the gifted property, and besides that 150 bighas of land of Mouzah Phulbaria or any other mouzah, shall, on measurement, be held by me for the purpose of cultivation, and

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the measurement and *thakbust* (fixing boundaries) of the same shall be made as soon as possible, and such land shall be held and cultivated by me free of all rents."

Some years after the execution of this deed of gift, the present plaintiff obtained a decree against the grantor, Shib Perkash Misser. He proceeded to execute his decree, and himself became the purchaser at the execution sale. What he purchased appears from the sale-certificate, dated the 7th January 1884: It was "the judgment-debtor's right to get by division or separation [244] 150 bighas of land by measurement in Mouzah Phulbaria, or in any other mouzah within the jurisdiction of the Sub-Registrar of Tegra for the purpose of cultivation."

The plaintiff having purchased that interest brought this suit with a view to obtain the benefit of the clause in the deed of gift about 150 bighas: in other words, to have 150 bighas assigned to him.

It does not appear that at any time there was any real answer to the claim on the merits. The controversy appears to have been whether the plaintiff might not be induced to make, or compelled to submit to, some declaration as to the duration of his title to the land to which he was entitled, the doubt being whether he should hold the land only for the life of Shib Perkash Misser, or on a larger title. That question obviously does not arise now, and may very likely not arise for years, and possibly may not arise at all. However, the suit was defended, and the plaintiff obtained a decree, and this appeal has been filed before us. The only real point suggested before us is that the interest of Shib Perkash Misser in 150 bighas under the deed was not such an interest as could be attached and sold in execution of a decree. Section 266 of the Civil Procedure Code describes what property is liable to attachment and sale in execution, and after mentioning a variety of matters, it says that, "except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he had a disposing power which he may exercise for his own benefit, &c." Therefore any interest which is saleable is attachable and subject to sale in execution. It is perfectly clear from the terms of the Transfer of Property Act that the interest in question is saleable. Under s. 6 of that Act, "property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force." The framers of that section clearly considered that property includes an actionable claim, because cl. (*c*) of that section says: "A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred." Besides this there is a whole chapter in the [245] Act, Chapter VIII, dealing with the subject of such claims, thereby placing it beyond doubt that a claim such as this is a transferable claim, and therefore capable of being attached and sold in execution within the meaning of s. 266 of the Code of Civil Procedure.

Moreover the remedy sought in this suit is a proper one. It is really a suit for specific performance of the condition in the agreement about 150 bighas. Section 23 of the Specific Relief Act says: "Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by (*a*) any party thereto; (*b*) the representative in interest, or the principal, of any party thereto." The plaintiff is the representative in interest of the original holder of the interest in 150 bighas. Therefore this suit was a proper suit. The appeal is dismissed with costs.

K. M. C. *Appeal dismissed.*

14 C. 245.

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ORIGINAL CRIMINAL.

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ORIGINAL CRIMINAL.

Before Mr. Justice Trevelyan.

EMPRESS OF INDIA v. KALIPROSONNO DOSS AND OTHERS.
[26th January and 2nd February, 1886.]

Practice—Evidence—Prosecutor's right of reply—Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X of 1882), *ss.* 289, 540.

The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. *The Queen-Empress* v. *Grees Chunder Banerjee* (1) followed.

In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court would not call a witness on whose evidence it could not put implicit reliance.

[**Diss.**, 11 M. 339=2 Weir 381; 14 A. 212=12 A.W.N. 63; **Appr.**, 14 A. 521=12 A.W.N. 110; **F.**, 17 C. 930; **R.**, 16 A. 84 (**F.B.**).]

THE prisoners in this case were charged with cheating and abetment of cheating under ss. 420, and 109 and 420 of the Indian Penal Code.

The charges were brought at the instance of one Shoshee Bhusan Bose upon the allegation that he had been induced to pay the prisoners a sum of Rs. 3,850, and to give them to [**246**] promissory notes for Rs. 1,150 and a cheque for Rs. 300, upon the statement that he would be employed as the manager of their jute business at Naraingunge and Serajgunge.

The Standing Counsel (Mr. *Phillips*) and Mr. *Dunne*, for the prosecution.

Mr. *M. P. Gasper* and Mr. *K. N. Mitter*, for Kaliprosonno Doss and another.

Mr. *Henderson*, Mr. *A. F. M. Abdur Rahman* and Mr. *Panioty*, for the other prisoners.

During the cross-examination of the complainant Shoshee Bhusan Bose by Mr. *Henderson*, counsel put into the witness's hands a Thanna book containing an entry of the charge against some of the accused, which had been made at the Thanna by the complainant, and which entry purported to be signed by the complainant, and sought to prove the signature of the complainant, and to put in the entry as evidence for the defence. Before doing so, however, Mr. Henderson asked for a ruling of the Court as to whether by putting in documentary evidence during the cross-examination of the witnesses for the Crown, the prosecution thereby would be entitled to the right of reply after he had addressed the jury. He referred to the decision in the case of *The Queen-Empress* v. *Grees Chunder Banerjee* (1) as an authority that the prosecution would not be entitled to reply, and relied on the provisions of s. 289 of the Criminal Procedure Code.

Mr. *Dunne* contended that the prosecution would be entitled to reply and stated that the decision of Mr. Justice Field relied on by Mr. Henderson had not been invariably followed, and referred to an unreported case in which Mr. Justice Norris had ruled the other way.

(1) 10 C. 1024.

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RULING.

TREVELYAN, J.—It seems to me that, having regard to the provisions of s. 289 of the Criminal Procedure Code, the putting in of documentary evidence by an accused during the hearing of the evidence of the prosecution, before he is asked whether he intends to call any evidence, does not give a right of reply to the Crown. I am referred to the decisions of [247] Mr. Justice Field in the case of *The Queen-Empress* v. *Grees Chunder Banerjee* (1), and of Mr. Justice Norris in a case which has not been reported. The reasons for the latter decision do not appear, and I prefer to follow the decision of Mr. Justice Field above referred to, and I therefore hold that by putting in this document the accused does not give the Crown the right of reply.

After Mr. Phillips had examined a number of witnesses for the prosecution, and tendered others for cross-examination, who had been called before the Magistrate, he closed the case for the prosecution without calling Brahmo Pershad Singh, an Inspector of Police, or tendering him for cross-examination. Brahmo Pershad Singh was the Inspector of the Sukhea Street Thanna, where the original charge had been laid by the complainant, and he had been called as a witness for the prosecution before the Magistrate.

Mr. *Gasper* thereupon contended that the prosecution were bound to tender Brahmo Pershad Singh for cross-examination, or that the Court should call him so as to give the prisoners an opportunity of cross-examining him, and he referred to the case of *In the matter of The Empress* v. *Grish Chunder Talukdar* (2) as an authority in support of his contention, and also to Roscoe's Criminal Evidence, 9th Ed., p. 138. He submitted that at all events the witness should be called by the Court.

Mr. *Henderson* referred to s. 540 of the Criminal Procedure Code, and contended that it was clear that he was a witness of the class referred to in that section, as his evidence was essential to the just decision of the case. He also referred to the cases of *R.* v. *Simmonds* (3) and *R.* v. *Bodle* (4).

Mr. *Phillips contra.*—The prosecution are not bound to call any witness or to tender a witness called before the Magistrate for cross-examination. All that they are bound to do is to have such witnesses in attendance, so that the defence can call them if they like. The prosecution cannot be forced to put forward a witness on whose evidence no reliance can be placed.

RULING.

[248] TREVELYAN, J. (after taking time to consider the question)—I have been asked by Mr. Gasper to call Brahmo Pershad Singh as a witness so as to give the defence an opportunity of cross-examining him. Brahmo Pershad Singh was the Inspector of the Sukhea Street Thanna and was called as a witness at the Police Court. I have been referred by Mr. Henderson to the provisions of s. 540 of the Criminal Procedure Code and to two English decisions on the subject. In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, I think I should call him, but I certainly should not call any witness on whose evidence I could not

(1) 10 C. 1024. (2) 5 C. 614. (3) 1 C. & P. 84. (4) 6 C. & P. 186.

place reliance, at any rate in a case in which the prisoner is defended by counsel. 1886 FEB. 2, — ORIGINAL CRIMINAL. — 14 C. 245.

I have again read over the deposition of Brahmo Pershad Singh before the Police Magistrate, and I do not think I could put implicit reliance on his evidence. I therefore decline to call him. I do not think that the prosecution is bound to tender him for cross-examination or do more than have him present in Court for the accused to call him or not as they may think fit.

H. T. H.

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14 C. 248.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

BAIJANATH SINGH (*Plaintiff*) v. SHAH ALI HOSSAIN (*Defendant*).*
[11th December, 1886.]

Interest—Penal clause in contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act (IX of 1872), *s.* 74*—Act XXVIII of* 1855, *s.* 2.

In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. *per mensem*, but that if the loan were not repaid on the date named the principal was to bear interest at the rate of 4 per cent. *per mensem* from the date of the loan:

[**249**] *Held*, on the authority of the decision in *Balkishen Das* v. *Run Bahadur Singh* (1), that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate from the date of the bond, and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date fixed for the repayment of the loan, s. 74 of the Contract Act was not applicable, *Mackintosh* v. *Crow* (2) upon this point dissented from.

The decision in the case of *Balkishen Das* v. *Run Bahadur Singh* (1) overrules the decision in the case of *Muthura Persad Singh* v. *Luggung Koer* (3), and all similar cases cited in *Mackintosh* v. *Crow* (2), which held that the stipulation for the payment of a higher rate of interest in the event of the non-poyment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty.

[**Overruled.**, 19 C. 392 (**F.B.**); **Diss.**, 12 M. 161; **Cons.**, 17 B. 106 (**F.B.**); 15 A. 232 (**F.B.**); **R.**, 14 B. 274; 3 C.P.L.R. 48 (52); 4 C.P.L.R. 167 (168); 22 C. 143 (153); 3 O.C. 168 (169); 36 M. 229 (262) = 24 M.L.J. 135 = 13 M.L.T. 20 (22) = 18 Ind. Cas. 417 (434); **D.**, 14 B. 200.]

THE plaintiff brought this suit to recover Rs. 1,000 as principal and Rs. 1,149-5-5 as interest due under a bond executed by the defendant in favour of his ancestor on the 14th December, 1881, the interest being calculated upon the principal from that date to the date of suit at the rate of 4 per cent. per mensem. The bond stipulated that the money was to be repaid on the 14th of December, 1883, and it was not disputed that payment was not made in accordance with that stipulation. The suit was brought on the 6th of May, 1884. The agreement as to the interest

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*Appeal from Appellate Decree, No. 1101, of 1886, against the decree of T. M. Kirkwood, Esq., Judge of Patna, dated the 20th of February 1886, modifying the decree of Moulvi Mahomed Nural Hosain, Khan Bahadur, Subordinate Judge of that District, dated the 27th of June 1884.

(1) 10 C. 305. (2) 9 C. 689. (3) 9 C. 615.

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in the bond was that the loan was to bear interest at the rate of 2 per cent. per mensem. It then went on to provide that, if the money were not repaid on the date mentioned above, that is, on the 14th of December, 1883, the principal should bear interest at the rate of 4 per cent. per mensem from the date of the loan, namely, the 14th December, 1881. The defendant, amongst other pleas taken in defence, contended that the stipulation, regarding the payment of interest at the higher rate, was in the nature of a penalty, and that he was entitled to be relieved from its full operation being enforced against him. The Subordinate Judge over-ruled that plea, and held that he was bound by the contract. He accordingly decreed the suit for the full amount claimed in the plaint. On appeal by the defendant the District Judge, relying upon the decision in the case of [250] *Mathura Persad Singh* v. *Luggun Koer* (1), and referring to other rulings by the Allahabad High Court to the same effect, held that the stipulation for the payment of interest at the rate of 4 per cent. per mensem should be treated as being in the nature of a penalty so far as the period, which elapsed from the date of the bond to the date fixed for repayment, was concerned. He accordingly modified the decree of the lower Court, and allowed the plaintiff interest at the rate of 2 per cent. per mensem for that period, and at the rate of 4 per cent. per mensem for the remaining period.

Against the decree the plaintiff now preferred this second appeal to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Nilkant Sahoy*, for the appellant.

Moulvie *Mahomed Yusoof*, for the respondent.

Baboo *Mohesh Chunder Chowdhry* contended that the decision of the lower Court was wrong, and that the provision as to the payment of the increased rate of interest in the event of the non-payment of the amount on the due date was not in the nature of a penalty, and therefore governed by s. 74 of the Contract Act, but was a perfectly valid agreement which fell within the provisions of s. 2 Act XXVIII of 1855. He also contended that the present case was governed by the decision of the Privy Council in the case of *Balkishen Das* v. *Run Bahadur Singh* (2).

Moulvie *Mahomed Yusoof*, for the respondent, contended that the case was governed by s. 74 of the Contract Act, inasmuch as the sum payable under the bond, in the event of a breach, was easily ascertainable by a mere mathematical calculation, and was therefore a sum "named" and in the nature of a penalty, and that the lower Court should have gone further than it had done, and held that the stipulation as to the increased rate of interest was of a penal nature even after the due date of the bond. He also contended that the case of *Balkishen Das* v. *Run Bahadur Singh* (2) was not in point, because there the solehnama was the basis of a decree, and the rule with reference [251] to penalties does not apply to the directions contained in decrees. He also cited and relied on the following cases: *Mazhar Ali Khan* v. *Sardar Mal* (3); *Bansidhar* v. *Bu Ali Khan* (4); *Behary Lall Doss* v. *Tej Narain* (5); and *Sungut Lal* v. *Baijnath Roy* (6).

The following judgments were delivered by the Court (Mitter and Macpherson, JJ.):—

(1) 9 C. 615. (2) 10 C. 305. (3) 2 A. 769.
(4) 3 A. 260. (5) 10 C. 764. (6) 13 C. 164.

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APPELLATE CIVIL.

14 C. 248.

JUDGMENTS.

MITTER, J. (after stating the facts set out above continued).—The plaintiff has preferred this second appeal, and it is contended before us that the decision of the lower appellate Court is contrary to law. The decision upon which the lower appellate Court specially relies is that in the case of *Muthura Persad Singh* v. *Luggun Kooer* (1). There the stipulation in the bond was that, in case of default of payment of the principal sum with interest at the rate of one per cent. per mensem on a certain date, interest should be paid at the rate of two per cent. per mensem from the date of the bond. Mr. Justice Wilson, in delivering the judgment of the Court, refers to certain cases apparently taking a contrary view, but he distinguished them from the case before him in the following way: "The former of these cases probably dealt with a document executed before the Contract Act, but however that may be, such cases differ materially from the present. In them the agreement to pay an increased rate of interest from a future day may will be regarded as a substantive part of the contract, not as a penalty for its breach; but where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act." He has more fully explained this view in a later case, namely, *Mackintosh* v. *Crow* (2). He says in the decision in that case: "Two rules of law are established by the Legislature of this country:

"*First*, that a man is free to contract to pay any rate of interest that he chooses upon money borrowed, and the Courts must enforce it against him (Act XXVIII of 1855, s. 2), and [252] there is nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now and a higher or lower rate hereafter."

"*Secondly*.—By s. 74 of the Contract Act, 'when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not actual damage is proved to have been caused thereby, to receive from the party who has broken the contract, reasonable compensation not exceeding the amount so named."

"This section, it will be observed, does away with the distinction between a penalty and liquidated damages; and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages."

Then he considers the question as to whether the particular case before him fell within the first or the second of the above-mentioned two rules. In the case before him the stipulation as to the payment of interest was that, in case of default, the higher rate of interest would be paid from the date of the default and not from the date of the bond. He comes to the conclusion that, where the higher rate is stipulated to be paid from date of default as in the case before him, the provisions of s. 2, Act XXVIII of 1855, would apply, but where the higher rate is, under the terms of the contract, payable from the commencement of the loan in

(1) 9 C. 615. (2) 9 C. 689.

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the event of the principal being not paid on the date agreed upon, the provision of s. 74 of the Contract Act would apply. Referring to a variety of cases, all set out in his judgment, he says that: "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where as here, the contract is merely that if the [253] money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, or, as the case may be, for a new consideration. And, in my opinion, the case falls under the first rule of law above mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (1)."

It seems to me, with deference to his opinion, that whether the interest in the case of non-payment of the principal on the date fixed in the contract is payable from the commencement of the loan, or from the date fixed for the repayment of the loan, s. 74 of the Contract Act has no application. That section says: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named." In either of the cases mentioned above no amount is *named* in the contract as the amount to be paid in case of breach. It is true that on the date when the breach took place, the amount that under the contract would be due on that date to the creditor could be ascertained by arithmetical calculation, but that is not a case where it can be said that that amount is named in the contract as the amount to be paid in case of a breach. Then, again, the amount which may be ascertained by such calculations is not the whole amount which is named in the contract as the amount to be paid in case of a breach, even if it be conceded that the use of the word "*named*" does not make any difference. The whole amount which, in consequence of the breach, would be payable to the creditor cannot be precisely ascertained on the date of the breach even by arithmetical calculation, because the breach continues so long as the money [254] is not repaid after due date, and, therefore, to use the language used in the judgment of Mr. Justice Wilson, "no one can say at the time of the breach what the sum will be." One or two illustrations will help to throw considerable light on the question, whether a case of this description falls under s. 74 of the Contract Act. Suppose a loan is advanced on the condition that it is to be repaid on demand; that interest at a *certain* rate is to be paid upon the amount borrowed if it be paid within a certain time; but if not paid within that time but paid within another fixed time, interest is to be paid at a certain other rate, and that if, again, the money borrowed with interest be not repaid within the last mentioned time, the principal should carry interest at a certain other rate; suppose no demand is made for the payment of the money till all these dates expire, certainly it could not be said that a case of this description would fall under

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(1) 2 C. 2.

s. 74, because no amount would be named here as payable in case of a *breach* as the higher rate of interest became payable before the demand and therefore before the date of breach. Suppose, again as it was the case in *Arjan Bibi* v. *Asgar Ali Chowdhuri* (1), no interest is chargeable under the contract for a certain time, and that if the money be not paid within that time interest would be payable at a certain stipulated rate from the commencement of the loan. Here also the case cannot fall under s. 74 of the Contract Act. It seems to me, therefore, that in both classes of cases mentioned in the judgment of Wilson, J., s. 74 of the Contract Act is not applicable. The law that is applicable is contained in s. 2, Act XXVIII of 1855, which says: "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." In the case before us the rate agreed upon by the parties is 24 per cent. under one set of circumstances, and double that rate under another set of circumstances. It is not a case of any sum being payable in case of a breach of the contract, but the stipulation amounts to this that two different rates of interest are payable for the loan under two different sets of circumstances. The decision of the Judicial Committee of the Privy Council in the case of *Balkishen Das* [255] v. *Run Bahadur Singh* (2) fully supports the view we take. In that case the defendant executed in favour of the plaintiff a solehnama, upon the basis of which a decree was passed. The solehnama stipulated for the payment of a debt due from the defendant to the plaintiff by instalments, and it provided that the plaintiff should get interest on the decretal money at the rate of 6 per cent. per mensem from the defendant. Then it further provided that, if the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree-holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of the solehnama. The date of the solehnama was the 29th March 1873, corresponding with the month of Choitro 1280. Therefore it is clear that the stipulation in the solehnama was that, in case of non-payment of the first instalment on the due date, that is, on the 30th Bhadon 1281 Fusli, interest at the rate of 12 per cent. per annum was to be paid from the date of solehnama, that is from Choitro 1280. The rate otherwise agreed upon to be paid was 6 per cent. per annum. The High Court had held, with reference to this provision, that the double rate of interest was in the nature of a penalty. Their Lordships of the Judicial Committee, with reference to this decision, say: "Independently of the fact that no appeal was preferred against that decision, their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnama was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others." Then further on they say: "It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere stipulation of interest at 12 instead of 6 per cent. per annum in a given state of circumstances." It seems, therefore, that the case cited by the lower

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(1) 13 C. 200. (2) 10 C. 305.

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[256] Appellate Court and all the other similar cases cited in the judgment of Mr. Justice Wilson, in the case of *Mackintosh* v. *Crow* (1), ruling that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty, have been overruled by their Lordships of the Judicial Committee in the case cited above.

The decree of the lower Appellate Court will, therefore, be reversed, and that of the Court of first instance restored with costs in all the Courts.

MACPHERSON, J.—I think we are bound to follow the view taken by the Privy Council in the case referred to, and which practically overrules the decisions of this Court to which reference is made. I concur, therefore, in reversing the decree of the lower Appellate Court.

H. T. H. *Appeal allowed.*

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14 C. 256.

ORIGINAL CIVIL.

Before Mr. Justice Mitter and Mr. Justice Trevelyan.

DOYA NARAIN TEWARY (*Plaintiff*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).*

[8th September, 1886.]

Jurisdiction—Letters Patent, 1865, *s.* 12—*Carrying on business and personally working for gain—Secretary of State—Cause of Action—Limitation—Acknowledgment—Statute* 21 *and* 22 *Vic.*, *c.* 106, *s.* 65—*Limitation Act* (*XV of* 1877), *ss.* 19, 20.

Section 65 of 21 & 22 Vic., c. 106, does not constitute the Secretary of State a body corporate, but simply lays down that that officer and department are to be sued *as* a body corporate. A suit, therefore, brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by s. 65.

The words "cause of action" in s. 12 of the Letters Patent, 1865, mean all those things necessary to give a right of action; and in a suit for breach of contract, where leave has not been obtained to sue under that section, it must be established that the contract as well as the breach have taken place within the local limits of the Court.

[257] The work carried on by the Government of India in governing the country, in salt, opium &c., although carried on by Government officers in charge of the several departments of Government, is not, properly speaking, business carried on by Government, but work carried on for the benefit of the Indian Exchequer. The words of s. 12 "carry on business or personally work for gain" are, however, inapplicable to the Secretary of State for India in Council.

The plaintiff, a purchasing agent, sued the Secretary of State for India in Council to recover certain sums of money alleged to be due to him for the purchase of stores, etc., for the Second Cabul Campaign. This suit was brought more than three years after the termination of the plaintiff's agency and more than three years after the last supply made by him as purchasing agent, but, within a few months after the final refusal of the Commissariat Department to pay him the amount claimed; *held* that it was doubtful if art. 61 of the second schedule of the Limitation Act would apply, as against the Secretary of State for India in Council but even if not, the suit was barred by art. 115.

[**Diss.**, 16 C.W.N. 747=15 Ind. Cas. 955; **F.**, 40 C. 308=21 Ind. Cas 1 (2); **Appr.**, 22 C. 451 (453); **R.**, 11 B. 649 (652); 11 M.L.J. 91 (104); 8 C.W.N. 207=31 C. 274; 29 M. 239 (261)=1 M.L.T 71=16 M.L.J. 238; 6 Bom. L.R. 131; 3 L.B. R. 33 (34) (**F.B.**).]

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* Original Civil Suit No. 211 of 1884.

(1) 9 C. 689.

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The plaintiff in this case, one Doya Narain Tewary, had been appointed and posted at Peshawar, having been engaged at Cawnpore as one of the purchasing agents and gomastahs of the Commissariat Department of the Government of India in connection with the Second Cabul Expedition, on a salary of Rs. 100 per month, his appointment dating from October 1879 to October 1880, both months inclusive. As such purchasing agent and gomastah it was, as he alleged, amongst other things, his duty to make purchases of stores, miscellaneous articles, taut bags, and other things required by the Commissariat Department; to take delivery of all articles purchased by him, and to carry them to the godowns of the Commissariat Department; to remove wheat and barley from such godowns and to cause such wheat and barley to be ground, and to carry the same when ground back to the Commissariat godowns; to make advances of all sums necessary for the above purposes (although admitting that at times the Government had made advances to him for the purpose); to submit the bills to the Director and Paymaster of the department, whose duty it was to examine such bills and to forward the same with his own observations thereon to the Examiner of Commissariat Accounts, by whom the said bills were further checked and passed for such amounts as the said Examiner deemed to be proper; and that any retrenchments made by the latter officer were subject to [258] appeal to the Comptroller of Military Accounts and to further reference to the Government of India, and that any balance in his favour, if any, would not become due until the final adjustment of the bills by the abovementioned officers.

Between the months of October 1879 and October 1880 the plaintiff made various purchases and did various acts falling under the category of the duties set out above, giving Government credit in his accounts for certain payments made, and eventually sending in a bill for the balance of the amount due to him amounting to Rs. 2,52,034-14-5. Correspondence passed between the plaintiff and the officers of the Commissariat Department regarding the payment of this balance, and also between the plaintiff's attorney and the Commissariat officers.

The following are extracts from some of the letters from officers of the Commissariat Department to the plaintiff or his attorney, put in by the plaintiff as tending to show that the account was treated as an open account, and as showing acknowledgment of liability on the part of the defendant, *viz*:—

12*th July* 1881.—" Your bill dated 6th January 1881 is returned for explanation why charges for November 1879 were not submitted until January 1881. As regards your charges for empty bags a statement is sent which shows that the cash, as far as has been ascertained, of 7,777 bags only is due to you."

(Sd.) C. F. Hallett,
Deputy Accountant-General.

13*th July* 1882.—" In reply to your letter, dated 6th July 1882, I have to state as regards meeting your client amicably, I am prepared to entertain any just claims of his for which he can furnish vouchers and authority without your definitely stating the dates and amounts charged on each of the bills referred to......I believe that all claims for which vouchers were furnished have been allowed, and if your client wishes other claims passed to him without proper vouchers he should appeal to higher

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authority, as this office has no power to pass charges unless properly vouched."

(Sd.) C. E. Tatten,
Assistant Commissary-General.

4th August, 1882.—" I request you will direct Doya Narain Tewary to proceed to the office of the Deputy Commissary-General, Lower Circle, and submit to him all the orders received in original, when the Deputy Comptroller-General will personally investigate the entire matter.

(Sd.) W. C. K. Mylne,
Commissary-General.

[259] *12th August*, 1882.—" In reply to your letter, dated 4th August, 1882, I beg to request you will communicate with the officer in charge, Commissariat Field Account Office, Calcutta, who will enquire into and consider your client's claims.

(Sd.) A. W. Montague, Col.,
Assistant Commissary-General.

27th June, 1882.—" Informs him that his bill for taut bags is under reference, and that claim for 508 maunds barley has been disallowed by the Examiner. His other re-charged bills are received and will be taken in hand shortly."

(Sd.) C. E. Hallet,
Deputy Accountant-General.

7th October, 1882.—" With reference to your letter of the 30th September, 1882, I request reference to my letter, dated 4th September, 1882, intimating that had the case been brought to notice of this office earlier it might have been settled, and that now I see nothing for it but to let it stand over till the return from England of Captain Patch in April next."

(Sd.) A. W. Montague,
for Commissary General.

Enclosure contained in letter of the 7th October, 1882, *dated 4th September*, 1882, *from the Commissary-General to plaintiff's attorney.*—" In Captain Patch's absence there are no means of ascertaining how it came to pass that the articles said to have been ordered were not taken over. Lieutenant-Colonel Judge died lately, and therefore it is not possible at present to give orders on the case, as for some of the articles it is shown that verbal orders were alone given. It may be that, owing to delay in delivery, the articles were not received, and the records must be looked into on the office arriving in Calcutta next October to ascertain if any orders were issued cancelling those, copies of which have been submitted to Doya Narain......I see nothing but to let the case stand over till return from England of Captain Patch in April next."

(Sd.) A. W. Montague,
Assistant Commissary General.

20th December, 1882.—" Informs him with reference to his letter of the 9th December, 1882, that the eleven bills of his client Doya Narain Tewary aggregating Rs. 1,11,365-12-4, will after check in this office be submitted for the orders of the Comptroller of Military Accounts."

(Sd.) C. F. Thomas,
Examiner of Commissariat Accounts.

23*rd December*, 1882.—" Is informed with reference to his letter dated 22nd instant, that the claims preferred by Doya Narain Tewary have been submitted to and are now with the Government of India whose instructions in the matter are awaited."

(Sd.) W. T. Chitty,
Comptroller of Military Accounts.

[260] 20*th January* 1883.—" Instructions have just been received from the Government of India, authorizing the payment to Doya Narain Tewary of such sum as the Examiner of Commissariat Accounts is prepared to admit as correct. Any claims which cannot be adjusted at present must, I am to say, be held over until the return from furlough in April next of Deputy Commissary General Captain R. Patch, who was in charge of the Field Department at the time the purchases were made."

(Sd.) W. Chitty,
Comptroller of Military Accounts.

22*nd January* 1883.—" A statement of the amounts " (due to Doya Narain Tewary) " that can now be admitted is under preparation in this office, and will be forwarded to him as soon as the same is complete."

(Sd.) C. F. Thomas,
Examiner of Commissariat Accounts.

8*th February* 1883.—" Has the honour to inform him......that his client's claim to costs of taut bags, &c., has again this day been referred to the Comptroller of Military Accounts, to whom his letter has been sent. On receipt of instructions the matter will be disposed of."

(Sd.) C. F. Thomas,
Examiner of Commissariat Accounts.

15*th February* 1883.—" Has the honour to inform him that the claim for Rs. 36,041-11-3 preferred by his client Doya Narain Tewary on account of taut cloth bags, &c., alleged to have been purchased by him during the late Cabul Expedition will be enquired into on the return from furlough of Captain Patch in April next."

(Sd.) C. F. Thomas,
Examiner of Commissariat Accounts.

6*th March* 1883.—" Has the honour to forward a statement showing the amount that can now be admitted from the claims preferred by his client Doya Narain Tewary. The items in this statement marked B cannot be disposed of for the reason stated against each. His client should furnish the information or vouchers required. The final statement of the remaining items claimed by his client must be held over till the return of Captain Patch from furlough next month."

(Sd.) C. F. Thomas,
Examiner of Commissariat Accounts.

1*st May* 1883.—" With reference to his letters, noted in the margin, has the honour to state that a statement of the unadjusted claim of his client Doya Narain Tewary is under preparation, and will be forwarded to the Deputy Accountant-General with the least possible delay."

(Sd.) C. F. Thomas,
Comptroller of Military Accounts.

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Payment of the amount claimed was refused. The plaintiff therefore brought this suit in the High Court of Calcutta on the [261] 19th April, 1884, against the Secretary of State, on notice under s. 424 of the Civil Procedure Code, not having obtained leave to sue in the High Court under s. 12 of the Charter, to recover the amount due and for an account, stating that his cause of action accrued in January 1884, when the authorities in charge of the Commissariat Department, after a protracted correspondence on both sides, refused to pay the amount claimed, partly at Cawnpore where he was engaged, partly at Peshawar where he supplied goods, and partly in Calcutta where he was refused payment; and as claiming exemption from the effect of the Limitation Act, he stated that the correspondence above referred to contained ample acknowledgments of an open account and of the liability of the Secretary of State, and that on the 23rd January, 1884, the Commissariat Officer had made part payments to him on account of work done by him in his capacity as such agent and gomastah.

The defendant denied that it was part of the plaintiff's duty to advance monies for the purpose of carrying out orders, and alleged that it was the plaintiff's duty to submit daily bills of all purchases made to the Commissariat officers for signature, which were then returned to the gomastahs to be submitted as vouchers in support of their bills when payment was required. That the decision of the Commissariat officer, in regard to amounts disallowed in bills, was final, but that it was the custom to allow agents to submit re-charge bills, so as to give an opportunity to the agents of producing any vouchers or evidence in support of the charges disallowed, which they had failed to produce with the original bills. He further stated that the plaintiff had persistently failed to submit monthly accounts, and stated that payment of all that was justly due to the plaintiff had been made, and alleged that the suit was barred by limitation, and that the Court had no jurisdiction to hear the case.

The suit came on for hearing before two Judges on the Original Side of the Court, when documentary evidence was put in as tending to show what were the duties of the plaintiff and the rules under which he worked, as also the correspondence which passed between the plaintiff or his attorney and the Commissariat officer. The plaintiff also called certain witnesses who proved that [262] the Secretary of State carried on business in Calcutta, and worked for gain there by selling jail produce at the jail depot, by the sale of opium at the Government opium sales held in Calcutta, and the receipt of money therefor, and by charging for advertisements issued in the Gazette of the Government of India, and by taking receipts from the Eastern Bengal State Railway.

It was, however, agreed by counsel on both sides that the two following preliminary issues should first be decided, and that if they were decided in favour of the plaintiff, the question of the examination and of the adjustment of accounts should be referred to an officer of the Court.

Issues: (1) whether or not the Court had jurisdiction to entertain the suit; and (2) whether or not the suit was barred by limitation.

Mr. *Pugh*, Mr. *Gasper*, and Mr. *Stephen*, for the plaintiff.

The *Advocate-General* (Mr. *Paul*) and the *Officiating Standing Counsel* (Mr. *Bonnerjee*), for the defendant.

Mr. *Pugh* contended that the cause of action arose wholly in Calcutta, because the money claimed in the suit was payable at Calcutta; that a cause of action is said to arise wholly in a place where a breach of contract upon which a particular suit is brought takes place; and that if the

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business of governing the country was not considered to be business within the meaning of s. 12 of the Letters Patent, still the Government carried on various trades, *viz.*, in opium, in salt, in printing, and the principal places of business of such trades were located in Calcutta; and cited in support of these points the following cases, *viz.*, on the question of jurisdiction given by the Secretary of State " dwelling and carrying on business at Calcutta."—*Beprodas Dey* v. *Secretary of State for India* (1), a case similar to the present, in which Pigot, J., decided on the 8th June 1885 that the High Court had jurisdiction to entertain the suit. [The judgment of that case, so far as the question of jurisdiction is concerned, will be found in a note* attached hereto,] [263] *Penin-*

(1) Suit No. 357 of 1884.

14 C. 262 N.

**Biprodas Dey* v. *Secretary of State for India in Council.* The plaintiff sued the Secretary of State claiming a sum of Rs. 31,300, alleged to be [263] the balance then remaining unpaid of monies which became due to him in respect of his employment as station gomastha at Quetta during the first Cabul Campaign. Counsel appeared for both parties.

The question of jurisdiction was raised by the defendant, and the following is the judgment on that point given by Pigot, J., on the 8th June 1885, sitting alone on the Original Side of the High Court : " As to jurisdiction, it was contended that the Secretary of State does not carry on business within the limits of the jurisdiction of the Court; and that, therefore, as no part of the cause of action arose here, the suit would not lie, or that, as some part at least of the cause of action arose outside the jurisdiction, and leave has not been obtained under clause 12 of the Charter, the suit would not lie. *Rundle* v. *Secretary of State* (1) was relied on as to this point. Further it was argued on the authority of James, L. J., in *Kinloch* v. *Secretary of State for India* (2), that the Secretary of State is not, in any sense, a person; he is a mere name under which the Government here is to be sued, and cannot, in any sense, be said to dwell or carry on business within the local limits. For the plaintiff it was argued that the observations of Wells, J., in *Rundle's* case relied on by the defendant were in truth *obiter dicta;* that the suit was substantially a suit for land outside the jurisdiction, and must have failed on that ground, and that the observations in question, constituting the greater part of the judgment, do not profess to be more than the opinion of the learned Judge, offered for the guidance of the profession. It was also pointed out that the view expressed in that case has never been followed in any other, although many cases have been since decided in which that view, if acted on, would have been decisive. I think there can be no doubt that, upon the decisions in this Court, that suit was substantially a suit for land within the meaning of cl. 12 of the Letters Patent : see the case of *the Delhi & London Bank* v. *Wordie* (3). Strictly speaking, no doubt, the relief claimed in such cases is relief *in personam* by which rights in respect of land are indirectly secured. But that distinction has not been recognised, and the substantial effect of the suit has been regarded as the test in applying the terms of cl. 12. That, indeed, appears to have been to some extent the view of Wells, J., in *Rundle's* case. See his observations at p. 40.

[264] There is much force in the argument that the part of the judgment in *Rundle's* case which construes the words of cl. 12, was not intended to be more than *obiter dictum;* to be regarded, of course, with the great respect due to the authority of the learned Judge who decided the case, but not necessary for the decision of it.

I own that it seems to me very difficult, if the Secretary of State be, in this country, a legal person in any sense, to hold that he does not carry on business in Calcutta. He enters into contracts, as for instance, in the conduct of the opium business of the Government, institutes suits in respect of breaches of such contracts, and appears as a judgment-creditor in this Court and in the Insolvent Court. The State Railways are held and their affairs conducted in his name, and some of them have their chief places of business here.

But it appears to me that *Rundle's* case, taking it as founded on the proposition that the Secretary of State does not carry on business within the jurisdiction, does not conclude the plaintiff in this suit.

This suit arises out of a contract between the plaintiff and the Government of India, which contract as plaintiff alleges, has been broken. Section 416 of the Code enacts that suits by or against the Government shall be instituted by or against (as the

(1) 1 Hyde 37. (2) L. R. 15 Ch. D. 1. (3) 1 C. 249.

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sular & Oriental S. N. Co. v. *Secretary of State for India in Council* (1), *Rundle* v. *Secretary of State in Council* (2); as being a suit for land outside jurisdiction and the remarks of Wells, J., being "obiter;"

(1) Bourke's Rep. Pt. VII, 166. (2) 1 Hyde 37.

case may be) the Secretary of State for India in Council. I think in the absence of such a provision this suit would lie against the Government of India, in Calcutta, the capital and chief seat of that Government. I agree with (if I may say so) and follow the view laid down by Sir Colley Scotland, C. J., in *Subbaraya Mudali* v. *The Government* (1) upon this point. A contrary opinion is, or perhaps is expressed by Wells, J., in *Rundle's* case at p. 46; but I confess myself, if that be so, unable to follow it; it is, moreover, as pointed out in argument by defendant's counsel, founded upon an inaccurate quotation of the words of cl. 12, which are there cited as "carry on business and personally work for gain," "and" being used in place of the disjunction "or"—a very material difference. In any case, the question discussed by Wells, J., at that place was whether the Secretary of State did "carry on business" within the jurisdiction by reason of the business of Government being there carried on. It is not exactly the same question as that decided by Sir C. Scotland whose view I should, in any case, however, follow upon this point.

[**265**] If it be the law that the Government (or now the Secretary of State) can only be sued in the High Courts, if all or, with leave granted, part of the cause of action arose within the local limits, then the following cases were gone into and decided without jurisdiction—*Ross Johnson* v. *Secretary of State* (2), dismissed, no doubt, on the merits, but entertained without jurisdiction if *Rundle's* case is conclusive: *The P. and O. S. N. Company* v. *Secretary of State* (3), decided by PEACOCK, C.J., JACKSON, J. and WELLS, J.—In that case, as was admitted in argument in the present, the cause of action arose outside the local limits. That no doubt was a case from the Small Cause Court. *Brito* v. *Secretary of State* (4) before the present Chief Justice Sargent, in which case the cause of action arose outside Bombay. *Hari Bhanji* v. *Secretary of State* (5), in which case the cause of action arose outside the jurisdiction, and *Rundle's case* was cited. These are only the reported cases. I know nothing of those cases, if there have been any, which have not been reported. Certainly, so far as my own experience can guide me, I should say that the view of Sir Colley Scotland is that which has generally been received; nor should it be disregarded that the presumption is in favour of jurisdiction in the case of a superior Court such as this, and if there be any ambiguity in the terms of the Charter, I think the construction of them should be in favour of the jurisdiction of this High Court.

Further, it is to be observed, as admitted by the learned Advocate-General in the course of his argument, that, if the proposition for which he contended be well founded in this case, and cases like it, the plaintiff would be absolutely without remedy. In the High Court sitting in the Capital of India, a Court intentionally and deliberately, invested with as high a dignity as the Crown could confer upon it, a party is without remedy against the Crown. Can that be a construction which can be reasonably adopted? Must not a construction be put upon the Charter which would avoid a conclusion so monstrous?

The Advocate-General argued that a party was not to be pitied if he was left only to the moderation, to the discretion of the Government, or that portion of the Administration with which he happened to deal. It may be so. It has not been hitherto the principle on which the administration of justice has been organized in this country.

No part of that system was originally organized with greater care than that part which provided that breaches of contract or wrongs committed by the officers of Government or by Government itself, should have a complete remedy in Courts whose absolute independence was secured by law.

I hold, therefore, that so far as the question of jurisdiction goes, that Court has jurisdiction to entertain the suit.

[On the question of limitation the case was dismissed. On appeal the finding of the lower Court as to limitation was upheld, the question of jurisdiction not being taken.]

[**Appr.**, 16 C.W.N. 747=15 Ind. Cas. 955; **R.**, 40 C. 308=21 Ind. Cas. 1 (2).]

(1) 1 M. H. C. 292. (2) 2 Hyde 153.
(3) 1 Bourke Pt. VII, 166=5 B. H. C. App. 1.
(4) 6 B. 251. (5) 4 M. 344; on appeal 5 M. 273.

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Subbaraya Mudali v. *The Government* (1); *Shiels* v. *Great Northern Railway Company* (2); *Taylor* [264] v. *Crowland Gas & Coke Co.* (3); *Brown* v. *London and N. W. Ry. Co.* (4); *Adams* v. *G. W. Ry. Co.* (5); *Hari Bhanji* v. *Secretary of State for India in Council* (6); *Brito* v. *Secretary of State for India in Council* (7); *Deputy Postmaster of* [265] *Bareilly* v. *Earle* (8); *Todul Singh* v. *Thompson* (9); *Secretary of state for India* v. *Kamachee Boyee Sahaba* (10). With regard to the cause of action arising within the jurisdiction. *Vaughan* v. *Weldon* (11); *Jackson* v. *Spittall* (12); *Cherry* v. *Thompson* (13). As regards the suit being framed as one for an account as well as one for breach of contract.—*Muhammad Abdul Kadar* v. *E. I. Ry. Co.* (14); *Taff Vale Ry. Co.* v. *Nixon* (15). On the question of limitation and as to [266] the letters from the officers of the Commissariat Department being a sufficient acknowledgment of an open account and of the liability of the Secretary of State.—*Chasemore* v. *Turner* (16); *Quincy* v. *Sharp* (17); *Prance* v. *Sympson* (18); *Skeet* v. *Lindsay* (19); *Holmes* v. *Smith* (20); *Edmonds* v. *Goater* (21); *Rendell* v. *Carpenter* (22); *Catling* v. *Skoulding* (23); *Inglis* v. *Haight* (24).

The *Advocate-General* (*Mr. Paul*) contended that in the case of *Biprodas Dey* v. *Secretary of State* there was this circumstance that, unless the case had been tried in the High Court, the plaintiff would have been without a remedy, all the goods having been supplied out of British India; that the jurisdiction of the Supreme Court was given by s. 13 of the Charter of 1774 and extended by 21 Geo. III., c. 70, s. 17; that the word "inhabitants" as used in that section must be taken to have been split into two classes of persons; 1st, actual inhabitants, those who actually dwelt in Calcutta; and 2nd, constructive inhabitants, those who held places of business, or had gomastahs dwelling in Calcutta. *See* Morton's Reports, 385-386.

[267] That by s. 12 of Letters Patent of 1865 ordinary jurisdiction was given to the High Court, and thereby the jurisdiction of the High Court on the Original Side was put on a different footing; that the question in this case was whether the 12th clause of the Charter applied to the Government, that clause referring to such persons "as carry on business, dwell or personally work for gain:" that the case of *Kinloch* v. *Secretary of State for India in Council* (25) held that the Secretary of State is not such a person; that 21 & 22 Vic., c. 106, an Act for the better Government of India, transferred the Government of India to the Queen, and all officers of Government here are in the position of Vice-Regents, the Government of India not being a governing power but a governing agent; that as to this see ss. 6, 39, 41, 64, 65.

That the words "personally work for gain" covered the case of a person working through an agent; that under s. 65 of 21 & 22 Vic., c. 106, the Secretary of State could be sued as a corporation in England, and that the only jurisdiction against the Secretary of State here, in cases of the present kind, would be, when the cause of action arose

(1) 1 M. H. C. 286. (2) 30 L. J. Q. B. 331. (3) 11 Exch. 1.
(4) 4 B. & S. 326. (5) 6 H. & N. 404.
(6) 4 M. 344=on appeal 5 M. 273. (7) 6 B. 251.
(8) 3 N. W. P. H. C. 195. (9) 2 N. W. P. H. C. 241.
(10) 7 M. I. A. 476 (509). (11) L. R. 10 C. P. 47. (12) L. R. 5 C. P. 542.
(13) L. R., 7 Q. B. 573. (14) 1 M. 375. (15) 1 H. L. C. 111.
(16) L. R. 10 Q. B. 500. (17) L. R. 1 Ex. D. 72. (18) 1 Kay 678.
(19) L. R. 2 Ex. D. 314. (20) 8 Ir. C. L. Rep. 424. (21) 15 Beav. 415.
(22) 2 Y. & J. 484. (23) 6 T. R. 189. (24) 8 M. & W. 769.
(25) L. R. 15 Ch. D. 1.

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wholly or in part within the jurisdiction, that the Government could not be the real person sued, for they were only the servants of the Queen.

That the decision in *Rundle* v. *Secretary of State* (1), although said to be "*obiter*" on the question of jurisdiction, was not so; that that case had been followed by *Hearsay* v. *Secretary of State* (2); and *Subbaraya Mudali* v. *The Government* (3). That the instances brought forward by the plaintiff of the trading operations of the Secretary of State were not really instances of trading, but were matters of revenue. That the dual character of Government, *viz.*, as Government and traders, passed away when the E. I. Co. ceased to exist; that the railways, telegraph, and postal arrangements were carried on by Government not for profit, but for the purpose of keeping up communications; that the case of *Judah* v. *Secretary of State* (4) showed that the proceeds of the sale of opium were part of the revenues of the country; that the case of the *P. and O. Co.* v. *Secretary of State* (5), [268] proceeded upon words in s. 65 of 21 and 22 Vic., c. 106; and that the law applicable here was that laid down in *Cherry* v. *Thompson* (6).

On the point of limitation—that there was no evidence of any special contract; that the mere fact of putting in recharge bills could not extend the period of limitation; that the letters made no sufficient acknowledgment of the debts—they merely admitted a limited liability of certain items which were admittedly due, and allowed the plaintiff to send in his bills. Counsel also referred to and distinguished the cases of *Chasemore* v. *Turner* (7), *Prance* v. *Sympson* (8), *English* v. *Haigh* (9), *Edmonds* v. *Goater* (10), as showing that these referred to acknowledgments of debts, whereas the letters in this case did not.

Mr. *Pugh*, in reply.

JUDGMENT.

The judgment of the Court was delivered by

Mitter, J. (Trevelyan, J., concurring).—The plaintiff in this case was appointed at Cawnpore in the North-Western Provinces, in the month of October 1879, as a purchasing agent and gomastah of the Commissariat Department of the Government of India to purchase stores, miscellaneous articles, &c., required for the troops assembled for the Second Cabul Expedition on a salary of Rs. 100 per month. His employment, which was in the Punjab Province, lasted till the month of October 1880.

His case is that the Commissariat Department, from time to time, made advances to him, but that, as a rule, he had to advance money out of his own funds to carry out his duties as such purchasing agent and gomastah.

He sues the Secretary of State for India in Council to recover the sum of Rs. 2,52,034-14-5, or such other sum as may be found due to him on taking of an account of the sums paid to him, and of the sums spent by him in the course of his employment.

The suit was instituted on the 19th of April 1884, on the Original Side of this Court, without previous leave being obtained under the provisions of s. 12 of the Letters Patent. It is [269] stated in the plaint that the cause of action accrued in the month of January, 1884, when the

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(1) 1 Hyde (2) 6 N. W. P. H. C. 47. (3) 1 M. H. C. 286 (292).
(4) 12 C. 445. (5) Bourke's Pt. VII. 166. (6) L. R. 7 Q. B. 573.
(7) L. R. 10 Q. B. 500. (8) 1 Kay, 678.
(9) 8 M. & W. 769. (10) 15 Beav. 415.

authorities in charge of the Commissariat Department, after a protracted correspondence between the plaintiff and his attorney on the one hand and the said department on the other, finally refused to pay the amount claimed by him. 1886 Sep. 8. — Original Civil. — 14 C. 256.

The plaintiff states further that it was understood that his employment was to be subject to the rules of the said department, regarding the investigation and passing of the bills, and accounts to be submitted by him from time to time; that according to the said rules it was his duty to submit his bills and accounts, first, to his immediate superior, the executive Commissariat officer, who would forward the same with his opinion to the Examiner of Commissariat Accounts; that the said Examiner of Commissariat Accounts, after necessary investigation, would pass the bills for such amounts as to him might seem proper; that the retrenchments made by the latter officer would be subject to appeal to the Comptroller of Military Accounts, and to further appeal to the Government of India; and that the balance, if any, in his favour would not become due until the final adjustment of his bills and accounts thus arrived at.

Various pleas have been taken in the defence, but it was agreed on both sides that two preliminary issues should be decided first, and that if they were decided in favour of the plaintiff, the question of the examination and adjustment of accounts should be referred to an officer of this Court.

These issues are: (1) whether or not this Court has jurisdiction to entertain the suit; and (2) whether or not it is barred by limitation.

The Ordinary Original Civil Jurisdiction of this Court, regarding suits for recovery of money, is thus defined in s. 12 of the Letters Patent: "That the said High Court of Judicature at Fort William in Bengal, in the exercise of its Ordinary Original Civil Jurisdiction, shall be empowered to receive, try and determine suits of very description, &c., &c., &c., &c., (1) if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said [270] High Court; (2) or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

In this case it is admitted in the plaint that the cause of action did not arise wholly within the said local limits. Notwithstanding this admission it was contended in the course of the argument that the cause of action did arise wholly within the said limits, because the money claimed in the suit was payable in Calcutta. Supposing that it was payable in Calcutta, still the cause of action would not arise wholly there. But it was urged on behalf of the plaintiff that a cause of action arises wholly in a place where the breach of contract, upon which a particular suit is brought, takes place. In support of this contention the case of *Muhammed Abdul Kadar* v. *The East India Railway Company* (1) has been cited; but the view taken in this case is in conflict with the whole series of cases involving this point decided by this Court see *Greeschunder Bonnerjee* v. *Collins* (2); *Indian Carrying Company* v. *McCarthy* (3). There is not a single case decided by this Court in which the view taken by the learned Judges of the Madras High Court.—*Muhammed Abdul Kadar* v. *The East India Railway Company* (1)—was adopted. It has been uniformly held here that the words "the whole cause of action" in s. 12 of the Letters

(1) 1 M. 375. (2) 2 Hyde 79. (3) Cor. 116.

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Patent mean *all* things necessary to give a right of action, and that in a suit for breach of contract it must be established that the contract, as well as the breach thereof, have taken place within the local jurisdiction of the Court. When the law has thus been settled in this Court by a current of decisions, we would not be justified in disturbing it. But in this case, as I shall show, in dealing with the question of limitation, there is no foundation for the contention that the breach of the contract took place in Calcutta.

Therefore, under the first head of jurisdiction laid down in s. 12 of the Letters Patent, the present suit is not cognizable by this Court.

[271] Neither is it cognizable under the second head of jurisdiction. In discussing this question it is material to consider the nature of the suit and the position and the connection of the defendant with reference to the claim involved in it.

It is enacted in s. 65 of the Act for the better government of India, 21 & 22 Vic., c. 106, that "the Secretary of State in Council shall and may sue and be sued as well in *India* as in *England* by the name of the Secretary of State in Council as a body corporate, and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of *India* as they could have done against the said Company, and the property and effects hereby vested in Her Majesty for the purposes of the Government of *India*, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company." This section does not constitute the "Secretary of State in Council" *a body corporate*, but it simply lays down that that officer and department are to be sued *as* a body corporate, the object of the suit being to obtain satisfaction of the plaintiff's claim, if it should be decreed, out of the Indian Exchequer. A suit of this kind is not really against any person or any real body corporate. But it is allowed to be brought against the Secretary of State in Council *as* a body corporate. In other words as a suit cannot be brought without a defendant, a nominal defendant is allowed to be put upon the record to enable the plaintiff to obtain the remedy secured to him by this section. I am supported in this view by the following observations of Lord Justice James in *Kinloch* v. *Secretary of State for India in Council* (1). "When you look," says his Lordship, "at the Act 21 & 22 Vic., c. 106, which put an end to the *East India Company*, all the property and assets of the *East India Company* were not transferred to any body corporate which were successors to the *East India Company*, but were vested in the Crown in trust for the Government of India; and [272] the words 'the Secretary of State for India in Council,' which are mere words providing that that officer and department could be capable of suing and being sued, are nothing more in my judgment than words indicating the mode by which the Government of India is to sue and be sued; that is to say, the mode in which the Indian Exchequer might itself institute proceedings, and might be made the subject of proceedings, for the purpose of determining the rights between any of Her Majesty's subjects and that Government. But the Government of India is not, it appears to me, capable of being a trustee; nor is the Secretary of State for

(1) L. R. 15 Ch Div. 8.

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India in Council (the name by which the Government can be sued) a person capable of being a trustee any more than the Attorney-General in this country would be, or any other person who sues in certain cases for or on behalf of the Crown." The words "the Secretary of State for India in Council," as observed by his Lordship, indicate *the mode* by which the Indian Exchequer is to be sued. Further on his Lordship says, referring to the words "the Secretary of State for India in Council": "There is no such body known except *as a name*, as I said before, for suing and being sued on behalf of the Indian Exchequer."

This being the nature of the suit contemplated by s. 65 of the Act for the better Government of India, and the defendant on the record being a mere name used for the purpose of prosecuting the suit, the words by which the second head of jurisdiction has been defined in s. 12 of the Letters Patent are in my opinion inapplicable to it. The same view was taken by Wells, J., in *Rundle* v. *The Secretary of State in Council* (1). He says: "The words 'carry on business and personally work for gain' do not refer to an institution like the Government of India." He further held, that the carrying on of the business of the Government cannot be considered to be carrying on of business within the meaning of the 12th section of the Letters Patent. It is somewhat difficult, nor is it necessary in this case, to define exactly what may be deemed as "business" within the meaning of s. 12 of the Letters Patent; but it is **[273]** clear to me that the business of governing the country is not business within the meaning of s. 12 of the Letters Patent. It may be useful here to cite the case of *Nobin Chunder* v. *Buroda Kant Shaha* (2); and of the *Anonymous case* (3) in which it was held that zemindari business is not business of the kind contemplated in s. 17 of the Code of Civil Procedure; and the cases *Sangster* v. *Kay* (4), and *Buckley* v. *Hann* (5) in which "it was held that clerks in Government offices cannot be said by reason of their being so to carry on business within the jurisdiction of the County Courts in which these offices are situate." That the word "business" in s. 12 of the Letters Patent was used in a restricted sense is also indicated by the words "personally work for gain" to be found in the same section. The latter words would be unnecessary if the word "business" had been intended to be used in an unrestricted sense.

In *Subbaraya Mudali* v. *The Government* (6), Scotland, C. J., says: "The words carrying on business can, we think, reasonably be applied to the Government as a deliberative body. Being of that opinion he held that a suit brought against the Government which was located within the limits of Madras was properly brought on the Original Side of the Madras High Court. It seems to me that quite apart from the question whether the business of governing the country is business within the meaning of s. 12 of the Letters Patent, it was overlooked in that case that under s. 65 of 21 and 22 Vic., c. 106, the suit should have been considered as brought against the Secretary of State for India in Council. If this fact had been present to the mind of the learned Chief Justice of Madras he would have come to the conclusion that the suit was not cognizable by the High Court; because in another part of his judgment he held that, by s. 12 of the Letters Patent, "a personal attendance to business was intended." This could not have been predicated of the Secretary of State in Council.

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(1) 1 Hyde 37. (2) 19 W. R. 341. (3) 23 W. R. 223.
(4) 5 Ex. 386. (5) 5 Ex. 43. (6) 1 M. H. C. 286.

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It has been said that supposing the business of governing the country is not business within the meaning of s. 12 of the Letters Patent, still the Government in this country carries on [274] various trades, such as the trades in opium and salt, and the principal places of business of these trades are located in Calcutta. But these trades are not carried on by the defendant in this case. As already observed, the words carrying on of a business or trade are inapplicable to this case. These trades, if they can be properly called trades, are carried on in one sense by the Government officers in charge of them, but they are so carried on for the benefit of the Indian Exchequer. For these reasons I am of opinion that this Court has no jurisdiction to entertain this suit.

On the second issue I am also of opinion that the plaintiff's suit fails. It seems to me that the present suit is based upon an implied contract on the part of the Commissariat Department to pay whatever money has been advanced by the plaintiff for the purchase of stores, miscellaneous articles, &c., in the course of his employment as a gomastah and purchasing agent of that department. It is stated in the written statement that it was understood at the time when the plaintiff was appointed a gomastah and purchasing agent in the Commissariat Department, that he was to be kept supplied with sufficient funds to effect the purchases of the articles that he might be required to purchase for the use of the troops. The case for the plaintiff is, that by the rules of the department, subject to which his appointment was made, he was required to advance funds for these purchases from time to time, and that the money so advanced by him would not become due until his bills and accounts had been finally adjusted in the mode described in the plaint.

Beyond the fact that there are certain rules observed in the Commissariat Department for investigating and finally passing the accounts of a gomastah, the plaintiff has not adduced any evidence in support of the case set up by him. It is not necessary to ascertain with any degree of precision what these rules are; because it seems to me that their existence has no bearing upon the question whether it was intended, as alleged by the plaintiff that a purchasing gomastah should be required to advance money when necessary from his own funds to make the purchases which he would be required to make. Upon [275] this point the plaintiff has adduced no evidence at all. In ordinary cases, when an agent is engaged on a small monthly pay without any further remuneration, to make purchases on behalf of his principal, in the absence of any express contract to the contrary, it would be reasonable to hold that it is understood that the principal should always keep the agent supplied with funds to make the required purchases. But in this case we have these additional facts. From the correspondence and bills filed as exhibits, it appears that the plaintiff was not entitled to charge interest as a matter of right upon the advances, if any, made by him. No such interest has been charged in these bills, and in some of these letters the plaintiff intimated to the Commissariat officers that, if his accounts were not settled speedily, he would claim interest. It is further clear upon the materials placed on the record that, when the plaintiff was appointed, it was well known to him that the funds that would be required for the purchases to be effected by him as Commissariat gomastah and purchasing agent, would be considerably large. Under these circumstances I think it may be reasonably concluded that the understanding was that the plaintiff was to be always kept supplied with funds to effect the purchases that he would be directed to make.

Having regard to this understanding it seems to me that, if on any occasion the plaintiff happened to have advanced money out of his own pocket to make any of these purchases, he was entitled to demand immediate payment of it. An agreement under the circumstances set forth above would be implied on the part of the Commissariat Department to repay immediately the money advanced by the plaintiff. If the money be not paid immediately there would be a breach of the contract, which would entitle the plaintiff to maintain an action for the recovery of the money advanced. In this state of things, in an ordinary case, art. 61 of the second schedule of the Limitation Act would be applicable. But it is doubtful whether the money in this case could be said to have been paid for the defendant who, as already observed, is a mere name. But if art. 61 is not applicable, then the suit would fall under art. 115, which is a sweeping Article providing for all cases of breach of contract [276] not specially provided for in the Act. The suit was brought in 1884, that is, more than three years after the termination of the plaintiff's agency, and therefore more than three years after the last supply made by him as a gomastah and purchasing agent. It is, therefore, barred under art. 115. Even if we hold that the breach took place when the money was demanded, and not paid, still the suit would be barred.

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In the course of the argument, several letters were referred to as containing acknowledgments of liability on the part of the Government. But I have carefully examined these documents, I do not find any acknowledgment of liability contained in them which would bring the case within s. 19 of the Limitation Act. Nor is it shown that the present suit is saved from the bar of limitation by the second para. of s. 20. There is not a single instance in which a part payment within three years has been made of an admitted debt.

The result is that the plaintiff's suit will be dismissed with costs.

Suit dismissed.

Attorney for plaintiff: Baboo *Gonesh Chunder Chunder.*

Attorney for defendant: The Government Solicitor (Mr. *R. L. Upton*).

T. A. P.

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

MAHOMED ABID ALI KUMAR KADAR (*Plaintiff*) *v.* LUDDEN SAHIBA, MINOR, THROUGH HER GUARDIAN SRIMATI AMIR BAHU (*Defendant*).* [16th June, 1886.]

Mahomedan Law—Shiah school—Muta Marriage—Gift of term—Maintenance.

In a suit brought by a Mahomedan of the Shiah sect against his wife, belonging to the same persuasion, for a declaration that the relationship of husband and wife had terminated, and that he was not liable to pay maintenance to her which he had been directed to do by an order passed under the provisions of the Code of Criminal Procedure, on the allegation that the [277] marriage was of a

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* Appeal from Appellate Decree, No. 1843 of 1885, against the decree of C. B. Garett, Esq., Judge of 24-Parganas, dated the 21st of July 1885, reversing the decree of Baboo Krishna Chunder Chatterjee, Subordinate Judge of that District, dated the 8th of September 1884.

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muta form, and that he, on the 22nd February 1882, had made *hiba-i-muddat* (gift of the term) of whatever period there then might remain unexpired, the wife pleaded *inter alia* that her husband was not competent to dissolve the marriage tie within the contracted period without her consent, and that, if under the Mahomedan law the consent was unnecessary, the Court was bound, in administering justice, equity and good conscience, to modify the strict law in this respect.

Held that, although the ordinary law of divorce does not exist in respect of marriages by the *muta* form, they can nevertheless be terminated by the husband giving away the unexpired portion of the term for which the marriage was contracted, and the consent or acceptance on the part of the wife is not necessary for the dissolution of the marriage.

Held further that, although the Court could not grant an injunction restraining the Magistrate from enforcing the order for maintenance, the plaintiff was entitled to ask the Magistrate to abstain from giving further effect to his order after the Civil Court had found that the relationship of husband and wife had ceased to exist.

[**F.**, 30 M. 400 (401)=2 M.L.T. 344; **R.**, 19 A. 50 (57)=16 A.W.N. 173; 11 C.P.L.R. 72 (73); 9 O.C. 49 (51)=3 Cr. L.J. 229.]

THE parties to this suit were nearly connected with the ex-King of Oudh, the plaintiff being his second son and the defendant the niece of one of his wives. They both of them belonged to the Shiah community, and contracted a *muta* marriage under the Shiah law towards the end of 1879. Not long after (the exact date was in dispute, and was not material to the decision of this appeal), they separated, and, in consequence, the defendant, early in 1882, applied to the Magistrate to obtain an order for maintenance under the Code of Criminal Procedure. The application was refused on the ground that, as a *muta* wife, she had no right to maintenance. A Division Bench of the High Court acting as a Court of Revision set aside this order, and directed the Magistrate to determine whether the defendant was still the wife of the plaintiff—*In the matter of the Petition of Ludden Sahiba* (1). On the 22nd of May, 1882, the Magistrate directed the plaintiff to pay maintenance to the defendant as his wife. The plaintiff now sued to have it declared that the relationship of husband and wife had terminated, the defendant being no longer his wife; and further that she was not entitled, under any circumstances, to maintenance. It is unnecessary to refer to the other prayers set out in the plaint, because [278] they were not pressed on behalf of the appellant at the hearing of the appeal.

The plaintiff's case was that he married the defendant in the *muta* form, that is to say, he contracted a temporary marriage with her, for the period of one month and a half, on a dower of Rs. 25; that after the lapse of one month, being dissatisfied with her, he gave away the unexpired period and thereupon dissolved the marriage; that subsequently, on the 22nd of February 1882, while the proceedings already mentioned were pending before the Magistrate, he again, as a matter of precaution, formally gave away the unexpired portion of the period for which the *muta* marriage had been contracted, in the Court of the presiding Magistrate, and that even if, notwithstanding this giving away of the term, it should be held that the defendant was still his wife, she was, under the Mahomedan law obtaining amongst the Shiah community, not entitled to maintenance as a *muta* wife.

The defendant replied that she was married to the plaintiff by the *muta* form for fifty years, and for a dower of Rs. 250, and that the plaintiff further agreed to pay her sufficient for her maintenance and support,

(1) 8 C. 736.

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and to provide her with a separate house for her residence. She denied any knowledge of the plaintiff having given away the unexpired period for which the *muta* marriage had been contracted, and she contended that, under the Shiah law, the plaintiff was not competent to dissolve the marriage in the manner alleged without her consent. She, therefore, asserted that she was still the lawfully married wife of the plaintiff.

The Subordinate Judge found that the period for which the marriage was contracted was not one month and a half as stated by the plaintiff, so that the marriage had not come to an end by the expiration of that term. But he found that whatever that term might have been, the plaintiff gave away the unexpired period in the presence of the Magistrate. He next found that the defendant's consent was not material to the giving away of the unexpired period by the plaintiff, but that this depended entirely on the option of the plaintiff. He accordingly concluded that the marriage had been dissolved, and that the [279] Magistrate acted without jurisdiction in directing that the plaintiff should pay maintenance to the defendant as his lawfully married wife.

The District Judge on appeal concurred with the Subordinate Judge in disbelieving the statement of the plaintiff in respect of the term for which the marriage was contracted, but he thought it unnecessary to find the exact time agreed on, although he expressed his disbelief also of the defendant's statement in this respect. He also agreed with the Subordinate Judge that the plaintiff had dissolved the marriage by, as he termed it, " adjuring all right to the use of the person " of the defendant, but he said that " the plaintiff cannot, so long as the defendant chooses to adhere to him, strike off the *vinculum matrimonii* unless the wife chooses to join him by accepting and profiting by the freedom he offers her." " He can," the District Judge proceeded, " free her from the obligation to yield him conjugal rights: he was never under the obligation to maintain or house her, but still he cannot shake himself free from the *vinculum matrimonii*. She is still his wife until the term expires, or she herself snaps the fetter by emancipating herself from his power by ceasing to adhere to the term," that is to say, so long as she lived a chaste life. In this view, the District Judge set aside the order of the Subordinate Judge and dismissed the suit.

Mr. *Evans*, Mr. *P. L. Roy* and Moulvie *Mahomed Yusuf*, for the appellant.

Mr. *Amir Ali*, Mr. *Abul Hossen* and Moulvi *Serajul Islam*, for the respondent.

Mr. *Evans* (for the appellant).—The question whether the defendant is still a *muta* wife of the plaintiff depends on the question of whether the *hiba-i-muddat* or " giving up the term " requires acceptance on the part of the wife. There are authorities to show that the acceptance on the part of the wife is not necessary under the Imamia law. The *Sharh-i-Looma* at p. 479, says as follows: " And if the husband makes a gift of the term to the woman before coition then he is liable to pay half of the dower in the same manner as the half of the dower is due in the case of *talak* (divorce) before coition in a permanent marriage. And if the *hiba* (gift) [280] is made after coition for the entire period or for a part of the period, then certainly no part of the dower shall be reduced (*sakit*), because dower becomes payable after coition. And it is clear that this *hiba* is *sakit*, or giving up in the way of *mâf* or forgiving. Therefore the *hiba-i-muddat* (giving up the term) does not depend on acceptance; and if she causes interruption during any period of the term voluntarily before or after

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coition, he will deduct out of the dower in proportion to what she has caused interruption, as the dower spreads over the whole of the term."

The author of *Jawaharul Kalam* in the book on *Nikah* takes *hiba* (*gift*) in the sense of *iskat* or *ibra* (release), and holds that in *hiba-i-muddat* (gift of the term) there is no necessity for acceptance (*kabool*) on the part of the wife.

The authority of the *Sharaya-ul-Islam* also supports this view. The passage in Baillie's Imamia Law at p. 41—" so that if he were to make the woman a gift of the term (that is, waive his right to her altogether) before coition he would (still) be liable for half the dower, and if coition should have taken place, she is entitled to the whole dower, on condition of her keeping the term (or adhering to him till its completion), but if it is not completed he is entitled to deduct a proportionate part of the dower "—is not an accurate translation of the passage from the *Sharaya-ul-Islam.* The words within the parenthesis do not form part of the original, but are Mr. Baillie's explanation. The expression " that if it is not completed " in the above passage would be that if she causes interruption during a portion of the term. It is, therefore, clear that Mr. Baillie is not justified in drawing an inference that a *muta* woman can adhere to her husband till the completion of the term.

The *Sharh-i-Looma* at p. 480, says: " And it (*muta* marriage) does not admit of *talak*, but, on the other hand, the woman becomes *buyan* or separated by reason of expiry of the term, or by reason of the husband making a gift of the term." And at p. 481 it says: " And the *iddut* of the woman after coition when the period has expired or made a gift of his two courses." If the view taken by the lower Appellate Court were correct, that, notwithstanding the gift of the term, the woman would continue to be the man's wife, the observance of the *iddut* could not be **[281]** necessary on the part of the woman. It is absurd to suppose that a man who contracted a *muta* marriage with a woman for a certain period could not release her from her obligation. (See the Tagore Law Lectures for 1874, p. 380, and Baillie's Imamia Law, p. 203).

Moulvie *Mahomed Yusoof* followed on the same side.

Mr. *Amir Ali* (for the respondent).—The case set up by the plaintiff as to the period of the *muta* being found to be false, the suit ought to be dismissed without entering into the legal question whether under the Imamia law the husband can " give up " the term without the consent of the wife. But if the Court is disposed to enter into the question, I submit that such power, which is as much against public policy as against the sense of justice and humanity, is not given under the Imamia law. There is no *talak* or divorce in a *muta* marriage, but Mr. Evans wants to introduce *talak* in this form of marriage by a process of inferential reasoning. It is contended that, according to the author of the *Sharaya-ul-Islama* a debtor can be discharged from his liability without his consent, and therefore similarly a *muta* wife can be released from her obligation to live with her husband and can be put away without her consent. This is an unreasonable contention, and even if there were any warrant for it under the Imamia law, it ought not to have operation given to it. If the contention of the other side is correct, it would make no difference between *talak* and the power claimed by the plaintiff. The power of *talak* is given by the Mahomedan law only in the case of a permanent marriage. The policy of the Imamia law, with regard to *muta* marriages, is distinct. A wife married by the permanent form takes larger rights subject to her being *talaked* or divorced; in a *muta* marriage both parties

enter into the contract by mutual consent, the wife takes limited rights and there is no power of *talak*. To give the power to one party and not to the other would be disastrous to public morality and would contravene the principles of the law.

The *Sharh-i-Looma* is no authority. It is a commentary on the *Sharaya-ul-Islam* by an unknown author. Against the view held by the author of the *Sharaya-ul-Islam* there are the dicta of the Sheikh-ul-Mashaekh Allamah Sheikh Abu Jafer [282] Tusi (the author of the *Mabsoot*) and Ibn-i-Zuhra, both of whom hold that an *ibra* (release) is of no effect without the debtor's consent. (See the Tagore Law Lectures for 1884, pp. 102, 601). The author of the *Mabsoot* thus lays down the principle: "When anything is due to one from another person, and he makes a gift of it to the other, that will be an *ibra* or discharge by the use of the word *hiba*. The question remains whether or not the consent or acceptance of the person discharged is a condition in order to make the *ibra* take effect. A body (of jurists) have made his consent a condition to the validity of the *ibra* and (hold) that (*ibra*) will not be valid until the person discharged has consented (to it), and so long as he has not consented or accepted it, the *huqq* (right) will remain intact. And this view is, in my opinion, correct." The author of the *Ghunia*, a work of great authority among the Shiahs, takes a similar view upon this point.

There can be no question, looking to these dicta, that at the least there is considerable conflict of opinion among the Shiah jurists on the question whether the consent of the debtor is necessary or not to a discharge by his creditor. The author of the *Sharh-i-Looma* (and that is the only authority for this doctrine) bases his view upon the analogy of a *muta* wife to a debtor. The passages referred to from the *Tahir-ul-Ahkam* taken piecemeal from Baboo Shama Churn Sircar's footnotes do not support the proposition; they only show that a gift may be made of the term, but it does not appear what the author's view is as to the consent of the wife. With this conflict of views admittedly existing on the subject, with the authority of the greatest of Shiah jurists on my side, a Court administering justice on the broad foundations of equity and humanity should not dissolve the tie, and give such a tremendous power for evil to Shiah Mahomedans. In the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), the Privy Council declared that if any provision of the Mahomedan law was against public morality or public conscience, the Courts would not be justified in enforcing or giving effect to it. Here there is no provision of the Mahomedan law, but mere inferential reasoning; and I submit that important rights should not be taken away by [283] inferences or analogies. In view of the decision in the case of *In the matter of Luddun Sahiba* (2) this case should be referred to a Full Bench.

Mr. *Evans* in reply.

JUDGMENT.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) after stating the facts as above, proceeded as follows:

It becomes necessary, therefore, in dealing with this appeal, to determine the exact effect of a *muta* marriage under the Shiah law, and whether it can be dissolved in the manner stated by the plaintiff, and found by both the Courts. The word *muta* signifies "enjoyment," and as

(1) 11 M. I. A. 551. (2) 8 C. 736.

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applied to a particular form of marriage indicates a marriage of a temporary character, "the extent of the period being left entirely to the parties who may prolong or shorten it to a year, a month, or a day; only some limit must be distinctly specified, so as to guard the period from any extension or diminution." (Baillie's Digest of Mahomedan Law, Part II, on the Imamia Code, page 42). In the Tagore Law Lectures, 1874, by Shama Charan Sircar, on the same subject, at page 373, s. 517, the law is expressed in the same terms, the *Tahrir-ul-Ahkam* being quoted as an authority.

There is apparently no limit to the number of wives married in this form. The Mahomedan law limits the number of permanently married wives to four, but it is stated on the authority of the *Imam Jafer Sadik* that the number of *muta* wives is not restricted to the usual number of *four* or even to *seventy* (see Baillie, 345). The eight rules of the contract of a temporary marriage are set out in Baillie, pages 42-44, and by Shama Charan at pages 379-381 to the same effect. From these, as well as from the fact that "there is no maintenance for a wife married in the *muta* form nor is a habitation to be assigned to her"—*Tahir-ul-Ahkam* (Shama Charan, page 377),—it is clear that the result of a *muta* marriage is to place the person of the wife, without any restriction in any sense of the term, at the disposal of the husband for the term agreed upon, the sole consideration being the dower stipulated between the parties. Her children are entitled to inherit, but unless there is some special contract with this object, the husband and the wife [284] cannot inherit *inter se*. No doubt rule 6 declares that, under this form of marriage, the ordinary divorce cannot be effected, inasmuch as the marriage is dissolved on the expiration of the period agreed upon; but it is not difficult to ascertain the reason for this. Unless there be some special agreement for the protection of the wife, she is no burden on the husband; she is under an obligation to be at his will and pleasure, and he is not in return bound to contribute to her maintenance or even to provide her with a place of habitation, and if a reference be made to the circumstances under which this form of marriage was created by Mahomet himself, it was intended to legalize sexual intercourse for any time agreed on by the parties concerned. It was probably for this reason thought unnecessary to extend to it even the easy form of divorce prescribed for dissolution of a permanent marriage. A dissolution of a *muta* marriage by efflux of time is, however, subject to this limitation. It is stated on the authority of the *Tahir-ul-Ahkam* (see Shama Charan, page 380, note) that, although "there is no divorce in the *muta* or temporary marriage, still separation (*bain*) would take place upon the term being given away to the wife, or upon the expiration thereof." So also, the *Sharaya-ul-Islam* declares that, "if the husband were to make the woman a gift of the term before coition, he would be liable for half the dower, and if coition should have taken place, she is entitled to the whole dower on condition of her keeping the term, and if she has prevented him, he is entitled to deduct a proportionate part of the dower." Mr. Baillie's translation of this passage, page 41, is not altogether accurate, and has been in some respects corrected. The passage is also reproduced in Shama Charan, page 381, note. In other words, so far as we understand the authorities, the conditions of a *muta* marriage are these: A dower and a period for co-habitation are mutually agreed upon; the dower being fixed, the woman is at her

husband's disposal for the term agreed on. If the marriage is not consummated, the woman is nevertheless entitled to half the dower, as it were by way of damages; but if the marriage is consummated, she is entitled to the full dower, whether the parties continue to cohabit for the stipulated period or not, [285] provided that, if cohabitation ceases through any fault on the part of the woman, the husband is entitled to make a proportionate deduction from the amount of the dower. But the husband, having paid or agreed to pay the dower, is not bound to cohabit with the wife for the stipulated term or for any longer term than he thinks fit. He may release the woman from her part of the contract at any time, though his liability for the dower will remain. On these authorities it has been held by the lower Courts, and rightly held, that, although the ordinary law of divorce does not exist in respect of marriages by the *muta* form, and they are dissolved *ipso facto* by the expiry of the term for which they may have been contracted, still there is another way of terminating the marriage by the giving away of the unexpired portion of the term for which the marriage was contracted.

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It has, however, been found by the District Judge, and this has been much pressed upon us by Mr. Amir Ali, who appeared for the defendant-respondent, the lady, that the act of the husband in giving away the unexpired term does not operate as a dissolution of the marriage except with the consent of the woman. We can find no valid authority for this contention. The Mahomedan law amongst Shias regards a *muta* wife as under an obligation to her husband to be at all times prepared to place her person at his disposal whenever required during the period for which the marriage may have been contracted; and without entering into particulars of a very disgusting nature, it is only necessary to state that even in this respect she is not regarded as having an equal status with a permanently married wife. In the matter of the obligation, the Mahomedan law regards persons in that position as debtors, and we have been referred, in the consideration of the question now before us, to the law in respect of debts and their cancellation. Baillie (page 203) states: " The donation of a debt, or what rests on the obligation of another, is not valid to any other than the debtor or person by whom it is due, according to the most approved doctrine, by reason of the condition already mentioned, that it requires possession to complete it, whereas, if made to the debtor himself, it is quite valid and operates as a release of [286] the debt—a release not requiring acceptance, according to the most approved opinion." Shama Charan (page 26) on the authority of the *Fatawa Alamgiri*, Vol. IV, pp. 535, 536, declares that " the gift of a debt to the debtor is a release, and it is lawful both by analogy and on a liberal construction of law "; and further, on the authority of the *Hedayah* and *Kifayah*, that " the gift of a debt, or release of it to the debtor, is complete without his acceptance, though it is reversed by his rejection." As opposed to this, Mr. Amir Ali has referred us to two passages from the *Mabsoot* and *Jami-ul-Fiquah* which seem to require the consent of a debtor to the cancellation of a debt. The *Mabsoot* no doubt is a wrok of considerable authority, but it is apparently little known in India, and having regard to this fact, we are not prepared on this contradiction to doubt the correctness of the *Sharaya-ul-Islam* as a binding authority amongst Shiahs in India. The passages quoted are isolated passages, and without reference to the context, which has not been laid before us, we should not be disposed to act upon them under any circumstances; but having regard

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to the fact that they are directly opposed to the authorities invariably accepted among Shiahs in India, and the fact that the *Mabsoot* is so little known and recognized that only one copy of this work has been obtained, and that with great difficulty, for the purposes of this appeal, it is not improbable that the parties to this suit were not cognizant of the existence of the *Mabsoot* and of the *Jami-ul-Fiquah*, or at all events that they were not aware of the passages quoted so as to make them operate in regard to any transaction between them in preference to the usually accepted authorities.

Mr. Amir Ali further contends that, even if we were to hold that under the Mahomedan law the consent of the woman is unnecessary, we are bound under the rules of justice, equity, and good conscience which we are required to administer, to modify the strict law in this respect, and as an authority for this he refers us to the remarks of their Lordships of the Judicial Committee of the Privy Council in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1).

The case before us is one to which the observations of their [287] Lordships cannot properly apply. If we were entitled to consider whether in this or in other customs prevalent in this country the particular law of a section of the community was "in plain conflict with the requirements of a more advanced or civilised society," as now pressed on us by Mr. Amir Ali, we might in many cases find it difficult to recognize customs regarding which we are by law required to administer local law (see Act VI of 1871, s. 24) as being consonant with what in a European country, where life is passed under entirely different conditions, is considered to be in accordance with the requirements of our society. The illustration given by their Lordships of the Privy Council seems to indicate that the exceptional case contemplated was one of inhumanity, amounting to barbarity and they did not contemplate the extensions of any of the requirements of more advanced western society.

In the case before us we should not therefore be justified in relaxing the Mahomedan law. The rules of that law are clearly defined in respect to *muta* marriages, and if parties, nevertheless, think proper to contract themselves or to allow their minor relatives to be contracted by this form of marriage, we think that they are not entitled to any special relief not contemplated by that law to avoid the effect of the dissolution of that marriage by the lawful act of the husband. So far, therefore, we agree with the lower Courts in finding that the marriage was dissolved by the husband in giving up the unexpired period agreed upon in the contract of marriage. But we do not agree with the District Judge that the consent of the woman was necessary to complete the termination of that marriage.

An objection has been raised on behalf of the defendant-respondent that, inasmuch as the Courts have found against the plaintiff in respect of the statement made by him regarding the amount of the dower and the period for which the *muta* marriage was contracted, the plaintiff's case should be dismissed. In respect of the amount of the dower, we would observe that it was not what is known in the Mahomedan law as "prompt," and that, therefore, any dispute, regarding the amount of that dower or the payment of it in the present case, would not affect the question connected with the dissolution of the marriage. It would be [288] open to the woman, after such dissolution, to recover any amount of the dower, which might remain unpaid from the husband in the same manner as any

(1) 11 M. I. A. 551 (615).

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other debt due from him. Next in respect to the term agreed upon and given up. No doubt, both the Courts have found, and, this being a finding of fact, we cannot question it on second appeal, that the term of one month and a half stated by the plaintiff was not what was agreed upon between the parties, and they have not thought it necessary to determine what that term was. But they have found that whatever that term may have been, the unexpired portion of it was given up by the husband. Whether he gave this up, as he states in his plaint, within a very short time after the marriage was contracted, has not been found, probably because what subsequently occurred rendered this immaterial. It seems that more than two years after the marriage was contracted, and while the proceedings for maintenance instituted by the wife were pending before the Magistrate, that is to say, long after the expiry of the period of one month and a half which the plaintiff still contends was the period agreed upon, the plaintiff as a matter of precaution (so he states) again in a public and unmistakeable manner gave up to the lady whatever might be the unexpired period of the marriage. We understand from this, that, without admitting that his own statement of the term agreed upon was incorrect, he intended to give and did actually give to the defendant whatever under any circumstances might be the period still remaining of the term agreed upon, and thus intimated in an unmistakeable manner to his wife his determination to dissolve the marriage, so far as lay in his power, by having recourse to this form of proceeding. We cannot but regard this as a complete surrender of whatever period might still be unexpired, and therefore sufficient to complete the dissolution of the marriage and the discharge of the woman from any obligation depending thereon. So far, therefore, in the case before us, we think that the plaintiff is entitled to a declaration that the defendant ceased to be his *muta* wife on the 20th of February 1882.

We were at one time in doubt whether, having regard to the decision of the Division Bench in the case of *In the matter* [289] *of Luddun Sahiba* (1) in the exercise of its criminal jurisdiction in respect to the proceedings for maintenance instituted by the defendant, we are not bound to refer this case to a Full Bench in consequence of a different opinion entertained by us. We think, however, that this is unnecessary, inasmuch as we learn from the judgment in that case that "no authority" was shown to the learned Judges "in support of the contention that the effect of giving up the rest of the period is to put an end to the relationship of husband and wife." It has been already stated that there is authority for this contention, and we, therefore, in view of that authority, do not feel embarrassed by the judgment of the other Division Bench of this Court. If that authority had been laid before the learned Judges, it is not improbable that they would have taken the view that has been already expressed as our opinion. We may refer in support of the view taken by us to the authority of the *Sharaya-ul-Islam* and *Tahir-ul-Ahkam* as reproduced by Mr. Baillie and Baboo Shama Charan Sircar in the passages quoted, as well as to the *Sharah-i-Looma*, a work of undoubted authority which is still more clear on this point. A copy of this work has been put in evidence, but although it has been quoted by the learned counsel for the appellant, we have not thought it necessary to refer to it except in corroboration of the better known authorities of the *Sharaya-ul-Islam* and *Tahir-ul-Ahkam*.

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(1) 8 C. 736.

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It is only necessary in passing to observe that the allegation of the defendant in her written statement that there was a special contract with the plaintiff in regard to her position and maintenance has not been raised before us in the argument addressed by the learned counsel, and was apparently abandoned in the lower Courts.

Having found that the relationship of husband and wife no longer exists between the parties, it remains for us to consider the effect of our finding on the proceedings before the Magistrate. The plaintiff asks for an injunction to restrain the Magistrate from enforcing the order for maintenance. We are of opinion that we cannot pass such an order. The plaintiff will be at liberty to satisfy the Magistrate that, by an order of this Court [290] in its civil jurisdiction, it has been declared that no relationship exists between him and the defendant, and he can ask the Magistrate on the authority of the cases of *Abdur Rohoman* v. *Sakhina* (1), and *Abdul Ali Ismailji* v. *Husenbi* (2), to abstain from giving any further effect to his order for maintenance. The decree of the lower Appellate Court will accordingly to set aside, and the plaintiff will receive his costs in this Court and in the lower Courts.

H. T. H. *Appeal allowed.*

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14 C. 290 (P.C.)=14 I. A. 1=4 Sar. P.C.J. 757=Rafique and Jackson's P.C. No. 94.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On petition from the Court of the Judicial Commissioner of Oudh*].

INDER KUMARI (*Defendant*) v. JAIPAL KUMARI (*Plaintiff*).
[13th November, 1886.]

Appeal to Privy Council—Security for performance of order to be made by Her Majesty in Council—Civil Procedure Code, 1882, *s.* 608—*Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below.*

A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the treasury in obedience to the decree. *Sidhee Nazur Ali Khan* v. *Oojoodhyaram Khan* (3) and *Zeraitool Batool* v. *Hosseinee Begum* (4) referred to.

[**Expl.,** 5 C.W.N.781 (797).]

PETITION for special leave to appeal from interlocutory orders ((22nd June 1886) made in execution of a decree (27th March 1886) of the Judicial Commissioner of Oudh, reversing a decree [291] (25th August 1886) of the District Judge of Faizabad, and also for an order that, pending the hearing of the appeal, execution of the said orders should be stayed.

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(1) 5 C. 558. (2) 7 B. 180. (3) 10 M. I. A. 322. (4) 10 M. I. A. 196.

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The proceedings out of which the present petition arose related to the will of the late Maharaja Digbijai Singh, talukdar of Balrampur, who died on the 27th May, 1882, leaving two widows, of whom the present petitioner, Maharani Inder Kumari, was the senior and the Maharani Jaipal Kumari, the plaintiff in the suit, was the junior.

On the 7th November, 1883, the senior widow, under a power which she believed herself to possess under the Maharaja's will, adopted a son to him. On the 3rd December in the same year, the junior widow commenced the present suit against the senior widow and the adopted boy, disputing the validity of the adoption, claiming to share the estate equally with the senior widow for her life, and claiming also mesne profits.

The District Judge of Faizabad held the adoption by the senior widow to be valid, in which opinion he was supported by the Judicial Commissioner on the appeal which followed. The District Judge also held that the senior widow was entitled to the rents and profits of the estate exclusively, and that the junior widow was only entitled to an annuity of Rs. 25,000 a year.

The Judicial Commissioner, when the suit was before him, sent it back for some further inquiries; and pending those inquiries, the junior widow petitioned that, as she was altogether without means, a receiver should be appointed under s. 503 of Act XIV of 1882. According to the present petition this was refused, but at the suggestion of the Court the senior widow paid Rs. 45,000 to the plaintiff to be accounted for on the decision of the suit. On the appeal coming before the Judicial Commissioner for judgment, he held that, though the adoption was good and valid, both the widows were, on the true construction of the will, equally entitled as Hindu widows.

The decree was that " the decree awarding to the plaintiff Rs. 25,000 per annum be set aside. The senior Maharani will retain the management of the estates. From their net profits she will be entitled to deduct year by year (*a*) the amount [**292**] at which the pay-bills of the house, establishment, charities, etc., stood during the last year of the Maharaja's life, this amount to be ascertained by enquiry in execution, (*b*) also such amount as after enquiry in execution may be found suitable for the maintenance and education of the adopted minor. After these deductions are made, the plaintiff will recover from the senior Maharani, defendant, a half share of the balance of the net profits of the estates; she will recover immediately whatever may be found to be due from the date of the Maharaja's death to the date of this decree; and thereafter she will be entitled to recover year by year, until such time as the Government may see fit to comply with the wishes of the Maharaja expressed in the will "—(that was an expression of a wish that the Court of Wards would undertake the management of the estate during the minority of any son that should be adopted)—" a half share of the balance of the net profits of the estate, ascertained as above, and the costs of this appeal, amounting to Rs. 1,31,440."

Leave to appeal from this decree was granted to the senior widow, and upon the same date (22nd June 1886) an order was made upon her petition applying for stay of execution under s. 608 of Act XIV of 1882, or, in the alternative, for security to be given for the due performance of any order that might be made by Her Majesty in Council. This order neither stayed execution nor provided for the security, but after directing payment of costs amounting to Rs. 63,000, to which the petitioner made no objection, it contained the following: " And further that execution of

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and up to a sum of five lakhs of rupees out of the total mesne profits decreed to Maharani Jaipal Kumari be also forthwith had unconditionally, and that execution of the rest of the decree be stayed until the decree-holder lodge good and sufficient security, for the remaining balance of the moneys decreed to her."

Besides the costs, the petitioner had paid into Court Rs. 2,85,000, and now asked leave to appeal against this order, as she objected to the sum going into the hands of the junior widow without adequate security for its repayment. It was stated at the Bar that the whole amount had since been paid into Court. The petitioner asked for an order staying execution and also for special leave to appeal against the above orders of 22nd June, 1886.

[293] Sir *Horace Davey*, Q. C., with whom were Mr. *R. V. Doyne* and Mr. *C. W. Arathoon.*—The order of the 22nd June, 1886, ordering payment of the five lakhs unconditionally, does not follow but varies the decree, which directs an account. But, granting that the Judicial Commissioner had a discretionary power thus to order execution in part, that discretion should have been judicially exercised—s. 608, Act XIV of 1882. Nor was there any evidence before the Court as to what was the real value of the estate and the actual receipts of rents and profits, while, in fact, this large sum exceeds what, in almost any event, the junior widow would be entitled to. The matter which requires redress is that, if in the end the judgment of this Committee should be that the junior widow is not entitled, as the District Judge had held, to more than the annuity, or, at all events, to a less amount than has been decreed by the Appellate Court, she would have to repay money, having however represented herself to be without means of her own, and without due security having been taken for the repayment. Besides the questions already raised under the will in regard to its construction, and the bearing of Act I of 1869 (the Oudh Estates Act) upon it, there might possibly arise another, which also might have reference to the risk incurred in this sum of five lakhs being unsecured. There might arise the question whether, in consequence of the adoption, the widow would not be liable to account to the adopted son through his guardian. It might be that, after the adoption, a different state of things arose; the senior widow should, therefore, be protected. The object of s. 608 had been misapprehended. That object was to maintain, if it was expedient to do, the *status quo* between the parties, pending the appeal to Her Majesty in Council. There has been a mistake as to the principle on which the discretion vested in the Judge should be exercised, even if there has not been, as her petition alleged, an excess of his power as given by the Code of Procedure. The former ground, not the latter, is however, the one on which the petition should rest. The order, as being an order for execution in anticipation, and operating to the prejudice of the petitioner, should not be enforced.

[LORD HOBHOUSE asked if the Committee was competent to [294] advise Her Majesty to order stay of execution, there being no appeal yet preferred. He drew attention to *Sidhee Nazur Ali Khan* v. *Oojoodhyaram Khan* (1) and *Zeraitool Batool* v. *Hosseinee Begum* (2)] (*a*).

(1) 10 M. I. A. 322. (2) 10 M. J. A. 196.

(*a*) In the Nawab's case the doubt was whether, where an order had been made by an Appellate Court below, and such order had not been appealed to the Queen in Council, the Judicial Committee had any authority to interfere, although an appeal was pending before them from a previous order of the Appellate Court made in the same suit, remanding the suit to the first Court.

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Sir *H. Davey*, Q.C.—Instead of an order staying execution the petitioner might have leave to appeal from the order of 22nd June, 1886, with only an expression of this Committee's opinion that the money should be retained in Court. That seems to have been the course taken in the cases referred to. At present money is to be handed over in anticipation of accounts, which should not be done.

Mr. *J. Graham*, Q.C., with whom were Mr. *J. D. Mayne* and Mr. *Theodore Thomas*, for the junior widow:—The present case is distinguishable from the cases referred to, for there is no information as to what took place when the Judicial Commissioner made the order of the 22nd June. This is, in fact, an *ex parte* application on incomplete grounds. As to the sum being large, the litigation involves a great estate. It cannot be assumed that the Judicial Commissioner acted on mere conjecture; and the defect is that this Committee has not before it materials for forming an opinion, besides the difficulty of there being no decree before it in appeal. The conclusion is that the order of 22nd June should not be interfered with, for nothing had been [**295**] shown that, in imposing conditions which the Judicial Commissioner had power to impose, he wrongly exercised his discretion.

Sir *H. Davey*, Q. C., in replying, said that it would be enough if the Committee gave leave to appeal from the order of the 22nd June, the appeal to come on with the principal appeal, at the same time intimating its opinion that the balance of the five lakhs ought to remain in Court. The petitioner could then apply to the Court below, which, no doubt, would be guided by an intimation of that kind.

ORDER.

LORD HOBHOUSE.—Their Lordships are of opinion that the interlocutory orders which the petition complains of are such that their Lordships ought to advise Her Majesty to grant leave to appeal from them. It is not competent to their Lordships to make any order as to the stay of execution, but they think it right to say that to them it appears to be the reasonable course that the plaintiff should not, pending the appeal, be put into possession of the large sums in dispute; and probably it is reasonable that she should not receive more than the annuity of Rs. 25,000, which was decreed to her by the first Court; and with that intimation of advice they leave the appellant at liberty to apply to the proper Court in India for the due security of all money paid into the Treasury in obedience to the decree of the Judicial Commissioner.

Special leave granted: stay of execution refused. Intimation to Court below.

Solicitors for the petitioner: Messrs. *T. L. Wilson & Co.*

Solicitors for the Maharani Jaipal Kumari: Messrs. *Watkins & Lattey.*

C. B.

In the other case, within six months after decree, and prior to the admission of the appeal therefrom to England, the S. D. A., upon an *ex parte* application, without notice, issued an execution order putting the decree-holder into possession, and omitted to call for security as provided by s. 4, Reg. XVI of 1797. The S. D. A. rejected an application to put this right as beyond their powers. The Judicial Committee made an order intimating that it was competent to the S. D. A., to require security to be given, notwithstanding execution of the decree had issued—*Note by Reporter.*

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[296] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

THAKUR HARIHAR BAKSH (*Plaintiff*) *v.* THAKUR UMAN PARSHAD (*Defendant*). [10th and 19th December, 1886.]

Custom, Evidence as to—Wajib-ul-arz—Concurrent findings of Courts below—Construction of a razinama disposing of estate with words " naslan bad naslan."

A custom of inheritance was alleged to prevail in an Oudh claim that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without regard to their degrees in kinship to the deceased. This custom was found not proved by the Original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *wajib-ul-arz*.

If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it could be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done.

In cases decided on the construction of documents, in which the expressions *mokurari*, *istemrari*, *istemrari mokurari*, have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words " *naslan bad naslan* " had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a *razinama* between parties dividing family estate, and expressly declaring that the shares should descend " *naslan bad naslan*," *held*, that the insertion of these words was conclusive in itself ; the expressed object of this *razinama* pointing to the same construction, *viz.* that the estate taken under it was absolute.

[**F.**, 22 B. 355 (367) ; **R.**, 3 O.C. 22 (24) ; 26 A. 299 (302) (**P.C.**) ; **D.**, 7 C.L.J. 202 (213).]

APPEAL from a decree, 4th April 1883, of the Judicial Commissioner of Oudh, affirming a decree (3rd September 1881) of the District Judge of Sitapur.

The appellant, who was plaintiff in the suit, obtained in 1883 special leave to prefer this appeal, on the ground that a substantial question of law was involved in the decision of his suit, which was brought for the possession as proprietor, by right of inheritance, of a taluk named Sarora in Sitapur in Oudh. His suit had been held to be barred under the provisions of s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879, by reason of a prior adjudication on the 7th June [297] 1867. The questions now raised related to proof of an alleged custom of inheritance, which gave the plaintiff a title, and also to the construction of a *razinama*. At the hearing of the suit in the Court of first instance, evidence was given of the custom which was said to prevail in the clan to which the parties belonged, named Panwar Rajputs; and their pedigree was admitted to be as follows:—

Basti Sing, died 1839.

Baldeo Baksh, died 1841 — Balwant Singh, died Oct., 1858. — The respt. Uman Parshad.

Baldeo Baksh:
Bissessur Baksh, died 17th November, 1865, left surviving his widow, Futteh Konwar, who died October, 1879, and a daughter, by another wife, who died in March, 1879.

Balwant Singh:
Sita Baksh, who renounced worldly matters in 1861. — Ganga Baksh, died 12th March 1867.

Ganga Baksh:
The appellant Harihar Baksh,

The respt. Uman Parshad:
Jung Bahadoor.

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In 1839, on the death of Basti Singh, who was the kabuliyatdar of taluk Sarora in the time of the Nawabs of Oudh, his son Baldeo succeeded him. The latter died in 1841, and was succeeded by his son Balwant, who died in 1858. The third and only other son of Basti Singh was Uman Parshad, the present respondent, between whom and Bissessur Singh, son of Baldeo, and Ganga Baksh (son of Balwant abovementioned and father of Harihar Baksh, the present appellant) disputes commenced as to their respective rights in Sarora.

In 1859, at the summary settlement of Oudh, the Deputy Commissioner of Faizabad ordered, and this was confirmed by the superior revenue authorities, that Ganga Baksh, the son of Balwant, should receive the settlement of the taluk, subject to a liability to pay to Bissessur and to Uman Parshad what they had received when Balwant was in possession before annexation.

In 1861 a sanad, dated 11th October, 1860, was delivered to Ganga Baksh, whereby the Chief Commissioner, under the authority of the Governor-General in Council, conferred on him the talukdari of Sarora, and his name was entered in the list, afterwards scheduled to Act I of 1869 (The Oudh Estates' Act). Disputes, however, continued, chiefly as to the maintenance to [298] which his uncle and cousin were entitled, and proceedings in the Settlement Court at the regular settlement ensued.

In 1864 all parties came to the agreement in the *rajinama*, dated 14th December 1864, which gave rise to the question of construction in this suit. It was as follows:—

"We are Ganga Baksh, talukdar, and Uman Parshad and Bissessur "Baksh, parties to the suit respecting claim to taluka Sarora.

"Whereas for several years there has been going on among us a "dispute about the proprietary right respecting taluka Sarora, and whereas "now, at the time of the regular settlement, we have agreed that after "coming to an amicable settlement we should set the whole dispute at "rest, so that whatever ill-feelings exist between relations the descendants "of a common grandfather may be removed, therefore by mutual consent "it is decided that the whole estate be divided as follows, the division "to hold good for ever and to descend from generation to generation, *viz.*:—

"Ganga Baksh, half of the estate.

"Bissessur Baksh, quarter do.

"Uman Parshad, quarter do.

"And the entire estate including Pachchimgaon having been divided "into four parts, four lists were drawn up; we Bissessur Baksh and Uman "Parshad took up one each by consent of each other, and I, Ganga "Baksh, took up the remaining two. There remains no longer any dispute "about the division of the estate. We, Bissessur Baksh and Uman Par-"shad, shall pay to Ganga Baksh the present Government revenue, until "the assessment of the regular settlement jama and I, Ganga Baksh, shall "add on to it my half share of the jama and continue to pay it to Govern-"ment. After the regular settlement the jama assessed on each village, "whether it be more or les than the present amount, shall be paid by the "party in possession in the manner abovementioned; but the above propor-"tion (of payment) shall be maintained in respect to the villages held in "common, *i.e.*, we, Bissessur Baksh and Uman Parshad, shall pay half, "and I, Ganga Baksh, the other half, and as there is a little difference "in the quantity of land it will be adjusted [299] in the villages held in "common, *viz.*, Kathwa, Ghazipur and Himmat Nagar. In addition

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"to the above we Uman Parshad and Bissessur Baksh, shall pay to Ganga "Baksh, talukdar, along with the instalment Rs. 10 per cent. on account "of talukdari right on the present Government revenue, or on such amount "as may hereafter be assessed from time to time. Therefore this agree-"ment is executed as a deed of compromise (*razinama*) that it may witness, "dated 4th May, 1864."

In accordance with this agreement Uman Parshad and Bissessur were put into possession of villages allotted to them as forming their shares, and were recognized and recorded by the revenue authorities as under-tenure-holders.

In 1865 Bissessur died without male issue. He left a widow and a daughter by another wife, deceased. His share, which he had held under the *razinama* of 1864, was immediately claimed by Ganga Baksh; and the Oudh regular settlement being in progress, which under Act XVI of 1865 (the Oudh Revenue Courts' Act) gave exclusive jurisdiction to the Revenue Courts, the litigation proceeded in those Courts.

On 1st February, 1866, Ganga Baksh, by a petition to the revenue authorities, claimed to recover one-fourth of the whole Sarora estate, which had been in the possession of Bissessur Baksh as against Uman Parshad, who alleged himself to be sole heir to Bissessur. The widow of Bissessur, Futteh Konwar, however, claimed to succeed for her widow's estate. On these contested claims, after the Assistant Settlement Officer, Settlement Officer, and the Commissioner of the division had made decrees in due order, the Financial Commissioner, upon the construction of the *razinama* of 4th December, 1864, decided as follows:—

"On the part of Ganga Baksh it is urged that, as the words "*naslan badnaslan*" are entered in the ikrarnama, it ought to be held that the talukdar's relinquishments of rights enjoyed under the sanad can benefit only heirs of the body of Bissessur Baksh and not collaterals. The Financial Commissioner cannot admit this plea; it is plain that by executing the ikrarnama and compounding for an allowance of ten per cent. the talukdar relinquished all special rights, and the common law of succession must take effect. The Financial Commissioner holds that the [**300**] order of the lower Courts, giving the widow a life-interest in her husband's estate without power of transfer, is correct.

"There is, however, a probability that the widow may be tempted to allow the property to be wasted, and it is necessary to make a declaratory order as to the parties with whom the reversionary rights lie."

Upon this judgment the following decree was made:—

"The decree of the Commissioner's Court is affirmed, and it is declared that, after the death of Bissessur Baksh's widow, his estate will be inherited by Uman Parshad and Ganga Baksh in such shares as may be legally due to them. No appeal to Her Majesty in Council was preferred, and Futteh Konwar remained in possession of her husband's share till her death on the 5th October 1879."

This was the proceeding which gave occasion for the question, whether or not it had been judicially decided, between parties representing the same interests as the parties to the present suit, that the estate taken under the ikrarnama of 1864 by Bissessur Baksh was an absolute interest or only one for his life.

Ganga Baksh died on the 12th March 1867. The widow of Bissessur lived for twelve years after. On her death the attempt was made on behalf of Harihar Baksh, then a minor, to bring back the share allotted in 1864 to Bissessur to the line of Ganga Baksh. At *dakhil kharij* proceedings

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ensuing upon the death of Bissessur's widow, right of possession was claimed on behalf of the minor, resulting in a direction by the Deputy Commissioner of Faizabad, under s. 65 of Act XVII of 1876 (The Oudh Land Revenue Act), that Thakur Uman Parshad should be put into possession of the disputed share, pending any order that might be made by a Civil Court. This was followed by the present suit, brought on the 23rd October 1880, by Thakurani Mohun Konwar as mother and guardian of Harihar, upon whom it was claimed the whole interest that had belonged to Bissessur had now devolved. It was alleged that the whole interest of Bissessur on his death "reverted" to the plaintiff Harihar as sole heir of Ganga Baksh, according to law and also according to the custom of the Panwar Rajputs. In the alternative it was claimed that, if under the *razinama* of 4th [**301**] May, 1864, it should be held that Bissessur had taken an absolute interest, then the plaintiff, by the same custom, was entitled to share Bissessur's estate with the defendant, and should take one-half of that share.

The defendant Uman Parshad, maintaining that no such custom existed, and that he by law was entitled to Bissessur's estate, disputing the construction put upon the *razinama* by the plaintiff, relied also on the decree of the Financial Commissioner made in 1867 as affording a bar to this suit for the reason above explained.

This defence of *res judicata* was held good by the District Judge of Sitapur, who dismissed the suit with costs on this ground. He also found as a fact that the custom alleged by the plaintiff was not proved. On both these points the judgment of the District Judge was upheld by the Judicial Commissioner, who quoted from the proceedings above referred to to show that the question whether Uman Parshad had a better title to the estate of Bissessur Baksh than Ganga Baksh was directly and substantially in issue between Ganga Baksh and Uman Parshad in the former suit; that Ganga Parshad then urged that the grant should revert to the talukdar on failure of heirs of the body of Bissessur Baksh; and that the point was decided against him in the Court of the Financial Commissioner, "which was a Court of competent jurisdiction. He added: "In this suit the plaintiff claims on the ground that Bissessur Baksh having died without issue, the object for which the said grant or allotment was made has been attained, and the proprietary title in the said property reverts to the plaintiff. This is precisely the point which was directly and substantially in issue in the former suit in the Court of the Financial Commissioner between the defendant Uman Parshad and Ganga Baksh, the father of the plaintiff. The point was finally decided by the Financial Commissioner, and the District Judge has rightly decided that s. 13, Act X of 1877, as amended by s. 6, Act XII of 1879, was a bar to the rehearing of the claim."

Taking the above as the ground of his decision, the Financial Commissioner held it unnecessary for him to consider the effect of the agreement of 1864; and his judgment then went to the [**302**] question whether the custom alleged to prevail among the Panwar Rajputs had been proved.

He continued thus:

"As we cannot go behind the Financial Commissioner's decree of the 17th June 1867, it is unnecessary to consider whether the District Judge's construction of the agreement of 4th May 1864 is or is not correct.

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"There remains the question whether the plaintiff is entitled to half the property of the late Bissessur Baksh. The plaint is not very clear as regards custom. In para. 11 it is said that on the death of Bissessur Baksh without issue the proprietary right in the whole property 'according to law and also to a usage prevailing among the Panwar Rajputs reverted to the plaintiff as sole heir of the said Ganga Baksh, deceased.' In the next paragraph it is said that, if Hindu law be held to be against him, 'the plaintiff claims to be entitled to one-half share in the said villages and lands by virtue of a custom prevailing among Panwar and other Rajput tribes, to the effect that on the death of the last representative of one branch of the family, so that such branch becomes extinct, the surviving branches of the said family, without regard to the nearness or degree of relationship, are entitled to the property left by the last representative of the extinct branch in equal shares."

"The plaintiff thus claims the whole of the estate according to 'a usage prevailing among the Panwar Rajputs, and half the estate by virtue of a custom prevailing among Panwar and other Rajput tribes.' The evidence produced was to support the alleged custom by which surviving members divide the property of a deceased relation without regard to the nearness or degree of relationship. The Counsel for the appellant has not contended that any custom has been proved by which the appellant as son of the deceased's first cousin would inherit the whole of the estate in preference to the uncle of the deceased. But the contention is that the uncle and the grandson of another uncle should inherit equally. Several instances were referred to by the plaintiff's witnesses. There were some discrepancies in the depositions of the different witnesses, but [303] on the whole the evidence shows that in the instances referred to the property has gone to relations standing in different degrees of relationship to the late owner. The one principle common to all these cases is that each branch of the family obtained a share of the property of the person who died without issue without reference to the degree of relationship. Thus, on the death of Aparbal Singh without issue his property went to the descendants of his great uncle Dhan Singh. Dhan Singh had three sons, namely, Sheo Baksh, Chain Singh, and Madari Singh. On the death of Aparbal Singh there were alive one son of Sheo Baksh, two grandsons of Chain Singh and two grandsons of Madari Singh. The property was divided into three shares, one going to the son of Sheo Baksh, another to the grandsons of Chain Singh and a third to the descendants of Madari Singh. So when Dina Singh died half his property went to the son of his uncle, Narain Singh, and half to the grandsons and great grandsons of his uncle Dhulip Singh. This principle was followed by the Assistant Settlement Officer on the first August, 1866, when he directed that on the death of the widow of Bissessur Baksh the property should pass in equal shares to Ganga Baksh and Uman Parshad or their heirs. But the decree of the Financial Commissioner left the question open. The same principle was followed by the Deputy Commissioner on the 31st August, 1869, in the case of certain Panwar Thakurs, *Gyar Prashad* v. *Dhaukal Singh*, and that decision was affirmed by the Financial Commissioner on the 20th November, 1869. If the principle above referred to were to be followed in this case, the property of the late Bissessur Baksh would be divided between Uman Parshad, son of Basti Singh, and the descendants of Balwant Singh, son of Basti Singh. On the other hand no mention is made of this custom in the Settlement Records. No case has been deposed to in which the first cousin, or first cousin once removed, of a deceased person has shared with the uncle of

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the deceased person. And the defendant's witnesses have deposed to cases in which the custom was not followed. On the death of Gauri the whole property went to Hindu Singh, the brother, although the sons of a second brother, Mehrban Singh, were alive. On the death of Raghu Singh the property [**304**] went to the families of three cousins, but the family of Ram Parshad, a fourth cousin, got nothing. On the death of Kushal his brothers succeeded, excluding his nephew, the son of a deceased brother. Other examples might be mentioned, but these are sufficient to show that there are exceptions to the custom relied on by the plaintiff-appellant; and seeing also that the custom was not recorded in the settlement papers, I am of opinion that it cannot be held to be so certain and invariable that the Court would be justified in following it in preference to the ordinary law of succession. I must, therefore, confirm the decision of the District Judge that the plaintiff-appellant has failed to prove the custom on which he relies. I can see my way to no other decision, and the result of this protracted litigation is that the property of Basti Singh will be divided equally between the families of his sons Balwant Singh and Uman Parshad, the plaintiff-appellant, as representative of the elder son, being the talukdar, and Uman Parshad, the younger son, holding half the estate as under-proprietor, a result not altogether unsatisfactory."

The appeal to the Judicial Commissioner was accordingly dismissed.

On the present appeal,—

Mr. *J. H. A. Branson*, for the appellant, argued that the Courts below had erred in holding that, under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879, the suit was barred. The first Court had also wrongly construed the *razinama* of 4th May 1864, and instead of omitting, as he had omitted, to consider the effect of this document, on the ground of *res judicata*, the Judicial Commissioner should have taken it up, and, on the question of construction, decided that the first Court had been in error. It was also contended for the appellant that sufficient *evidence* had been given of the alleged custom.

In regard to the construction of the *razinama*, the petitions and orders in the Settlement Department, and the nature of the dispute between the brothers, all tended to show that the intention of the parties, in executing the document of 4th May 1864, was to secure maintenance for Bissessur Baksh and Uman Parshad. The contention was that the villages were not allotted for an absolute estate to be held therein. True it was that the term [**305**] *naslan bad naslan* might indicate estates of inheritance, but by analogy to what had been held in regard to words so definite as *mokurari istemrari* and *istemrari mokurari*, the construction of a document, in which the term *naslan bad naslan* was used, should depend on the actual transaction without a conclusive effect being attributed to these words themselves. See *Bilasmoni Dasi* v. *Raja Sheopershad Singh* (1), where the decisions on this subject were collected, not that any one of them referred to the use of the words *naslan bad naslan* now in question, but the same opinion was fairly applicable to them.

The descent of the family property in the line of Ganga Baksh would accord with the custom of the clan as to which the evidence was reviewed. The plaintiff, according to the custom, was, at all events, entitled to come in along with the respondent as an heir to one-half of Bissessur's estate. The above points would require decision if, as it was contended, his suit

(1) 8 C. 664.

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was not barred by the decision given in 1867. In giving his decision the Financial Commissioner had expressed his opinion that the estate was such that it included descent to collaterals, but that question was not necessarily put in issue in order to arrive at the decision of the matter before the Financial Commissioner; and *res judicata* could only be constituted by the decision of a material issue between the parties raising an identical question. Reference was made to Lord Herschell's judgment in *Concha* v. *Concha* (1) and to *Krishna Behary Roy* v. *Brojeswari Chaodhrani* (2).

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

Lord Hobhouse.—Their Lordships do not think it necessary to call upon Counsel for the respondent.

This case has been put before their Lordships by Mr. Branson with great fulness, and they consider that he has argued it with great lucidity and force, and said everything that is possible in [306] favour of his client; but it is put before them in so clear and perspicuous a manner that they are able to deal with it on the opening.

There are two questions. The first is how the agreement, the *razinama* or compromise, of the 4th May 1864, is to be construed; and if it is to be construed as giving an absolute interest to Bissessur Baksh, then the second question is, in what shares the inheritance is to be taken by his heirs?

To take the last question first, the plaintiff alleges that, by a certain custom prevalent among the Panwar Rajputs, if a branch of a family has become extinct, the other branches take the estate in equal shares, which means in equal shares as between those branches without regard to their being more or less remote in kinship to the deceased. That question was tried in the Courts below, and both Courts, the District Judge and the Judicial Commissioner, have come to the same conclusion upon it, adverse to the plaintiff. Two lines of evidence appear to have been pursued—one consisting of instances of successions in kindred families, and the other of records of rights in *wajib-ul-araiz*. Upon the first line of evidence the Judicial Commissioner, who seems to have examined the cases with care, has come to the conclusion that, balancing case against case there is no certain invariable custom proved on this point. He also states, and the District Judge states, that the *wajib-ul-araiz* do not support the custom. In their Lordships' judgment the *wajib-ul-araiz* to which they have been referred seem to go further. The document appearing in p. 126 of the record is a specimen, and it states that brothers or nephews of the deceased are to succeed, regard being had to the nearness of kinship. That is a statement contrary to the statement in the plaint and to the custom which the plaintiff alleges. Therefore their lordships have not considered it proper to go through the mass of oral evidence given in this case, because if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied, if there had been written documents referred to on which the appellant could show that the Courts below had been led into [307] error, their Lordships might

(1) L. R. 11 Ap. Ca. 541 (552).

(2) 2 I. A. 283=1 C. 144.

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re-examine the case; but in the absence of any such ground they decline to do so.

Then the question comes back to the construction of the *razinama*, and that again is divided into two branches. The Courts below have found that the *razinama* ought to be construed to give an absolute interest, because it has been decided that it should be so construed—in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it.

They rest their opinion upon the terms of the *razinama* itself. After providing that the estate shall be divided into the fractions specified in it, the conclusion of the *razinama* is that the division shall hold good for ever, and to descend from generation to generation—*naslan bad naslan*. Their Lordships have not been furnished with any authority, in fact Mr. Branson has fairly said he can find no authority, in which a gift with the words *naslan bad naslan* attached has been held to confer anything less than the absolute ownership. On the contrary, in the various cases in which the expressions *mokurari istemrari*, *istemrari mokurari*, have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words *naslan bad naslan* had been added, there would have been an end to the argument, because an absolute interest would have been clearly conferred. Their Lordships think that the insertion of those words in the *razinama* would be conclusive in itself; but, looking at the expressed objects of the *razinama*, they would come to the same conclusion even if words of a less peremptory character had been used. It was for the purpose of settling a dispute which had been going on for several years about the proprietary right to the taluk Sarora, and it was agreed that the whole dispute should be set at rest. The dispute was not as to maintenance, it was not as to a temporary interest, but it was as to the proprietary right. That is the dispute to be set at rest; and when their Lordships find that such a dispute is set at rest by a [308] division of the estate to hold good for ever, and that not a word is introduced which of its own force imports less than an absolute ownership, they find it impossible to doubt that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, *viz.*, that absolute ownership which each was claiming for himself in the whole or part of the property.

On those grounds their Lordships agree with the decision of the Courts below, though not for the same reasons, and the result is that the appeal will be dismissed.

Their Lordships will humbly advise Her Majesty in accordance with that opinion, and the appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

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PRIVY COUNCIL.

Present:

Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

Amanat Bibi (*Plaintiff*) *v.* Lachman Pershad and others (*Defendants*). [15th December, 1886.]

Specific Relief Act (*I of* 1877), *s.* 31—*Rectification of instrument.*

A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under s. 31 of Act I of 1877 (The Specific Relief Act) to have the instrument rectified was held to have been rightly dismissed.

[R., 13 C.P.L.R. 65 (68); 8 O.C. 1 (3); 5 A.L.J. 192 (199).]

Appeal from a decree (10th March, 1881) of the Judicial Commissioner of Oudh, affirming a decree (5th August, 1880) of the District Judge of Faizabad.

The appellant was the widow of the original plaintiff, Malik Hidayat Hussain, who died while these proceedings were pending, and who was talukdar of an estate, named Samanpur, in the Faizabad District. The respondents were bankers of Faizabad, to whom [309] the deceased talukdar had in his lifetime executed a mortgage. The question now raised was whether the mortgage deed should be rectified under s. 31 of Act I of 1877, the Specific Relief Act.

On the 16th July, 1874, the Land Mortgage Bank of India obtained a decree for Rs. 2,59,714, with interest at 10 per cent., from the 1st June, 1874, and further interest at 12 per cent. on such portions of the interest as might be six months in arrear against Malik Hidayat Hussain. This decree was, on the 18th May, 1876, assigned to the respondents, who themselves had obtained three decrees against the same defendant for amounts aggregating Rs. 29,826. Under these decrees execution was issued against Malik Hidayat Hussain, who to prevent a sale of his property executed a mortgage, dated 15th October, 1878, which led to the question now raised.

The following was the material part of the mortgage-deed:—

"Whereas the aforesaid taluka has, at present been advertised for sale by an order of the Court of the Deputy Commissioner of Faizabad District, the date of the sale being fixed for the 28th of October, 1878, in execution of the decrees of Babu Lachman Persad, Bisheshar Pershad and Narotam Das, Raisan and Mahajans of Benares, Mohalla Nandan Sah, the decrees being dated the 16th of July, 1874, 14th of August, 1876, and 27th of November, 1876, aggregating Rs. 4,04,576-12: and whereas I have lately borrowed Rs. 32,700 from the aforesaid Mahajans in order to repay the debt of Ram Kishen and Lalti Pershad, Mahajans—the total sum of both the aforesaid items amounts to Rs. 4,37,276-12—I, the declarant, while in good health and in a sound state of mind, with a view to save my estate from serious loss—that is, to

save it from being sold off at the auction sale in execution of decree—have mortgaged my ilakas detailed hereinafter, with my proprietary right...... ....And the term of the mortgage is fixed to be for the period beginning from 1286 F. to 1299 F."

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The mortgagees were to have possession.

The plaint, which was filed on the 11th December, 1879, alleged the above facts, and that the real amount of those four decrees and of the debt to Ram Kishen should have been stated in the deed as [310] amounting to Rs. 3,78,588 and not Rs. 4,37,276: the difference, amounting to Rs. 58,688, had been inserted by "mistake and fraud," as had been discovered on the 25th January 1879.

To the plaint was appended an account, by which it appeared that there was due upon the aforesaid four decrees to the end of May 1878,

for principal and interest the sum of	Rs.	3,79,888-2-7
From which there was deducted as paid ...	,,	34,008-0-0
Leaving a balance of ...	,,	3,45,880-2-7
To which there being added the debt to Ram Kishen	,,	32,700-0-0
The total was ...	Rs.	3,78,580-2-7

which the mortgagor alleged was all that the mortgage should have been for.

The respondents on the 20th February, 1880, filed their written statement, in which they maintained that there was neither fraud nor mistake in fixing the principal amount mentioned in the mortgage at Rs. 4,37,276-12-0: that this amount had been arrived at by calculating the interest on the debt to the Land Mortgage Bank at 12 per cent. instead of at 10 per cent., which increased interest was the consideration to the respondents for entering into the arrangement, and by adding an item of costs which the mortgagor had agreed to pay: that the mortgagor had wrongly taken credit in his account for a sum of Rs. 5,000 and that the sum of Rs. 34,000 deducted above ought to be reduced to Rs. 32,173-7-9, and that the mortgagor had brought the interest account down only to the end of May, in place of bringing it down to the 15th October 1885, the date of the deed, which was the arrangement, and had made a mistake in calculating interest.

The first and main issue was whether the mortgagor was bound by the mortgage-deed of 15th October 1878, stating the mortgage-debt to be Rs. 4,37,274-12.

The District Judge found that there was no doubt that the plaintiff, or his agents, had had full opportunity to examine the accounts, and that it had not been shown the defendants [311] had misrepresented anything, or concealed any material fact. He accordingly found against the mortgagor on the above issue, and dismissed the suit with costs. On appeal the Judicial Commissioner affirmed this judgment.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellant.

Mr. *J. H. A. Branson*, for the respondents.

For the appellant it was argued that a case had been made out for the rectification of the mortgage-deed on the ground that the appellant had acted under a mistake of fact: the respondents being aware of this had

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concealed it, taking undue advantage of the appellant. The judgments in *Barret* v. *Hartley* (1); *Kelly* v. *Soluri* (2) were referred to.

Mr. *J. H. A. Branson*, for the respondent was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—The question in this case is whether there are sufficient grounds made out by the plaintiff for reforming or altering the deed of mortgage which was executed on the 15th October, 1878. The plaintiff in his plaint declares: "That on the 15th October, 1878, at Faizabad, the present plaintiff, having been deceived by the defendants, executed, according to the accounts furnished by the defendants, and without examining them, an instrument for Rs. 4,37,376-12 in lieu of the aforesaid decrees, and of the debt due to Ram Kishen Mahajun." Then he says that, looking to the actual accounts between the parties, "Rs. 58,688 ought to be deducted from the mortgage money entered in the aforesaid instrument," and so on; and then that the cause of action accrued on the 25th June, 1879, when he found out the mistake.

The Judge in giving judgment at the trial says: "The plaintiff admits that, previous to the execution of the mortgage-deed, an account was produced before him, and that Uma Persad, his Dewan, stated that a certain sum was due. Mir Ghazafur Husain, a well-known talukdar and a man of ability, had also been requested by the plaintiff to examine the account, and the plaintiff has deposed that he relied on him. A draft of the deed was prepared only after the accounts had been produced; and the plaintiff [**312**] says, moreover, that it was discussed for some fifteen days, and altered." In another part of his judgment he says: "The defendants have not produced clear proof that plaintiff entered into a special agreement about interest, nor that he authorized them to include other debts in the mortgage-deed, or to appropriate payments on account of decrees to the liquidation of other claims, but it is only reasonable to assume that, when the defendants were entering into such a heavy transaction with the plaintiff, they would make a general settlement of their claims, and not leave small, or comparatively small, debts outstanding." It appears to their Lordships that, putting a correct construction upon the deed, and taking the evidence which was adduced, and the findings of the learned Judge, there is no reason to suppose that there was any fraud or deceit on the part of the defendants, or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was to be given.

Under these circumstances, their Lordships are of opinion that the decision of the Judge who tried the case in the first instance, and the decree of the Judicial Commissioner, who affirmed that decision, are correct, and they will therefore humbly advise Her Majesty that the judgment below be affirmed, and that the appeal be dismissed, the appellant paying the costs of the appeal.

Appeal dismissed.

Solicitors for appellant: Messrs. *Borrow & Rogers.*
Solicitors for the respondent: Messrs. *Watkins & Lattey.*
C. B.

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(1) L. R. 2 Eq. 794. (2) 9 M. & W. 54.

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Cunningham.

HOSSAIN BUX (*Petitioner*) *v.* MUTOOKDHAREE LALL AND OTHERS (*Opposite parties*)* [10th February, 1887.]

Bengal Tenancy Act (*VII of* 1885), ss. 93, 143—*Manager, Application for—Appeal—Civil Procedure Code* (*Act XIV of* 1882), *s.* 2.

An application under s. 93 of the Bengal Tenancy Act, 1885, is not a suit between a landlord and tenant within the meaning of s. 143, and no appeal lies from an order rejecting such an application.

[**313**] ON the 11th August, 1886, one Hossain Bux, who held a mokurari tenure in a portion of an estate, applied in the Court of the District Judge of Gya for an order, under s. 93 of the Bengal Tenancy Act, 1885, for the appointment of a common manager to the estate. This application was opposed by certain persons, who, although admitting that they collected their rents separately from the petitioner, denied his right to have a manager appointed.

The District Judge, holding that the petitioner was not a co-owner with the objectors opposing the application, refused to appoint a manager, intimating that the petitioner should sue the ryots for his share of the rent, making the objectors parties to the suit.

The petitioner appealed against the order.

Baboo *Saligram Singh*, for the respondents, took a preliminary objection that no appeal lay; the application not being a suit between a landlord and tenant within the meaning of s. 143 of the Bengal Tenancy Act; contending that under that section the Civil Procedure Code regulated appeals, no rules having as yet been framed under the Act, and that under the Civil Procedure Code there was no provision for an appeal from such an order.

Mr. *M. L. Sandel*, for the appellant, contended that the order amounted to a decree within the meaning of s. 2 of the Civil Procedure Code.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and CUNNINGHAM, J.) was delivered by

PETHERAM, C. J.—It appears, on an examination of the Code, that the order in question is not a suit within the meaning of s. 143 of the Bengal Tenancy Act of 1885, as the operation of that section is confined to suits between landlord and tenant. This is not a proceeding between landlord and tenant, but a proceeding initiated by some third person who does not fill either of these positions. Under these circumstances, and it not being shown to us that unless it comes within the meaning of s. 143, this order would be appealable at all, we must hold that the order is not appealable, and therefore we must dismiss the appeal for that reason.

T. A. P. *Appeal dismissed.*

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* Appeal from Order No. 396 of 1886, against the order of T. Smith, Esq., District Judge of Gya, dated the 11th of August 1886.

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CRIMINAL REVISION.

14 C. 314.

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[314] CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF GOLAM AHMED KAZI.*
[19th February, 1887.]

Penal Code (Act XLV of 1860), s. 182—False information to the Police—Charge made against no specific person—Specific charge.

Section 182 of the Penal Code must be read as an entire section, and when so read, it applies to those cases in which the Police are induced, upon information supplied to them, to do or omit to do something which might affect some *third person* and which they would not have done had they known the truth of the matter laid before them.

[**Commented upon,** Rat. Unrep. Cr. Cas. 564 (569); **Diss.,** 13 B. 506 (509); 13 A. 351 =11 A.W.N. 109; 1 Weir 118.]

ON the 14th December, 1886, one Golam Ahmed Kazi informed the Police that, whilst proceeding along a certain road at night, he was attacked and robbed of a shawl; he, however, made no mention of any particular person being implicated in the attack. On this information the Police inquired into the matter, and searched the house of the mistress of Golam Ahmed Kazi, but from her evidence taken by the Police on the inquiry, it transpired that the shawl in question had been given to her by Golam Ahmed Kazi some time previously, but had been lent to him by her for a short time, and that on the night of the 14th December he had worn the shawl and had at her request returned it to her. Golam Ahmed Kazi was thereupon accused by the Inspector of Police of having given false information to the effect that he had been robbed of the shawl.

The Joint Magistrate of Sealdah, before whom the case was heard, charged the accused under s. 182 of the Penal Code, and convicting him of an offence thereunder sentenced him to six weeks' rigorous imprisonment.

The prisoner petitioned the Sessions Judge of the 24-Pergunnahs to send for the record and to take steps to have the conviction set aside. The Sessions Judge, however, refused to interfere, and with reference to the case of *Reg.* v. *Saraji* [315] *Mohun* (1) cited in the notes to Mr. O'Kinealy's Penal Code, p. 122, referred to by the pleader making the application, mentioned that the case was a very old one and was not cited with approval by Mr. O'Kinealy.

The prisoner thereupon moved the High Court under the revisional sections of the Criminal Procedure Code, and obtained a rule calling on the Crown to show cause why the order of the Joint Magistrate should not be set aside.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

Baboo *Kishori Lal Sircar*, for the prisoner, contended that s. 182 did not apply, as no specific person was mentioned in the charge to the Police citing the Bombay case above referred to.

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*Criminal Revision No. 28 of 1887, against the order passed by C. B. Garrett, Esq., District Judge of 24-Pergunnahs, dated 20th of January 1887, confirming the order passed by Baboo Gopendra Krishna, Officiating Joint-Magistrate of Sealdah, dated the 11th of January 1887.

(1) Unreported.

ORDER.

1887 Feb. 19. — Criminal Revision. — 14 C. 314.

The order of the Court (Petheram, C.J., and Beverley, J.) was delivered by

Petheram, C. J.—We think that this rule must be made absolute to set aside the conviction.

The facts of the case are that a person went on one occasion and informed the Police that he had been robbed in the street of a shawl, but in the statement which he made to the Police he did not indicate any particular person or describe any person in such a way as by any possibility could be supposed to implicate any one as the person who committed the robbery. All he said was that he was robbed by a person whom he did not see, so that in the statement that he made he did not say anything to cast suspicion on any one in particular. Under these circumstances, there was no offence within the meaning of s. 182 of the Penal Code That section provides that if any person gives any information to a public servant with the intention of inducing him to put his powers in force to the injury or annoyance of any person, or to do or omit anything which such public servant would not have done or omitted to do if the true state of facts respecting which such information was given had been known to him, shall be punished in a certain way there specified.

As it seems to us, that section must be read as a whole, and, taken as a whole, we think it applies to those cases in which [**316**] the Police are induced, upon the information supplied to them to do or omit to do something which might affect some third person, and which they would not have done if they had known the true state of things.

Upon the information which was given to these Police constables, all that they could be justified in doing was to examine the informant as to what had happened to him, and then make such inquires as the result of that examination might render desirable, but they would have no right to interfere with any one or search any one's house, because there were no circumstances brought to their knowledge by the information which this man gave, which entitled them to suppose that any particular individual was guilty of any offence. Under the circumstances, the most that the statement of the accused amounts to is, that it was untrue and was made for the purpose of hoaxing the Police. No doubt that is a very wrong thing for any man to do. In the first place it is wrong to tell lies, and in the second place it is extremely wrong to take up the time of Government servants by putting them to useless inquiries under circumstances of this kind; but I do not think myself that such conduct comes within the meaning of this section, or amounts to anything more than a hoax, for which no punishment is provided by the Code. Under these circumstances, we cannot make a crime when it is not made one by the Code, or provide a punishment for it.

The rule will therefore be made absolute to set aside the conviction; the prisoner will be discharged.

T. A. P. *Rule absolute.*

1886 DEC. 22.

APPELLATE CIVIL.

14 C. 316.

14 C. 316.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Agnew.

FANINDRO DEB RAIKUT (*Judgment-debtor*) *v.* RANI JUGUDISHWARI DABI (*Decree-holder*).* [22nd December, 1886.]

Execution of decree—Decree against executors for debts incurred while acting under a will afterwards found invalid, Effect of—The heir's liability under the decree—The remedy of the decree-holder.

Certain executors, acting under an order of the Court, borrowed a sum of money from *K.M.* for the funeral expenses of *J.D.*, the testator. *K.M.* [317] obtained a decree for the amount against the executors and the adopted son of *J.D.* Afterwards *F.D.* got a decree, whereby both the will and the adoption were set aside, and he was declared the legal heir of *J.D.* *K.M.* then sought to enforce his decree against *F.D.* by the sale of the property which now formed part of the estate of *F.D.*, who objected to the proceedings.

Held, that as *F.D.* was not the legal representative of the judgment-debtors, the decree could not bind the estate in his hands; but, in order to make the estate liable for the debt, the proper course of the decree-holder was to bring a regular suit against *F.D.*

[R., 16 C. 603 (608).]

JOGENDRO DEB RAIKUT died on the 10th March 1878. He had made a will, appointed executors and left an adopted son. The executors took out probate, and gave a bond to Kali Mohun Rae for a sum of Rs. 5,000, which they had borrowed for the performance of the funeral ceremonies of Jogendro. Kali Mohun obtained a decree for the amount on the 29th July, 1881. In the meantime Fanindro Deb had brought a suit for the establishment of his right to the estate left by Jogendro, and to set aside the will and adoption. Fanindro fought up to the Privy Council and obtained a decree on the 14th February, 1885. On the 26th March the estate of the deceased Jogendro in Byeuntpore was attached in execution of Kali Mohun's decree. Afterwards under the direction of the Subordinate Judge the name of Fanindro Deb was substituted in respect of the estate of Jogendro Deb, and a fresh application was made in execution for the sale of the property. Fanindro took objection, and his principal ground was that, inasmuch as he was not a party to the suit, the decree was not enforceable against him, nor was the estate which had now passed to him liable under that decree. The Subordinate Judge, holding on the authority of *Sudindra* v. *Budan* (1) that the objector was not entitled to go behind the decree and re-open the whole case, granted the application.

Fanindro Deb appealed to the High Court.

Mr. *Woodroffe*, Baboo *Srinath Das* and Baboo *Bhagabati Charan Ghose*, for the appellant.

Mr. *Evans*, Baboo *Grish Chunder Chunder Chowdhry* and Baboo *Mukunda Nath Roy*, for the respondent.

[318] The Court (PRINSEP and AGNEW, JJ.) delivered the following judgment:—

JUDGMENT.

The matter before us relates to the execution of a decree obtained by Kali Mohun against the executors of the estate of Jogendro Deb, deceased,

* Appeal from Order No. 216 of 1886, against the order of G. J. B. T. Dalton, Esq., Subordinate Judge of Jalpaiguri, dated the 20th of May 1886.

(1) 9 M. 80.

acting under an order of the Court, and also against the minor, stated to be his lawfully adopted son, represented by the widow of the deceased as guardian *ad litem*. The decree was for money borrowed by the executors to celebrate the funeral ceremonies of the deceased Jogendro, and was made on the 29th July 1881. In 1878 a suit was brought by Fanindro the appellant before us, to establish his right to succeed to the estate of Jogendro, and to set aside the adoption of the minor as well as the will in his favour. On the 11th of November 1879, Fanindro obtained a decree in the Court of first instance. An appeal against this order was pending before this Court while the suit by Kali Mohun was still under trial. That appeal was decided on the 24th June 1881, in favour of the adoption, reversing the judgment of the first Court which had been obtained by Fanindro. At that time also, it may be observed, Kali Mohun's suit had not been decided. On the 27th of December 1881, Kali Mohun took out execution and attached certain property belonging to the judgment-debtor. On the 22nd of February 1882, Jugudishwari, the widow of Jogendro and the guardian of the minor whose adoption had been disputed, purchased this decree, and on the 20th of March following was substituted in the place of the decree-holder as his assignee. No further proceedings were taken, and on the 5th of April the proceedings terminated. On the 6th of November 1884, Jugudishwari, the assignee of the decree-holder, applied for execution against Jogendro, who had attained majority. The appeal in the suit brought by Fanindro was heard by the Privy Council in the early part of December, and judgment was delivered on the 14th February 1885, setting aside the decree of this Court and restoring that of the first Court in favour of Fanindro (see L. R., 12 Ind. App., 72). Nevertheless the execution of Kali Mohun's decree proceeded, and, on the 26th of March, the estate of the deceased Jogendro in Bycuntpore was attached. On the 2nd April orders for its sale were passed, and on the 7th of May, Fanindro objected that execution could not be [**319**] taken out against him, as he was not one of the judgment-debtors or a party to the suit. This objection was allowed on the 11th of June; and the Subordinate Judge expressed the opinion that "the proper course will be for decree-holder to apply to have the name of Fanindro Deb substituted for that of Jogendro Deb, on the ground that the estate of Jogendro Deb is liable." The proceedings in execution were renewed on the 16th July, and on the 25th September Fanindro again raised objections, which may be shortly described as those which are now presented before us in this appeal. The Subordinate Judge disallowed them on the 20th of May, 1886. It is first objected that Fanindro is not bound by any of the acts of the executors and others acting under the will and adoption made by Jogendro Deb, which at his suit have been declared invalid by their Lordships of the Privy Council. To this it is replied that, so long as the probate was operative, the acts of the executors within the authority conferred on them bound the estate especially in a matter connected with the performance of the religious ceremonies of the deceased under Hindu law, and further that in lending money to them for that purpose Kali Mohun could recover from the estate. For Fanindro it is stated that any ceremonies performed by a person unlawfully adopted are not valid, and therefore cannot be charged against the estate; and further that the funds in the hands of the executors were much more than sufficient for this purpose. Another objection raised is to the jurisdiction of the Court of the Sub-Judge of

1886 Dec. 22. — Appellate Civil. — 14 C. 316.

Rungpore to pass the decree now under execution, and of the Court of the Sub-Judge at Jalapaiguri to take proceedings in execution. This is an exceedingly complicated and difficult matter. The suit was instituted by Kali Mohun on 11th February, 1881, in the Court of the Sub-Judge of Rungpore, which it is not disputed, had jurisdiction. On 24th March following a notification was published by the Government of Bengal under s. 10 of the Bengal Civil Courts' Act of 1871, vesting the Deputy Commissioner of Jalpaiguri with powers of a Sub-Judge from the 1st April next, and further declaring that from that date the Sub-Judge of Rungpore shall cease to have jurisdiction in Jalpaiguri. We are next informed that on 6th April following the Registrar of the High Court under its order directed the Sub-Judge to continue to [**320**] exercise jurisdiction until further orders. He consequently proceeded with the trial and finally made a decree. Execution was however taken out in the Court of the Sub-Judge at Jalpaiguri. No order for the transfer of the decree under s. 223 of the Code appears to have been made, and it would seem that the proceedings were taken under authority of the Government of Bengal of 1st April. It would certainly not be open to a judgment-debtor to question in execution the jurisdiction of the Court which had made the decree, but Fanindro, whom it is sought to bind by that decree, was no party to it. He holds the estate from which it is about to be realized; and he justly contends that he is entitled to an adjudication of all those objections before the decree can be realized from his estate. We are aware of no precedent under which an objection, such as have been raised before us, can be taken in the course of execution. Mr. Evans contends that it is for Fanindro in another suit to have himself absolved from liability under the decree, and that as it stands it can be executed against the estate. The matter is of considerable difficulty, but after some hesitation we have come to the conclusion that Fanindro cannot be held liable to satisfy the same, and that, if the decree-holder wishes to make him liable for the debt incurred, he should bring a separate suit in which matters which cannot be tried in the form in which the proceedings are now before us may be regularly and finally determined. Fanindro cannot be regarded as the legal representative of those who incurred the debt, and if it be sought to bind him as now representing the estate which was then represented by the parties to the bond, he can be made liable only in a separate suit.

We accordingly set aside the order of the Sub-Judge and direct that execution be stayed.

Appellant will receive his costs.

K. M. C. *Order set aside.*

14 C. 321.

1887 Feb. 2.

Appel-late Civil.

14 C. 321.

[321] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

RAHIM BUX (*Auction-purchaser*) *v.* NUNDO LAL GOSSAMI AND ANOTHER (*Decree-holders*) AND SITAL CHUNDER MUKERJI AND OTHERS (*Judgment-debtors*).* [2nd February, 1887.]

Bengal Tenancy Act (VIII of 1885), s. 174—Deposit, Nature of—Jurisdiction—Application under s. 622 of the Civil Procedure Code.

The deposit under s. 174 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions.

[**Disc.**, 2 C.W.N. 474 (477); **R.**, 23 B. 723 (725).]

SITAL CHUNDER MUKERJI, on behalf of himself and a minor along with other co-tenants, made an application to the Subordinate Judge under s. 174 of the Bengal Tenancy Act to set aside a sale of their joint tenure, and under the special circumstances of the case, the Court accepted the deposit, although it was not made strictly within time. The deposit, however, was partly in cash and partly in a Government Promissory Note, by way of security for a balance of less than Rs. 600. The Court, notwithstanding the objection of the auction-purchaser, accepted the amount with the consent of the decree-holder, and upon the view that one of the parties was a minor, that the decree-holder was satisfied, and that the section ought to be leniently construed in favour of the judgment-debtors, held that there was a sufficient compliance with the terms of the section, and set aside the sale, allowing the auction-purchaser 5 per cent. on his purchase-money according to law.

On the motion of the auction-purchaser the High Court issued a rule under s. 622 of the Civil Procedure Code.

Baboo *Gurudas Banerjee* (with him Baboo *Omakali Mukerji*), for the opposite party, showed cause.—In this case there has been a sufficient compliance with the law. There was a sufficient deposit within the meaning of the section. The decree-holder being a consenting party, the money must be taken to have been deposited. The language of the Act is not "amount recovered under the decree" but "money recoverable under the decree." There is no ground of relief under s. 622 of the Civil Procedure [322] Code. The Subordinate Judge, in the exercise of his jurisdiction, has done substantial justice. Moreover, interference under s. 622 is discretionary with this Court. There is no question of jurisdiction here. *Raja Amir Hassan Khan* v. *Sheo Baksh Singh* (1).

Baboo *Troyluko Nath Mitter*, for the petitioner, in support of the rule.—There was no legal deposit in this case. A Government Promissory Note is not a legal tender. The words of the section confer on the judgment-debtor a substantial right to the detriment of the purchaser; the section should not therefore be leniently construed in favour of the judgment-debtor. The consent of the decree-holder is immaterial. There being no legal tender in this case, and consequently no deposit, the Subordinate Judge had no jurisdiction to set aside the sale.

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* Civil Rule No. 1506 of 1886 against the order passed by Baboo A. C. Mitter, Subordinate Judge of Hooghly, dated the 13th November, 1886.

(1) 11 I.A. 237=11 C. 6.

1887 FEB. 2. — APPELLATE CIVIL. — 14 C. 321.

The Court (PRINSEP and BAVERLEY, JJ.) delivered the following judgment:—

JUDGMENT.

This is a matter under s. 174 of the Bengal Tenancy Act, in which the Subordinate Judge has set aside the sale on receiving from the debtor what, in his opinion, represented the money due to the decree-holder, and the percentage allowed to the auction-purchaser. Three objections are raised before us: first, that the case does not come within the Bengal Tenancy Act; secondly, that the deposit was not made in time; and, thirdly, that from the nature of the deposit made, it was not a proper deposit such as would entitle the judgment-debtor to relief. It is unnecessary in the view that we take of the merits of the case to consider the first point. The facts found by the Subordinate Judge seem sufficiently to show that the deposit, if it were a proper deposit, was made in proper time. We are, however, of opinion that the third objection is fatal. The judgment-debtor deposited a sum of money in cash and also a Government Promissory Note for Rs. 1,000, which, if negotiated, would probably be more than sufficient to cover the balance due. The auction-purchaser and the decree-holder both objected to this kind of deposit, and represented that there was no power to negotiate this Government Promissory Note. Two days later, [323] the debtor came to terms with the decree-holder, and on certain conditions connected with the probable difficulty to negotiate this Promissory Note, the decree-holder agreed to accept this Government Promissory Note, and the balance in cash paid in satisfaction of the amount due to him. The auction-purchaser, however, still objected, although the payment to him was apparently to be made in cash. We think that to claim the benefit of s. 174 the judgment-debtor is bound strictly to comply with its provisions, and that the deposit made should be of such a nature as to be at once payable to the parties. In the present case it is quite possible that no objections may have arisen, but if a deposit otherwise than in the currency of the country were receivable, the finality which the law contemplates in such a transaction would be completely lost, and the time of the Court would be unnecessarily occupied in determining various points which the Legislature never contemplated in such a matter. Under such circumstances we think that the order of the Subordinate Judge must be set aside and the sale confirmed. The petitioner will be entitled to his costs, which we assess at Rs. 50.

K. M. C. *Rule absolute.*

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14 C. 323.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

DROBOMOYI GUPTA AND OTHERS (*Defendants*) *v.* C. T. DAVIS AND OTHERS (*Plaintiffs*).* [24th January, 1887.]

*Receiver, Power of—Suit to eject tenant claiming permanent tenure without leave of Court—Notice to quit—Limitation—Adverse possession—Tenant claiming to hold permanent tenure as against landlord—Landlord and tenant—*Jungleburi *tenure—Hindu widow, Power of, to grant* jungleburi *tenure in respect of chur land.*

D was appointed receiver in a partition suit pending in the High Court by an order which, amongst other things, gave him power to let and set the immoveable

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* Appeal from Original Decree No. 492 of 1885, against the decree of H. Beveridge, Esq., Judge of Furreedpore, dated the 6th of July, 1885.

property, or any part thereof as he should think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstanding debts and claims by action, suit, or otherwise as should be expedient. *D*, without special leave of the Court, served a notice to quit on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them, also without special leave of the Court.

1887 JAN. 24.

APPELLATE CIVIL.

14 C. 323

[**324**] *Held*, that the order appointing him did not give him power to serve such notice or to institute such suit without the special leave of the Court, and that as he was appointed under the provisions of s. 503 of the Code of Civil Procedure and not vested with the general powers referred to in that section, but only with the power referred to in the order apointing him, and as a receiver is not otherwise authorized to institute such suits without special leave of the Court, the suit must be dismissed.

R, a Hindu widow, granted a *jungleburi* tenure to contain tenants in respect of a *chur* belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of *R* in respect of the tenure. *R* died in January 1861, and was succeeded by *J* and *P*, two daughters, the last of whom died on the 31st December 1880. On her death the grandsons succeeded to the estate. On *R's* d ath *J* and *P* got possession of all estate papers, and amongst them a *dowl* granted by the tenants in return for the *amulnama*. In 1865 proceedings were taken by the tenants to obtain kabulyats on the footing of those documents, which proceedings came to an end in 1868. In 1873 *J* and *P* instituted suits against the tenants' alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to th m, as well as to have it declared that *R's* acts did not bind them. In these suits it was found that *J* and *P* had all along been aware of the claim made by the tenants that they held a permanent tenure, and the suits were dismissed on the ground that it was too late for *J* and *P*, after the laps of twelve years from *R's* death, to raise the question. In 1884 *D*, a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons' reversioners were not bound by *R's* acts, and that the *jungleburi* tenure was not binding on them; that the tenants were middlemen and had no right of occupancy; that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amount covered by the *amulnama* and *dowl*. The defendants amongst other things pleaded limitation, *res judicata* and that *R* had the power to grant the *jungleburi* tenure so as to bind the reversioners.

Held, that being middlemen, the defendants had no right of occupancy, and that were the suit not dismissed for other grounds they were liable to have the rent assessed on the whole amount of lands held by them, which was in excess of that covered by the *amulnama* and *dowl*.

That the suit was not barred by *res judicata* as in the suits brought by *J* and *P*, the question of whether *R*'s acts bound the reversioners was never decided.

That the suit was barred by limitation. Adverse possession began to run on *R's* death (as *J* and *P* who represented the estate were then well aware that the tenants claimed to hold the lands under a permanent lease, and though *J* and *P* received rent, the possession of the tenants was adverse to them), and more than twelve years elapsed before Act IX of 1871 came [**325**] into force, and therefore the defendants had then obtained a good title by adverse possession as against all the reversioners which could not be defeated by the provisions of the subsequent Limitation Acts of 1871 and 1877.

Held, further, that the question whether a *jungleburi* tenure granted by a Hindu widow is binding on reversioners depends on the circumstances of the land.

Quœre.—Whether such a tenure granted in respect of a *chur* where no legal necessity on behalf of the widow is shown, could under any circumstances be binding on the reversioners.

[**Cons.**, 8 M.L.T. 258; **R.**, 5 C.L.J. 270=34 C. 305; 247 P.L.R. 1913=56 P.R. 1913=17 Ind. Cas. 751; 23 C. 460 (471); 19 A. 357 (367, 373)=17 A.W.N. 80; 25 C. 354 (365); 3 O.C. 273 (275); **D.**, 18 C. 477 (480); 25 M. 507 (513).]

THE facts which gave rise to this suit were as follows: The property in suit originally belonged to one Raj Chunder Dass who died many years ago without leaving a son, but leaving a widow named Rashmoni,

1887 JAN. 24. — APPELLATE CIVIL. — 14 C. 323.

who succeeded to his estate and held it during her life. Rashmoni in her turn died in 1861, and the estate passed into the hands of her two daughters, Padmamoni and Jagadumba, who remained in possession jointly till the death of Padmamoni. After her death Jagadumba continued to hold the estate up to the date of her death, which took place on December 31st, 1880. The succession thereupon opened out to the grandchildren of Raj Chunder, who were all daughter's sons. Upon Jagadumba's death disputes arose between the grandchildren, and in the end a suit was instituted on the Original Side of the High Court for partition of the estate between them and other relief, and in that suit Davis was appointed receiver by an order dated the 11th August 1881. The portions of that order material to this case were as follows:—

"It is ordered that Charles Thomas Davis, Esq., be and he is hereby appointed the receiver without security * * * of the immoveable property (except such portion of the family dwelling house and such other property as yields no income) of the estate of Raj Chunder Dass, deceased, in the pleadings in this suit named, and of the rents, issues, and profits of the said immoveable property of the said estate, with power to get in and collect all the outstanding debts and claims due to the said estate. * * * And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, of the said estate, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrears and growing rents to the said receiver, and that the said receiver be at liberty * * * to let and set the said immoveable property, or any part thereof as he shall think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the said rents, issues and [**326**] profits of the said immoveable property and of the outstanding debts and claims by action, suit, or otherwise, as shall be expedient, and for that purpose to use the names of the plaintiffs and of the defendants. * * * "

In pursuance of the power given him to use the names of the plaintiffs and defendants, this suit was instituted by Davis in their names on the 19th August 1884 to recover possession of a certain *chur* called *Chur Gobra* from the defendants. The plaint alleged that, whilst Rashmoni was alive, the defendants Nos. 1 and 2 and the predecessor of defendant No. 3, colluded with the *karpardaz* of Rashmoni and obtained an *amulnama* in respect of 1,600 bighas of land at a jumma of Rs. 1,000, but that there had been gradual accretions to the *chur*, and they were now holding about 2,937 bighas; that as Rashmoni only held a Hindu widow's interest in the estate, she had no power to make any settlement of the *chur* to enure for a period exceeding her life, and that she had no valid or legal necessity for making the settlement in question, so as to bind the reversioners; that the defendants were not cultivating tenants and could not therefore acquire a right of occupancy; that after the death of Rashmoni, though Padmamoni and Jagadumba succeeded and received rents from the defendants, their interest was limited to the periods of their lives, and the reversioners were in no way bound by their acts; and that, though there was no necessity for so doing, a notice to quit had been served on the defendants on the 30th Assin 1290 (15th October 1883). The prayer of the plaint was for ejectment of the defendants and for *khas* possession with mesne profits, with an alternative prayer for enhancement of rent on the whole amount of land held by the defendants, or at all events to have rent

assessed on the lands held by them in excess of the amount covered by the *amulnama*.

Various pleas were raised in the written statement of the defendants, and amongst them were the following, *viz.*, that the suit was barred by limitation; that the notice was not served as alleged; that the suit was barred by *res judicata* in consequence of a decision of the High Court in suit brought by Padmamoni and Jagadumba against the defendants; that plaintiffs had ratified the settlement made by Rashmoni by receiving rents for a period subsequent to the death of Jagadumba; that [**327**] Rashmoni was entitled to make the settlement of the land in the way she did, having regard to the nature of the land, and that the settlement was therefore binding on the reversioners.

The defendants alleged that the *chur* in question at the time of the *amulnama* was a jungle infested by wild beasts, and that in order to bring it under cultivation, the *amulnama* was granted on the 27th Kartic, 1260 (11th November 1853), the conditions being that no rent was to be paid for three years, for 1264 rent was to be paid at 4 annas a bigha, for 1265 at 6 annas, and for 1266 at 8 annas, and from and after 1266, the jumma was to be permanently fixed at 10 annas a bigha. On receipt of the *amulnama* the defendants alleged they had spent some Rs. 10,000, in exterminating the wild beasts and bringing the lands under cultivation, and that in the year 1265 Rashmoni received a *dowl* from them, the *amulnama* and the copy of the *dowl* being signed by her authorised naib as was customary in the pergunnah. The defendants further claimed to have cultivated and held possession of the land for over 12 years, and to have been exercising a permanent *junglcburi jummai* right, and they therefore contended that they were not liable to ejectment.

The plea of *res judicata* was based on suits instituted by Padmamoni and Jagadumba, in which they sought to enhance the rent of the lands held by the defendants, alleging that the *amulnama* and *dowl* were forgeries, and even if genuine invalid as against them; and that Rashmoni had no power to grant a settlement to have effect for a longer period than her life. The suits terminated in a decree of the High Court on the 13th April, 1877, by which they were dismissed. The grounds upon which they were so dismissed are sufficiently stated in the judgment of the High Court in the present case. Previous to these suits, proceedings had been taken in the Collector's Court in 1865 by Jagadumba and Padmamoni against the defendants for kabulyats at enhanced rates of rent, and the defendants then contended that they held a permanent tenure under the *amulnama* and *dowl*, and were not liable to have the rent enhanced. It was also proved in the lower Court that Davis served a notice of enhancement on the defendants, dated the 25th Pous, 1288 (8th January, 1882). The lower Court held that the defendants [**328**] were trespassers and not entitled to notice, and also that they were equally not entitled to notice as they set up a permanent title—*Baba* v. *Vishvanath Joshi* (1); that the notice was served; that Rashmoni had no power to grant the settlement in favour of the defendants; that it was not proved that the reversioners had ratified Rashmoni's acts, or acknowledged the defendants as tenants; that the suit was neither barred by limitation nor *res judicata;* and that the defendants being middlemen had not acquired a right of occupancy. The Court accordingly gave the plaintiffs a decree for

(1) 8 B. 228.

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ejectment of the defendants and for *khas* possession with mesne profits for three years.

Against that decree the defendants now appealed to the High Court, upon grounds which sufficiently appear in the arguments of counsel and the judgment of the High Court.

Mr. *Woodroffe*, Baboo *Grija Sunkar Mozoomdar* and Baboo *Gurudas Banerji*, for the appellant.

Mr. *Evans*, Baboo *Srinath Das*, Baboo *Gopi Nath Mukerji*, and Baboo *Gunesh Chunder Chunder*, for the respondents.

Mr. *Woodroffe* and Baboo *Gurdas Banerji* for appellants.—Assuming the defendants to be liable to ejectment at the suit of the plaintiffs, other than the receiver, they are nevertheless entitled to proper notice to quit before being sued in ejectment. At the lowest they are yearly tenants. Their tenancy, whatever it was, did not terminate immediately upon the deaths of either Rashmoni Dasi or her surviving daughter Jagaduma Dasi, unless it can be successfully contended that a Hindu heiress cannot create a tenancy from year to year—a proposition for which no authority can be found. No proper notice having been issued or served upon them, the defendants contend that this suit should, even on this ground alone, have been dismissed—*Chaturi Singh* v. *Mukund Lall* (1) *Ram Khelawan Singh* v. *Mussamut Soondra* (2).

The Bombay decision—*Baba* v. *Vishvanath Joshi* (3)—relied on by the lower Court as obviating the necessity of notice, is inapplicable to the facts of the present case, as there has been [**329**] here no repudiation of the landlords's title, and proceeds moreover upon the erroneous assumption that the principle laid down in *Vivian* v. *Moat* (4) is applicable to this country. *Kali Kishen Tagore* v. *Golam Ali* (5) and *Kali Krishna Tagore* v. *Golam Ali* (6) are the most recent decisions of this Court on this point. The notice said to have been served upon the defendants purports to have been signed by Davis as receiver. It is not found that it was so signed, and there is no sufficient proof of service in the face of the defendant's express testimony to the contrary. But even if the notice in question were in fact signed by Davis and served upon the defendants, it is nevertheless insufficient in law. Davis had as receiver no power to issue it without the special leave of the Court. The order appointing him, it is true, empowers him to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the rents, issues, and profits of the immoveable property and of the outstanding debts and claims by action, suit or otherwise, as shall be expedient. But these words do no more than utmost empower him to eject tenants from year to year admitted by himself. They cannot be construed so as to empower the receiver of his own motion to issue notices of ejectment to tenants who, as the defendants in this case, had for years been in occupation under a claim of permanent tenancy. A receiver does not represent the owner of the estate in his charge as an officer of Court, and should not therefore fail to obtain leave of the Court before proceeding to determine an existing tenancy, and without leave of the Court he can neither sue or be sued—Kerr on Receivers, pp. 148 *et seq*, *Mansfield* (Lord) v. *Hamilton* (7); *Wynn* v. *Lord Newborough* (8); *Ward* v. *Swift* (9); *Wilkinson* v. *Gangadhar*

(1) 7 C. 710. (2) 7 W. R. 152. (3) 8 B. 228. (4) L. R. 16 Ch. D. 730.
(5) 13 C. 3. (6) 13 C. 248. (7) 2 Sch. and Lefroy 28.
(8) 3 Bro. Ch. Ca. 88=1 Ves. Jr. 164. (9) 6 Hare 312.

Sircar (1): and *Miller* v. *Ram Ranjan Chakravarti* (2). Here the receiver not [**330**] only had no authority to issue the notice said to have been served upon the defendants, but was, in suing them in ejectment, acting of his own motion without the leave of the Court, and, as would also appear, without even the authority of the owners of the estate, whose names were used in this most harassing and costly litigation.

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This suit is moreover barred by limitation. Rashmoni died on the 19th February, more than 12 years before Act IX of 1871 came into operation, and consequently the Full Bench decision [*Srinath Kur* v. *Prosunno Kumar Ghose* (3)] does not touch the present case, even if it be taken to be that which it does not profess to be—a decision on art. 141 of sch. II of Act XV of 1877, and the defendants had by adverse possession against Rashmoni's daughters, who though females, fully represented the estate, acquired a valid title by prescription to the land in suit before Act IX of 1871 came into force and the right of suit thus lost as well as the right of property thus gained were alike unaffected by either Act IX of 1871, or Act XV of 1877, with respect to which it is further to be observed that the former dealt with suits by reversioners on the death of a Hindu widow, whilst the latter dealt with suits by Hindus or Mahomedans entitled to the *possession* of immoveable property on the death of a Hindu or Mahomedan female—two entirely distinct matters. The Court below was in error in reading " Hindu widow " in the one Act as equivalent to " Hindu female " in the other, and in considering a person (against whom adverse possession for upwards of 12 years had been enjoyed,) to be a person entitled to possession within the meaning of the later Act. Limitation Acts are to be strictly construed as against the rightful owner.—*Dayachand Nemchand* v. *Hemchand Dharamchand* (4); *Umiashankar Lakhmiram* v. *Chhotalal Vajeram* (5); *Balvantrao* v. *Purshotum Sidheshvar* (6). It was found as a fact by the judgment of the High Court of the 13th April 1877, that Padmamoni and Jagadumba had all along been aware that the present defendants claimed to hold a permanent tenure under the *dowl* and *amulnama*, and this is binding on [**331**] the reversioners—*Pertabnarain Singh* v. *Trilokinath Sing* (7); *Tekait Ram Chunder Singh* v. *Srimati Madho Kumari* (8).

It is not alleged that the claim was first made in 1865, and it is clear that if a landlord knows that a claim is made by a tenant that he holds a permanent tenure, the landlord has twelve years within which to proceed to protect his interests—*Ogra Kant Chowdhree* v. *Mohesh Chunder Sikdar* (9); *Tekaetnee Goura Coomaree* v. *Mussamut Saroo Coomaree* (10); *Petambar Baboo* v. *Nilmony Singh Deo* (11); *Maidin Saiba* v. *Nagapa* (12); *Bejoy Chunder Banerjee* v. *Kolly Prosonno Mookerjee* (13).

As in this case adverse possession began to run in 1861 on the death of Rashmoni, the twelve years was complete before 1873 when the Act of 1871 came into force, as under the Act of 1859 the reversioners had twelve years from the death of the " widow," and the daughters were the reversioners, and fully represented the estate.

Next the suit is barred by *res judicata*, as the effect of the judgment of the High Court of the 13th April, 1877, was to hold that the *dowl* and *amulnama* were genuine documents, and binding on the reversioners. Padmamoni and Jagadumba, on the death of Rashmoni, fully represented

(1) 6 B. L. R. 486. (2) 10 C. 1014. (3) 9 C. 934 (4) 4 B. 515.
(5) 1 B. 19. (6) 9 B. H. C. 99.
(7) 11 C. 186 (197). (8) 12 I. A. 188=12 C. 484. (9) 4 C. L. R. 40.
(10) 19 W.R. 252. (11) 3 C. 793. (12) 7 B. 96. (13) 4 C. 327.

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the estate. They had an interest analogous to that of the widow, and the principle to be applied is to be found in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1), and *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (2). The suits brought by Jagadumba and Padmamoni were dismissed, and as the plaintiff is bound to include in his plaint the whole of his claim and all his grounds of attack, and as these suits were dismissed, we must take it that the effect of the dismissal was that the Court decided that the tenure was a permanent one, and that the defendants could not be ejected or their rents enhanced.

The defendants also contend that Rashmoni was entitled to make the settlement, having regard to the nature of the land at [332] the time it was made. A Hindu widow, so long as she does not commit waste, is entitled to manage her estate in any way she pleases, and for effectuating such management to lease or settle the lands comprised therein, and such leases or settlement, whether temporary or permanent, will ensure beyond her own life, provided she acts in that behalf as a prudent owner and to the benefit of the estate. In ascertaining whether a settlement made by a Hindu widow is such as could be considered the act of a prudent owner, and for the benefit of the estate, one must look to the position of affairs at the time when such settlement is made, and not be guided by the light of subsequent events. Here the lands were lying waste, and were covered with jungle, and overrun with wild animals. Considerable expense was therefore necessary to be incurred, and that for several years, before such lands could be brought under cultivation, which the widow was under no obligation to incur, and for which she might never obtain a return, and under these circumstances this settlement was not only a fair and reasonable one, but also one actually resulting in great benefit. Evidence was tendered to show the condition of the *chur* and that the lease was of a nature similar to settlements made by neighbouring zemindars for similar lands, and therefore the act of a prudent owner; but that evidence was rejected, and before therefore it can be held that it was not an act which would be binding on the reversioners, that evidence would have to be taken. As to the power of a Hindu widow in this respect see *Pertabnarain Singh* v. *Trilokinath Singh* (3); *Sreemutty Puddo Monee Dossee* v. *Dwarka Nath Biswas* (4); *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (5); and Mayne's Hindu law, s. 544.

It cannot be contended that a Hindu widow who fully represents the estate of her husband, and is seized of it as her own, though without power of alienation save for necessity or under the circumstances before mentioned, is in this respect in a worse position than a Shebait, who may grant a permanent lease of debutter property, of which he is merely manager, if the granting [333] of such lease be beneficial to the estate, and the lease be of such a nature as a prudent owner would grant—, *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1); *Konwar Doorganath Roy* v. *Ram Chunder Sen* (6).

Here Rashmoni had a large *chur* covered with jungle, uncultivated and yielding no profit whatever. Bringing it under cultivation was no part of her duty, nor was it an incident to the proper management of the estate to spend income which was her own in order to bring it under cultivation for the benefit of the reversioners. She adopted the course

(1) 2 I. A. 145=14 B. L. R. 450. (2) B.L.R. Sup. Vol. 1008=9 W.R. 505.
(3) 11 C. 186 (197). (4) 25 W.R. 335. (5) 10 C. 823. (6) 2 C. 341.

usually adopted by prudent owners, and granted a *jungleburi* tenure in order to have the *chur* brought under cultivation, and made a source of profit to the estate. You cannot require a Hindu widow to be more prudent than a full owner and set aside a *jungleburi* tenure, because it turns out at a subsequent period that the reversioners could obtain a higher rent than that fixed by the settlement.

The plaintiffs have also ratified Rashmoni's acts. Jagadumba and Padmamoni received rents from the defendants, and Davis also received rents after he got possession—*Gazee Synd Mahomed Azmul* v, *Chundee Lall Pandey* (1); *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (2).

Mr. *Evans* for respondents.—The argument for the appellant has shown that the effect of the *amulnama* and *dowl* has been to alienate the property, and that they do not amount to a lease, and therefore it cannot be said that it was the act of a prudent manager. *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (3). The evidence of neighbouring zemindars to prove that it is the custom to grant such *jungleburi* tenures is therefore irrelevant and unnecessary.

There can be no doubt that the granting of a permanent tenure amounts to an alienation. *Lall Soonder Doss* v. *Hurry Kishen Doss* (4), *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (5); *Juggut Mohini Dossee* v. *Mussumat Shokheemoney Dossee* (6); *Prosunno Kumari Debya* v. *Golab Chand Baboo* (7).

[**334**] The case of *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (8) does not assist the contention of the other side, and it cannot be contended that in order to bring this *chur* under cultivation it was necessary to alienate it, for it was not virgin jungle but merely a recently formed *chur* covered with scrub and grasses, which in themselves were a source of revenue to the estate. It is also admitted by the defendants that some Rs. 10,000 only were spent in bringing it under cultivation, and even that amount, if actually spent, could have been provided by Rashmoni, as the estate of Raj Chunder was a very large one.

Upon the question of notice—no notice was necessary as defendants are trespassers, and even if it was necessary, it was served, and no objection was taken in the Court below that it was not proved to have been signed by Davis; and had such objection been taken, the fact was one which might easily have been proved. Nor is there any force in the objection that the receiver was not empowered by the order appointing him to give notice to quit. The words in the order " to let and set " and to " recover, realize and obtain payment of claims by suit " are ample to include such a power (Kerr on Receivers, pp. 148—151). A receiver can give notice to quit when the tenancy is merely a yearly one. Even if it be held that the notice was bad, and that we are not entitled to a decree for ejectment, we are still entitled to a declaratory decree that the defendants are not entitled to the permanent tenure claimed by them —*Kali Krishna Tagore* v. *Golam Ally* (9). This would leave us to bring a fresh suit to eject them upon serving a fresh notice next year.

The suit is not barred by *res judicata*—*Prosounno Kumari Debya* v. *Golab Chand Baboo* (7); *Joygobind Sahoy* v. *Mahtab Koonwar* (10); *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (11); *Pertabnarain Singh* v. *Trilokinath Singh* (12).

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(1) 7 W.R. 250. (2) 14 C. 33. (3) 3 I.A. 92. (4) Marshall 113.
(5) 13 M.I.A. 270. (6) 14 M.I.A. 289. (7) 2 I. A. 145=14 B. L. R. 450.
(8) 10 C. 823. (9) 13 C. 248. (10) 7 W.R. 1.
(11) B.L.R. Sup. Vol. 1008=9 W.R. 505. (12) 11 C. 186.

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The question was not decided by the judgment of the High Court in the previous cases as contended by Mr. Woodroffe, and if the Court finds that the question was not fully tried out and decided, there can be no bar on that account to this suit. Could [335] it be said that the judgment in *Petambar Baboo* v. *Nilmony Singh Deo* (1) could be pleaded as *res judicata* against a subsequent rajah?

As to limitation—a reversioner has 12 years from the time when his estate falls into possession within which to bring his suit—*Srinath Kur* v. *Prossunno Kumar Ghose* (2). In this case there was no hostile assertion of right till the year 1865, when Jagadumba and Padmamoni brought suits in the Collector's Court for kabulyats at enhanced rates. The case of *Tekait Ram Chunder Singh* v. *Srimati Madho Kumari* (3) is conclusive upon the question as to the period of time when limitation begins to run. The acts of the two daughters in no way affect the reversioners. When an alienation is made by a widow and ratified by a daughter, the whole principle of the law is opposed to the alienee taking any thing, for no one of several successive female holders has any more power than the other. *Isri Dut Koer* v. *Mussumat Hansbutti Koerain* (4). Therefore the defendants could derive no benefit by the acquiescence of Jagadumba or Padmamoni in the acts of Rashmoni, daughters not being protectors of the estate.

The case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (5) throws no light on the subject, for in that case Mr. Justice Markby thought that the possession of the wife was adverse.

As to ratification by the plaintiff,—the judgment of the lower Court is right, and there is no evidence that the plaintiffs in any way ratified the acts of Rashmoni, but on the contrary evidence to show that they disputed them from the first.

Mr. *Woodroffe*, in reply.—Notice was necessary in the case. *Ram Khelawun Singh* v. *Mussamut Soondra* (6) lays down that persons holding over cannot be treated as trespassers without reasonable notice, and *Chaturi Singh* v. *Makund Lall* (7) lays down the same proposition. Rashmoni, Jagadumba and Padmamoni [336] could create a tenancy from year to year, and no tenancy terminates on the death of the widow who creates it; but the tenant is certainly entitled to hold till the end of the year. Besides rent was received after the death of Jagadumba, and the tenancy, whatever it was, was admitted thereby [*Cazee Syud Mahomed Azmul* v. *Chundee Lall Pandey* (8), and the defendants could not therefore be treated as trespassers.

The setting up of permanent lease is not a repudiation of the landlord's title [*Kali Krishna Tagore* v. *Golam Ally* (9)], and therefore notice was necessary, and as it was not given, the suit must fail.

Next Mr. *Evans* contends that at all events he is entitled to a declaratory decree, but he got no such decree in the lower Court, and he has not appealed, nor is he entitled to any such decree even if he had asked for it, which he did not. As to the point of limitation—immediately on Rashmoni's death the daughters could have ousted the defendants, and they were well aware of the *amulnama* and *dowl* at that time. The whole current of decisions show that limitation commences to run from the time when the vendor is aware that there is an assertion of a claim to a permanent tenure—*Maharajah Rajundur Krishwar Singh Bahadoor* v. *Sheopursun Misser* (10); *Maidin Saiba* v. *Nagapa* (11);

(1) 3 C. 793. (2) 9 C. 934. (3) 12 I.A. 188. (4) 10 I. A. 150. (5) 4 C. 327. (6) 7 W.R. 152. (7) 7 C. 710. (8) 7 W. R. 250. (9) 13 C. 248. (10) 10 M. I. A. 438. (11) 7 B. 96.

Dinomoney Dabea v. *Doorgapersad Mozoomdar* (1) *Ogra Kant Chowdhree* v. *Mohesh Chunder Sickdar* (2); *Ram Chunder Singh* v. *Madho Kumari* (3). The possession of a tenant in this respect is not the possession of a landlord, and when a tenant pays rent but claims that he holds a permanent tenure, he holds adversely to the landlord, who disputes the claim, and limitation runs—*Srinath Kur* v. *Prosunno Kumar Ghose* (4), and therefore we had obtained a perfectly good title by adverse possession before the new Limitation Act of 1871 came into force.

[337] The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

This is an appeal from a decree of the District Judge of Furreedpore in favour of the plaintiffs in a suit brought by Mr. C. T. Davis as receiver to the estate of the late Raj Chunder Dass in the names of himself and the proprietors of the estate against the appellants Permanund Sen and others to set aisde a permanent settlement granted to them by Rashmoni Dasi, the widow of the said Raj Chunder Das, in respect of a *chur* named Gobra, which was an accretion to the mouzah of that name. Rashmoni granted the settlement of this *chur* in perpetuity to the defendants in the year 1260, the *chur* being then, as it is stated, mainly covered with jungle; the lessees were to hold it rent-free for the first three years, and subsequently at a progressive *jumma* until the year 1267, from which year they were to hold it in perpetuity at 10 annas per bigha. Rashmoni Dasi died in 1861, and after her death the estate was held during their lifetime by two of her daughters, Padmamoni and Jagadumba, the last of whom died in Pous 1287, that is, the 31st December, 1880. Upon the death of the last-named lady the sons of herself and sisters as reversioners came into possession of their grand-father's estate. A partition suit was brought for the division of the estate, and in the course of that suit Mr. C. T. Davis was appointed by the High Court as receiver. It is stated that a notice to quit was served upon the defendants, their lease not being valid as against the reversioners, and the present suit to eject the defendants was brought, because they refused to give up possession. There was an alternative prayer for enhancement of the rent of the defendants should they be found entitled to remain tenants.

Various pleas were raised in the written statement of the defendants, and twenty issues were laid down by the Subordinate Judge, in whose Court the plaint was filed. The suit was afterwards transferred to the file of the District Judge, who made a decree in the plaintiff's favour for the ejectment of the defendants and for mesne profits for three years, with costs of the suit.

The grounds argued before us in appeal on behalf of the defendants were, that Mr. Davis as receiver had no power either **[338]** to serve a notice to quit or to bring this suit to eject, and that there was no proof that the notice said to have been served was actually signed by Mr. Davis. The finding of the lower Court that the notice was actually served was impugned as not being supported by credible evidence. The finding by the Judge that it was unnecessary to serve any notice, he having held the defendants to be mere trespassers as against the plaintiffs, was impugned as contrary to law. The next contention was that the suit was barred as *res judicata* in consequence of the decision of the

(1) 12 B.L.R. 274
(2) 4 C.L.R. 40.
(3) 12 C. 484=12 I.A. 188.
(4) 9 C. 934.

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High Court in a suit brought by the daughters of Rashmoni, who were in possession of the estate, to set aside the settlement in question and to enhance the rent of the holding. The next objection was that the suit was barred by limitation. Next it was urged that the plaintiffs ratified the settlement made by Rashmoni by receiving rents from the defendants for the period subsequent to the death of the last surviving daughter. And, lastly, it was contended that, regard being had to the true condition of the land, Rashmoni was justified in granting the settlement, and that, at the very least, the defendants were entitled to retain possession as being tenants with right of occupancy.

Another question was raised by the plaintiffs respondents in the Court below, but which has not been dealt with by the Judge, *viz.*, whether, supposing the *dowl*, which forms the basis of the defendant's title, to be valid as against the reversioners, the plaintiffs are still not entitled to assess rent upon all land held in excess of the area specified in that *dowl*. The area specified in the *dowl* is 1600 bighas. According to the plaintiffs' case the area of the *chur* in their possession is nearly 3,000 bighas, and according to the evidence of the defendant Permanund himself is 2,500 or 2,600 bighas.

These are the points which we have to decide in this case.

The first point, touching the authority of the receiver to issue a notice to quit and to bring this suit to eject, was not raised in the written statement, and was not the subject of any of the issues laid down in the lower Courts; but it appears from the order sheet that on the 17th of March 1885, before any witnesses were examined, the objection to Mr. Davis' action was urged before the lower Court upon the strength of a decision of this [339] Court in the case of *Miller* v. *Ram Ranjan Chakravarti* (1) in which it was held that the receiver could not sue or be sued without the consent of the Court, that is, of the High Court. The lower Court, however, upon the construction which it put upon the order appointing Mr. Davis as receiver, held that he was entitled to maintain the suit; and accordingly the objection was overruled.

The objection taken in the first issue in the lower Court was that the plaint had not been signed and verified by a competent person. It was verified and signed by Kali Churn Singh, a mukhtear of the receiver. If the receiver had, as held by the District Judge, authority to bring this suit, then the verification by his authorised mukhtear would probably be sufficient, otherwise of course it would have no effect. We may here observe that though the owners of the estate were joined with Mr. Davis as plaintiffs in the case, none of them took any part in it nor did they put in any appearance or authorise anybody to verify the plaint on their behalf. This would probably be immaterial if Mr. Davis, as receiver, had power and authority to bring the suit; for according to the rules of practice and the wording of the order of appointment, the receiver, in suits which he is authorised to bring, is permitted to use the names of the plaintiffs and defendants, and no action on their part appears to be necessary in such suits. The question therefore is whether, by the terms of the order of the High Court, dated the 11th August, 1881, appointing Mr. Davis as receiver, he was authorised either to issue a notice to quit, the tenants holding under a permanent lease, or to follow up that notice by an action for ejectment without further special permission from the

(1) 10 C. 1014.

Court. With reference to this point we may observe that, when the learned counsel for the appellants first opened it, we heard the counsel for the respondents before going further into the case; and we then decided to hear the appeal on all the points raised, upon the express understanding that before the close of the case an application should be made on behalf of all the plaintiffs-owners, adopting the action of the receiver, and agreeing to be bound by the result of the trial. But no such application has been made. Some days after the hearing [**340**] had terminated a petition was tendered signed by some of the owners-plaintiffs, but not by all. It is obvious that an action for ejectment cannot be maintained by some only of the owners of an undivided estate. We were therefore unable to take cognizance of that petition. And the question already stated must be decided. We have been referred to English cases as showing what a receiver may do of his own authority and what he may not do without the permission of the Court. The order of appointment, which is printed at pages 55 and 56 of the paper book, authorizes the receiver to take possession of the property, moveable and immoveable, of the estate, and, amongst other things, authorizes him to let and set the said immoveable property or any part thereof as he should think fit. Mr. Evans for the respondent referred us to Kerr on Receivers, and pointed out a passage at page 151, showing that a receiver appointed by the Court with general authority to let the lands from year to year has thereby also an implied authority to determine such tenancy by a regular notice to quit. He referred us to the cases mentioned in the footnote to page 151 as authority for this doctrine. Those cases, however, appear to us to refer only to tenancies of the nature there described, namely, tenancies from year to year, or other tenancies, the periods of which expire during the incumbency of the receiver. The words " to let and set " in Mr. Davis' appointment order cannot, we think, give him as receiver any implied authority to interfere with tenures which, upon the face of them, are permanent. We think that to authorize him to issue such notice special consent of the Court would be necessary. Mr. Davis must have been appointed receiver under the provisions of s. 503 of the Code of Civil Procedure; and no doubt the Court could have, had it seen fit, granted to him under that section all such powers as to bringing and defending suits, and for the realization, management, etc., of the property as the owner himself had, or such of those powers as the Court thought fit. And if the order of his appointment had been drawn up in the form prescribed in the fourth schedule to the Code, that is, in the Form No. 168 of that schedule, there would have been no difficulty in the receiver's way in the present suit, for the form in question gives a receiver *full* powers under the provisions of s. 503. But the order was not [**341**] drawn up in that form; it was drawn up in the old form which prevailed at the time of the Supreme Court, and which, as we are informed, has ever since been in use. Instead of having full powers under s. 503, the receiver has the limited powers expressly given by the order of appointment. And we find in that order no words upon which we could hold that he was authorised to serve upon the defendants a notice to quit the tenure which they obtained from Rashmoni.

Then it was contended by Mr. Evans for the respondents that the words of the order are sufficiently large to give the receiver power to bring this suit to eject, for the order authorizes the receiver to enforce claims by action, suit, or otherwise. He submitted that the word " claims " is sufficient to cover the present suit, the matter in dispute

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being a claim to a portion of the landed property. We are, however, unable to adopt this construction. The passage in which this word occurs is as follows: " And to take and use all such lawful and equitable means and remedies for recovering, realising and obtaining payment of the said rents, issues, and profits of the said immoveable property, and of the outstanding debts and claims by action, suit, or otherwise." These are the objects for which he is authorised to bring suits; and a suit to eject tenants and to take possession of land is not a suit for obtaining payment of a claim. That being so, it appears to us clear that the proceedings of the receiver in this matter, both as to the notice to quit and as to the bringing of this suit for ejectment, were unauthorized and of no effect against the defendants. This finding would of itself be sufficient to dispose of the suit; but as this is a case appealable to Her Majesty in Council, we think it our duty to express our opinion upon the other points raised.

As to the notice not being proved to have been signed by Mr. Davis, we find it undoubtedly true that there is no proof of this fact upon the record. But no question of this kind was raised in the Court below, nor is it raised in the petition of appeal to this Court. We think that the defendants-appellants may be held to have tacitly admitted that the notice was signed by Mr. Davis, and if they had raised the question at the proper time, no doubt evidence would have been forthcoming to [**342**] establish the fact. We should not, therefore, be prepared to dismiss the suit on the ground that this signature was not proved. It was contended on behalf of the respondents that no notice to quit was necessary. We are of opinion that there can be no doubt in the circumstances of this case that the defendants were entitled to notice. They were acknowledged to be tenants by the receiver upon the notice he served upon them for enhancement of rent, and also by receipt of rent from them, although it was for a period antecedent to the death of Jagadumba; and we think that upon the authorities the matter is perfectly clear. We may refer to two cases—*Chaturi Sing* v. *Makund Lal* (1) and *Kali Krishna Tagore* v. *Golam Ali* (2), as also to the case of *Ram Khelawun Sing* v. *Mussammut Soondra* (3). It cannot be said that at the time when the reversioners came into possession the defendants were trespassers.

Then as to the evidence of service of the notice to quit we think that it is not wholly satisfactory, for there are discrepancies in the statements of the two witnesses who were called to prove it, which discrepancies we think ought not to have existed. Still the Judge below, before whom the witnesses were examined, believed them substantially, and we should hesitate to come to an opposite finding upon the evidence which satisfied him. If the plaintiffs recognized the necessity for issuing a notice, or recognized the fact, as they probably would, that the defendants would certainly claim to be entitled to such notice if any suit were brought to eject them, it seems very unlikely that the plaintiffs should neglect to serve one. And we think, therefore, that the evidence in support of the service may be accepted as sufficient, even though somewhat unsatisfactory. Upon this point therefore we would confirm the finding of the lower Court.

As to the contention with regard to *res judicata*, we think that it cannot be sustained. It appears that after the death of Rashmoni, her daughters Padmamoni and Jugadumba sued the defendants for enhanced

(1) 7 C. 710. (2) 13 C. 248. (3) 7 W.R. 153.

rent in respect of the lands now in dispute. They alleged that the *dowl*, under which the defendants held, and the *amulnama* were forgeries, and that even if [343] genuine they were not valid as against themselves, Rashmoni, their mother, having no power to grant such a settlement to enure beyond the period of her own life. Those cases were finally decided in this Court on the 13th April, 1877. The suits were then dismissed. The Court, having noticed the objections raised in appeal, to the effect that the documents, even if executed by Rashmoni, were unauthorised, and that if they could bind Rashmoni, they were not binding upon the reversioners, as she could not create a permanent lease, observed as follows:—

"What would have been the effect of these objections had they been raised by the appellants immediately on or within a reasonable time after the death of Rashmoni we need not now consider. But we agree with the lower Appellate Court in holding that the objections cannot now be raised in these suits." The Courts then having observed that the documents in question had been found not to be forgeries, said: "It is too late after the lapse of more than twelve years since the death of Rashmoni, during all which years the appellants have been receiving rent from the defendants at the rates mentioned in this *dowl kabulyat*, to raise questions as to whether tenures created by her are binding on those who have taken the estate in reversion." No doubt Padmamoni and Jagadumba fully represented the estate of Raj Chunder Dass, and if it was really decided by the Court as against that estate, that the *dowl kabulyat* executed in favour of Rashmoni, and the tenure created by her were binding on the reversioners, we have no doubt that that matter would be *res judicata* in the present suit. But reading the judgment of the High Court printed at pages 100 and the following of the paper book, we find, as pointed out above, that the Court refused to consider the question at all, and therefore there was no adjudication of it. That being so, we think that we cannot say that the matter is really *res judicata*. We see no reason, therefore, why the plaintiffs may not raise the question in the present suit if it be not otherwise barred. This brings us to the question of limitation, and this we are compelled to hold is a bar to the present suit.

It appears to us that the title of the defendants had become [344] perfect by efflux of time before Act IX of 1871 came into effect in the place of Act XIV of 1859. Act IX of 1871 came into effect in April 1873, more than twelve years after the death of Rashmoni, which took place in January 1861. The possession of the defendants was of course not adverse to Rashmoni; and, if it be shown that her daughters, while in possession, had ratified the settlement in question, the defendants' possession could not have been adverse to them also. But we find in fact that the daughters, so far from ratifying their mother's settlement, did all they could to get rid of it. True it is that, as found by this Court in 1877, they received rent from the defendants at the rates mentioned in the *dowl*, but this was no ratification of the grant. On the contrary, they impugned the documents as forgeries, and denied that they were bound by them even if they were genuine.

Therefore adverse possession no doubt commenced during the lifetime of the daughters of Rashmoni. They fully represented the estate; and, if limitation barred them under Act XIV of 1859, it follows that it would bar the reversioners also—see the Full Bench decision in *Nobin*

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Chunder Chuckerbutty v. *Issur Chunder Chukerbutty* (1). We find from the decision of the Court to which we have already referred that the daughters (who were the appellants) knew all along that the defendants had set up the claims which they attempted to defeat. This must, we think, refer to the time when the daughters came into possession upon Rashmoni's death; and it must be presumed that they then came into possession of all the records belonging to her zemindari; and that the documents relating to this settlement were there, was admitted by Jugadumba in a written statement, filed by her in the suit of 1865, which is printed at page 97 of the paper book; and the presumption follows that she and her sister had notice of the title claimed by the defendants. In this view of the matter it would appear that adverse possession commenced to run from the time of Rashmoni's death, from which more than twelve years had elapsed when Act IX of 1871 came into force, so that the defendants' title would be perfected by limitation under [**345**] the provisions of Act XIV of 1859. There can be no doubt that the law in this respect was altered by Act IX of 1871 and Act XV of 1877. But it is obvious that if the defendants had acquired a title by prescription under Act XIV of 1859, that title could not be defeated by either of the Acts subsequently passed.

In deciding a question of this kind the point to be looked to is, when did the plaintiffs or their predecessors first obtain knowledge of the title claimed adversely to them. There are many cases which afford authority for this, the latest of which is *Ram Chunder Singh* v. *Madho Kumari* (2). As to what constitutes an adverse claim and adverse possession as between a tenant and his landlord, we would refer to *Maiden Saiba* v. *Nagapa* (3); *Tekaetni Gowra Kumary* v. *The Bengal Coal Company* (4); *Ogra Kant Chowdhry* v. *Mohesh Chunder Sickdar* (5); and to the case of *Maharaja Rajundra Kishwur Sing Bahadur* v. *Sheopursun Misser* (6) in which their Lordships of the Privy Council at page 449 observe as follows: "If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists, but if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some *jumma* from the mesne proprietors. It is obvious then that the assertion of such a title is a serious prejudice to a *zemindar*, and may materially interfere with his successful management of his *zemindari*. Such an intermediate tenure cuts off the possession, that is, the zemindar's title to the rents and profits immediately derived from the cultivators."

"In this sense, the term 'possession' is used in this plaint. Now this injury, supposing the claim to the *bhakee birt* tenure to be groundless, is not the less a wrong requiring a remedy when it is put forward by one in possession under a title to an inferior right derived from the *zemindar*, as for instance by a farmer of a portion of the *zemindari*. If such a claim were preferred [**346**] by a person having such an interest, it would certainly be competent to the *zemindar*, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also, because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits."

(1) B.L.R. Sup. Vol. 1008=9 W.R. 505.
(2) 12 C. 484=12 I.A. 188.
(3) 7 B. 96.
(4) 12 B.L.R. 282 (*note*).
(5) 4 C.L.R. 40.
(6) 10 M.I.A. 438.

We think therefore that in this case there was adverse possession by the defendants since the death of Rashmoni, and that upon the ground of limitation also this suit must fail, so far as it seeks to recover *khas* possession of the lands in suit.

The appellants have contended that the reversioners ratified the settlement granted to them by accepting rent for a period subsequent to the death of the last surviving daughter of Rashmoni. We think that the judgment of the lower Court in overruling this plea is correct. We think that the evidence as to the receipt of such rent is inconclusive, and that it has been shown that there was no intention to ratify the settlement. This point, therefore, we should decide in favour of the plaintiffs.

Then as to the right of occupancy pleaded in this case by the defendants, we think that that plea cannot be maintained upon their own showing. Their possession is that of middlemen and not of tenants who can claim a right of occupancy. That was their own contention in the cases brought against them for enhancement of rent after notice, and we think that there is no foundation for their present plea. We have, therefore, no hesitation in overruling it.

Next, as to the power of Rashmoni, a Hindu widow, to make a settlement of this nature, it has been contended that it was a settlement necessary for the improvement of the estate, that without it the jungle lands would never have been brought into cultivation at all. The question depends, in our opinion, upon the circumstances of the land. It has been complained that the District Judge excluded evidence tendered to show what the condition of the *chur* was when the settlement was made, and what was the custom followed by Rashmoni and other landlords in the same part of the country in respect of similar lands. As to the former point, we think that the Judge was wrong to exclude any evidence tendered, and had our decision been otherwise on the [347] points already mentioned, we should probably have found it necessary to send the case back for the reception of further evidence on this point. But upon the evidence as it stands we certainly should not be prepared to differ from the conclusion arrived at by the Judge, and hold that the settlement made by Rashmoni was really necessary for the improvement of the estate. The land appears to have been a *chur* thrown up in a large river as an accretion to an existing mouzah of the estate, and as such it is almost impossible to believe that ryots could not be found to bring it under cultivation upon less exceptional terms. Had the land been a portion of a tract of forest or other land difficult of access and difficult of cultivation without considerable outlay, there might have been some reasonable ground to urge in favour of this settlement; but so far as the evidence goes, we are disposed to hold that Rashmoni was under no necessity to grant a permanent lease at a very low rate of rent, bearing in mind that she was a wealthy zemindar and could have easily laid out the nine or ten thousand rupees said to have been expended by the defendants in bringing the property under cultivation.

Upon the whole, therefore, we are of opinion that the suit must fail both upon the ground that the receiver acted *ultra vires* in instituting it, and that so far as it seeks to recover *khas* possession it is barred by limitation so far as regards the area covered by the *dowl* upon which the defendant's title rest. If the suit had been maintainable by the receiver, we should be prepared to hold that the plaintiffs would be entitled to an

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assessment of all the lands held by the defendants in excess of the area covered by their *dowl.*

The result is that the appeal must be allowed, the decree of the lower Court set aside, and the plaintiff's suit dismissed with costs against the receiver, Mr. Davis.

H. T. H. *Appeal allowed.*

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14 C. 348=11 Ind. Jur. 377.

[348] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Macpherson.

ABDUL RAHAMAN SODAGUR (*Judgment-debtor*) *v.* DULLARAM MARWARI (*Decree-holder*).* [22nd July, 1886.]

Limitation Act, 1877, *art.* 179 *and art.* 175—*Application for execution of decree—Order on petition to pay by instalments—Civil Procedure Code, s.* 210.

An application to execute a decree, dated 30th August 1880, was made on 25th May 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following order: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March 1885: *Held*, that the order was not one recognizing or sanctioning the arrangement within the meaning of s. 210 of the Civil Procedure Code, inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by art. 175 of Act XV of 1887. The application for execution was, therefore, barred under art 179 as not having been made within three years of 25th May 1881. *Jhoti Sahu* v. *Bhuban Gir* (1) dissented from.

[R., 23 T.L.R. 142.]

IN this case the decree-holder obtained a decree on the 30th August 1880. Application for execution was first made on 25th May 1881; and whilst the execution proceedings were pending, a petition was filed by the judgment-debtor, setting forth that he had already paid a certain amount of the decree, and praying that he might be allowed to pay the remainder by instalments as detailed in the petition. The decree-holder consented to this, and an order was made by the Munsif in the following terms: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Munsif, but when or [349] by whose order this was done did not appear. On 7th March 1885 application for execution was made for the amount due, the decree-holder basing his claim on the terms of compromise as set forth in this kistbandi. The judgment-debtor contended that the kistbandi had materially altered the terms of the decree, and that the application for execution was barred as not having been made within three years of the last application in May 1881.

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* Appeal from Order No. 126 of 1886, against the order of Baboo Gunga Nund Mukerjee, Subordinate Judge of Manbhoom, dated the 31st of December 1885, reversing the order of Baboo Purna Chandra Mitter, Munsif of Burrabazar, dated the 30th of May 1885.

(1) 11 C. 143.

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The Munsif held that the application was barred, the arrangement between the parties not having been recognized and sanctioned by the Court.

The Subordinate Judge on appeal held that the order made on the petition to be allowed to pay by instalments was practically an order granting the prayer of the petition as to the payment, and, therefore, the Court had recognized the arrangement for payment.

The judgment-debtor appealed to the High Court.

Baboo *Dwarkanath Chuckerbutty* and Baboo *Prannath Pandit*, for the appellant.

Baboo *Jogesh Chunder Dey*, for respondent.

The case of *Jhoti Sahu* v. *Bhubun Gir* (1) was referred to on behalf of the respondent.

The following judgments were delivered by the Court (Norris and Macpherson, JJ.)

JUDGMENTS.

Macpherson, J.—I think the Munsif's decision is right and that of the Subordinate Judge wrong.

The decree is dated the 30th August 1880 and the first application to execute it was preferred on the 25th May 1881.

Three days afterwards the judgment-debtor petitioned to be allowed to pay the amount due under the decree by instalments extending over many years, the instalments being set out in the petition, which was made with the consent of the decree-holder. The Court passed this order: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The present application to execute was made on the 7th March 1885. The Munsif has held [350] that it is out of time, more than three years having expired since the date of the last application. The Subordinate Judge considered that the Court recognized the arrangement proposed by the parties, and that under s. 210 of Act X of 1877, which corresponds with s. 210 of the present Code, the order above referred to must be taken to embody an order that the amount of the decree should be paid by instalments.

I am unable to adopt this view. The second clause of s. 210 empowers a Court, after the passing of a decree for the payment of money, to order, on the application of the judgment debtor and with the consent of the decree-holder, that the amount decreed be paid by instalments; and the last clause enacts that "save as provided in this section and s. 206, no decree shall be altered at the request of parties." If, therefore, a decree is silent as to the manner in which it is to be executed, and no subsequent alteration is to be made by order of the Court, the decree must be executed as it stands. It is clear that in this case there was no order either directing an alteration of the decree or that the amount should be paid by instalments, and the Court was not in a position to make any such order as, under art. 175 of sch. II of the Limitation Act the application should have been made within six months from the date of the decree. We cannot, therefore, give to the order of the Court the extended meaning which the Subordinate Judge gives, and the mere fact that an amlah of the Munsif has recorded on the back of the decree the instalments set out in the petition of the parties, does not help the appellant, as it is not shown when or under whose orders he did this.

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(1) 11 C. 143.

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A case—*Jhoti Sahu* v. *Bhubun Gir* (1)—has been cited, in which the Court held that, although there was no direct order, there was a substantial compliance with the provisions of s. 210. Whether this is so or not must depend on the facts of each case.

As more than three years have expired since the date of the last application, or since any written admission of the judgment-debtor of his liability, the decree cannot be executed. I would, therefore, reverse the order of the Sub-Judge and restore [351] that of the Munsif but I would under the circumstances allow no costs of this appeal.

Norris, J.—I agree with Macpherson, J., in allowing this appeal. I have pointed out to my learned colleague, Mr. Justice Mitter, that in the case of *Jhoti Sahu* v. *Bhubun Gir* (1) we overlooked the provisions of art. 175 of the Limitation Act, and I am authorized by him to say he concurs with me in thinking that our decision in that case was erroneous.

J. V. W. *Appeal allowed.*

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14 C. 351.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Cunningham.

Mulla Adjim, *In re* (*Petitioner*).* [14th March, 1887.]

Burmah Courts Act (*XVII* of 1875), *s.* 95—*Certificate of administration—Act XL* 1858, *s.* 28—*Appeal under Act XL of* 1858.

The apeal given by s. 28 of Act XL of 1858 is subject to the ordinary law of appeal laid down in the Burmah Courts Act.

No apeal, therefore, will lie from an order refusing an application for the issue of a certificate of administration under Act XL of 1858, it being impossible to place any specific money valuation on such an application.

This was an application made by one Mulla Adjim, in the Court of the Officiating Recorder of Rangoon, for the issue of a certificate of administration, under Act XL of 1858, to the estate of certain minors. The application, for reasons immaterial to the report, was dismissed.

The petitioner appealed to the High Court against this order of dismissal, the appeal being admitted by the Registrar subject to the question as to whether an appeal would lie at all being raised at the hearing.

Mr. *Stokoe*, for the appellant.—I contend that an appeal lies from the decision under s. 28 of Act XL of 1858, and that neither the Burmah Courts Act nor the Civil Procedure Code interfere with the power of appeal given under Act XL. The case of *Golam Rahaman* v. *Fatima Bibi* (2) is a decision under the Burmah Courts Act, and is therefore inapplicable.

[352] No one appeared for the respondent.

JUDGMENT.

The judgment of the Court (Petheram, C. J., and Cunningham, J.) was delivered by.

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* Appeal from Order No. 440 of 1886, against the order of R. S. T. MacEwen, Esq., Officiating Recorder of Rangoon, dated the 25th of September 1886.

(1) 11 C. 143. (2) 13 C. 232.

1887 MARCH 14. — APPELLATE CIVIL. — 14 C. 351

CUNNINGHAM, J.—The first point which arises in this appeal is the question whether we have any right to hear it. We think we have not. The powers of appeal from the Court of the Recorder of Rangoon are of a special character, and are defined in s. 49 of Act XVII of 1875, which lays down certain money limits within which, and within which alone, an appeal lies to the High Court here. Then s. 28 of Act XL of 1858 provides that all orders passed under the Act shall be open to appeal under the rules in force for appeals in miscellaneous cases from the orders of such Courts. We might have felt some doubt as to the effect of these two provisions but for the provisions of s. 95 of the Burmah Courts Act, which expressly refers to Act XL of 1858, and in effect embodies it as one of the enactments of the Act itself.

We think, therefore, that it is perfectly clear that the appeal given in Act XL of 1858 is subject to the ordinary law of appeal as laid down in the Burmah Courts Act; and consequently, as in this case there is no specific money value which enables us to say that an appeal does lie to this Court, we must, following former rulings of this Court on the point, hold that no appeal lies. The present appeal must therefore be dismissed.

T. A. P. *Appeal dismissed.*

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14 C.352.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Cunningham.

RAM CULPO BHATTACHARJI (*Decree-holder*) *v.* RAM CHUNDER SHOME AND OTHERS (*Judgment-debtors.*)*
[11th March, 1887.]

Decree payable by instalments—Instalment, Failure of, whole sum decreed to fall due—Right of decree-holder to waive his right to execute the whole decree—Waiver—Limitation Act, XV of 1877, sch. *II, art.* 75.

A proviso, in a decree made payable by instalments, by which the whole amount of the decree is to become due upon default in payment of any instalment, is a proviso enuring for the benefit of the decree-holder [353] alone, and he is at liberty to take advantage of it or to waive it as he thinks fit.

[**Cited.** 131 P.L.R. 1902=100 P.R. 1902; **R.**, 15 C. 502, (506); 4 C.P.L.R. 21 (22); 21 C. 542 (546); 16 A. 371 (374); 1900 P.L.R. 415 (418); 27 B. 1(13) (**F.B.**); 31 C. 83=8 C.W.N. 66; **D.**, 24 C. 281 (283).]

ONE Ram Culpo Bhattacharji obtained a decree against one Ram Chunder Shome on the 9th October, 1879, for Rs. 623-8, the decree directing that the said sum should be paid by instalments falling due on the 18th November in the year 1879 and the 14th November in the years 1880, 1881, 1882 and 1883, and that on default in the payment of any one of such instalments being made, the whole of the decretal money should immediately fall due.

The whole of that first instalment was not paid on the due date, but it appeared that the total amount of such instalment was subsequently received by the decree-holder; subsequently at different dates all other

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* Appeal from Order No. 406 of 1886, against the order of S. H. C. Tayler, Esq., District Judge of Burdwan, dated the 14th of July 1886, reversing the order of Baboo Nundo Lall Dey, Munsif of Bood Bood, dated the 7th of April 1886.

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instalments due up to the 14th November, 1881, were received, and also a portion of the instalment due on the 14th November, 1882.

On the 11th November, 1885, the decree-holder applied for execution of the balance remaining due under the decree; this application after notice had been served on the judgment-debtor was struck off. And on the 18th January, 1886, the decree-holder again applied for execution.

The judgment-debtor contended that, inasmuch as more than three years had expired from the 18th November, 1879 the date of the default made in payment of the first instalment, the application was barred by limitation.

The Munsif held, on the authority of *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (1) that, although execution for the full amount of the decree could have been taken out after failure of the payment of the first instalment, yet it was open to the decree-holder to waive his right to take out execution for the whole amount, and that, the application having been made within three years from the 11th November, 1885, execution was not barred.

The judgment-debtor appealed to the District Judge, who held that the decree-holder was not entitled to waive his right to take out execution for the whole decree after default made; that the words of the decree left him no option in the matter; that he was bound to apply for execution of the whole decree within three [354] years from the 18th November, 1879; and that therefore the application was barred under art. 179 of the Limitation Act.

The decree-holder appealed to the High Court.

Baboo *Rash Behary Ghose* for the appellant contended that the decree-holder was at liberty to waive his right to execute the decree as a whole on the failure in the payment of an instalment, citing *Nilmadhab Chuckerbutty* v. *Ramsodoy Ghose* (1); that leases often contained covenants for re-entry on failure in payment, and that it was open to the lessor to waive his right to re-enter, and to sue for subsequent rent, and that the present case was analogous to such cases.

Baboo *Srinath Das*, for the respondent.

JUDGMENT.

The judgment of the Court (Petheram, C. J., and Cunningham, J.) was delivered by

Petheram, C. J.—We think that this appeal must be allowed. The question is whether a particular decree is barred by limitation. The decree is a decree for the recovery of a certain sum of money by instalments, and it contains a proviso that, in the event of default in the payment of any of the instalments, the whole sum shall become due. It is found, as a fact, that default was made in the payment of one instalment, and therefore the creditor might, if he had thought fit, have issued execution for the whole amount due under the decree, and that at a period which is so long ago that, if he was obliged to do it, his remedy is now barred by limitation; and consequently the only question is whether, when default is made under such circumstances, the judgment-creditor is bound, at his peril, to put his decree into force for the whole amount, and whether, if he does not, the Statute runs against him.

A good deal has been said about the wording of the decree, but we do not think it very material that we should consider the precise

(1) 9 C. 857.

wording. The proviso by which the whole amount of the decree becomes due upon default in payment of any one instalment is a proviso which, look at it how you will, is put in for the benefit of the creditor, the decree-holder, and his benefit alone; and when a proviso is put into a contract or security [355] and in "security" I include "decree," for the benefit of one individual party, he can waive it, if he thinks fit, and consequently the only question which arises in a case of this kind is the same question as that which arises under art. 75 of sch. II of the Limitation Act, namely, whether the decree-holder did, at the time when default was made, waive his right to the whole sum that was decreed to him or whether he did not.

1887. March 11. — Appellate Civil. — 14 C. 352.

On the findings in this case, and on the facts in this case, we do not think there can be any doubt that he did waive it, because what he says, and what is uncontradicted, is that, although there was a default in the payment of an instalment, the creditor accepted so much of it as was not paid at the time afterwards, and therefore it is obvious that he did waive it, because he did not, as he was not bound to, insist upon putting into force the decree for the whole amount; and inasmuch as this proviso was for his benefit he might or might not take advantage of it as he pleased. Under these circumstances we think that this creditor did waive the right which he had under the decree to enforce it for the whole amount in the event of a default being made in the payment of any instalment, and having waived it, the decree still remained a decree for the recovery of the sum decreed by instalments, and therefore the Statute of Limitations did not run against him.

For these reasons we think that the Judge was wrong in holding that this decree was barred by limitation, and his judgment must be reversed with costs.

T. A. P. *Appeal allowed.*

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14 C. 355.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt. Chief Justice and Mr. Justice Norris.

QUEEN-EMPRESS v. CHANDU GOWALA AND ANOTHER.*
[21st March, 1887.]

Magistrate, Jurisdiction of—Criminal Procedure Code (Act X of 1882), *s.* 349—*Penal Code, Act XLV of* 1860, *s.* 411—*Receiving stolen property.*

Under s. 349 of the Criminal Procedure Code a Second Class Magistrate transmitted a case to the District Magistrate, being of opinion that a more [356] severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second Class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second Class Magistrate to commit.

[**R.**, 2 Weir 428; **D.**, Rat. Unrep. Crl. Cas. 472.]

Two persons were accused before Baboo Chandra Bhusan Chakravarti, a Magistrate of the second class, of dishonestly receiving stolen

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* Criminal Reference No. 51 of 1887, made by T. Smith, Esq., Sessions Judge of Gya, dated 12th of March, 1887.

1887 MARCH 21. — CRIMINAL REFERENCE. — 14 C. 355.

property, and were found guilty; the Magistrate, there being a previous conviction against one of the accused for a like offence, considering that the case required a higher punishment than he, as Second Class Magistrate, was empowered to give, forwarded the two accused to the District Magistrate to be dealt with in accordance with s. 349 of the Criminal Procedure Code.

The District Magistrate considered that the case was a bad one, and returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions. The accused were, therefore, charged under s. 411 of the Penal Code, and were committed to he Sessions Court for trial.

The Sessions Judge, considering the order of the District Magistrate and the final order of commitment by the Second Class Magistrate to be illegal on the authority of the case of *Queen-Empress* v. *Havia Tellapa* (1), reported the matter to the High Court, recommending that the order of commitment should be quashed, and that the District Magistrate should be ordered to dispose of the case, committing it to the Sessions himself should he think that the case was one for the Sessions Court, and remarking that the prisoner, against whom the previous conviction had been charged, had since died in jail.

No one appeared before the High Court, and the Court (PETHERAM, C.J., and NORRIS, J.) passed the following.

ORDER.

We do not think that what happened took away the jurisdiction of the Second Class Magistrate to commit the case to the Sessions, and as his proceedings were not illegal we decline to interfere; the Sessions Judge must proceed to try and dispose of the case.

T. A. P. *Order of Committal upheld.*

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14 C. 357.

[357] CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt. Chief Justice and Mr. Justice Cunningham.

QUEEN-EMPRESS *v.* SRICHARAN BAURI.* [19th March, 1887.]

Sentence—Penal Code, Act XLV of 1860, *ss.* 75, 179, 511—*Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction.*

A person who has been convicted of the offence of theft (an offence punishable under Chapter XVII of the Penal Code) does not, on being convicted of an *attempt* to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code.

[**F.**, 14 C.P.L.R. 72 (73); **R.**, 17 A. 120 (123)=15 A.W.N. 22; 10 Bom. L.R. 26=7 Cr.L.J. 32 (33).]

ONE Sricharan Bauri, who had on the 7th April, 1885, been convicted of an offence under s. 380 of the Penal Code, and sentenced to three months' imprisonment, was, on the 4th February, 1887, convicted of an attempt to commit theft under ss. 379 and 511 of the Penal Code.

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* Criminal Reference No. 43 of 1887, made by Col. W. L. Samuels, Deputy Commissioner of Manbhoom, dated the 28th of February, 1887.

(1) 10 B. 196.

The Deputy Magistrate, before whom the latter case was tried, in passing sentence on Sricharan, refused to take into consideration the former conviction, which had been duly proved against him, inasmuch as the offence for which he was last under trial was an *attempt* to commit an offence only, and as such did not fall within the meaning of s. 75 of the Penal Code.

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CRIMINAL REFERENCE.

14 C. 357.

The Sessions Judge referred the case to the High Court under s. 438 of the Criminal Procedure Code, with a view to the sentence being enhanced.

No one appeared for either side on the hearing of the reference.

The order of the Court (PETHERAM, C. J., and CUNNINGHAM, J.) was as follows:—

ORDER.

We must decline to interfere. The accused has been convicted of an attempt, and the conviction therefore does not fall strictly within the terms of s. 75 of the Indian Penal Code.

T. A. P.

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14 C. 358.

[358] CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt. Chief Justice and Mr. Justice Beverley.

BACHU MULLAH AND OTHERS (*Petitioners*) *v.* SIA RAM SINGH AND OTHERS (*Opposite Party*).* [11th December, 1886.]

Irregularity in Criminal trial—Rioting, Counter—charges of—Cross cases taken—Procedure Code, Act X of 1882, *s.* 537—*Irregularity prejudicing the accused—" Failure of justice."*

A Magistrate, there being counter-charges of rioting and assault before him took up and tried one of such cases, and having heard the evidence for the prosecution called on the counter-case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case: *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Criminal Procedure Code.

[**Disappr.,** 20 C. 537 (549); **R.,** Rat. Unrep. Cr. Cas. 331; 1 C.W.N. 426 (427); 8 C.W.N. 180 (184); 8 C.W.N. 344 (346); 5 C.L.J. 231=11 C.W.N. 472=5 Cr. L.J. 197.]

THIS was a rule obtained by Bachu Mullah and others calling on the opposite party to show cause why the order of the Sessions Judge of Bhagalpore, confirming the order of the Deputy Magistrate of Begoo-serai, convicting Bachu and his party of rioting and sentencing them to six months' rigorous imprisonment each, with a fine of Rs. 25, and in default to a further sentence of two months' rigorous imprisonment, should not be set aside. It appeared that originally there were cross charges of rioting and assault brought in the Deputy Magistrate's Court, the one by Bachu Mullah and his party against Sia Ram Singh and his party, and the other by Sia Ram Singh and his party against Bachu Mullah and his party, and that the Deputy Magistrate first took up and heard the case of Bachu

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*Criminal Motion, No. 475 of 1886, against the order passed by J. Whitmore, Esq., Sessions Judge of Bhagalpore, dated the 13th of November, 1886, confirming the order of J. T. Babonau, Esq., Deputy Magistrate of Begooserai, dated the 22nd of September 1886.

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Mullah, and without passing any order thereon called on the cross case of Sia Ram Singh, and in that case called Bachu Mullah and his party as witnesses; the Magistrate eventually finding that the case against Bachu Mullah and his party had been proved, convicted them and sentenced them as above mentioned, dismissing the case against the party of Sia Ram Singh.

[359] Mr. *Woodroffe*, showed cause.

Mr. *M. Ghose*, in support of the rule.

The order of the Court (Petheram, C.J., and Beverley, J.) was as follows:—

ORDER.

We think that this rule must be dischagerd, at all events so far as the conviction is concerned.

The Magistrate has tried two cases in which there were practically counter-charges of riot and assault. He has tried, first of all, one party, and having taken the evidence for that party he has, without giving his decision in that enquiry, proceeded to take the evidence for the other party, and in this second enquiry he has called as witnesses some of those very persons whose conduct was enquired into in the first enquiry, and as to whose guilt or innocence he was suspending his judgment.

I think that is a course which is to be deprecated to the last degree. I think it a very great pity that Magistrates should ever adopt it. There is no doubt, to my mind, that it constitutes a very great irregularity, and the reason why it is so very objectionable is that you call a man as a witness whose conduct has been enquired into, but the decision in whose case has not been pronounced, and you hear his statement of the case given before the very person who is to decide upon his guilt or innocence; and by doing that you introduce an element into the question whether or not he will tell the truth, which ought not to be there because he has a personal interest in the enquiry; his liberty or life may be at stake on what will be the verdict in his own case, and it is not in human nature to suppose that he would, under such circumstances, give his evidence in the impartial way that it ought to be given in a Court of Justice. Therefore it seems to me that it is not only an irregularity but an irregularity of a grave kind, and in this matter I am speaking not only for myself but I believe for my brother Beverley also, and therefore I hope that in similar enquiries in future Judges and Magistrates will discontinue this irregular and highly objectionable practice. What they can do in a case of this kind is, they can try and decide it, and having decided it they can convict or acquit the accused, whose interest in the enquiry will then have come to an end, and they can then be called into the witness box and [360] examined in the other case, and they will then be in a position to give their evidence without having any personal interest in the evidence which they are being called upon to give.

For these reasons we think this irregularity is very objectionable, and I hope that it will be discontinued, but as to whether it is such an irregularity as to lead us to set aside the conviction and order a new trial is another matter. Section 537 of the Code of Criminal Procedure provides that enquiries are not to be set aside for irregularity unless the Court comes to the conclusion that there has been a "failure of justice," and therefore before the proceedings can be set aside it must be shown that, by reason of the irregularity, the true facts have not come out or that there is danger that they will not come out. But that is not the

case here. As I said before, the reason why this irregularity is objectionable is that persons have a very strong inducement to give evidence with a colouring in their own favour. In this case they have given their evidence, and the persons who practically object are the persons whose evidence was actually given. It cannot be said that they were prejudiced by giving evidence too strongly in their own favour. The other accused were not concerned one way or the other, and therefore we think that there is no prejudice shown to the disadvantage of any of the accused. That being so, notwithstanding the fact that the procedure was irregular, we think that irregularity is cured by that section, and we cannot interfere with the conviction, and therefore on that ground we think that the rule must be discharged.

With reference to the sentence, however, we think that the sentence of imprisonment is sufficient without the additional fine, therefore we confirm the sentence, so far as the imprisonment is concerned, and remit the fine.

T. A. P. *Rule discharged.*

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14 C. 361=11 Ind. Jur. 379.

[**361**] CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Cunningham.

REID, MANAGER OF THE SUDDOWAH FACTORY (*Petitioner*) *v.* RICHARDSON, MANAGER OF THE RAJPORE FACTORY (*Opposite Party.*)*

[16th March, 1887.]

Criminal Procedure Code (Act X of 1882), s. 145—Order passed under s. 146 on proceedings taken under s. 145, Criminal Procedure Code—Power of Courts on revision—Evidence on revision.

Where a Magistrate has passed an order under s. 145 of the Criminal Procedure Code, whereas the proper order in the case should have been one under s. 146, the High Court on revision will make the order which the lower Court ought to have made.

Case in which the High Court on revision entered into the whole of the evidence in the case. *Raja Baboo* v. *Muddun Mohun Lall* (1) explained.

[**Disappr.**, 36 M. 275 (282); **R.**, 22 C. 297 (305); 24 B. 527 (531); 22 C. 998 (1001); 6 Bom. L.R. 379 (389) = 28 B. 533 (550); 13 Cr. L.J. 753 (757) = 17 Ind. Cas. 65 (69) = 23 M.L.J. 419 (501) = 12 M.L.T. 439 (444).]

THIS case originally arose out of disputes concerning the boundaries between the lands held by the Suddowah and Rajpore Factories. After enquiry the police reported that proceedings under s. 145 of the Criminal Procedure Code were necessary, a breach of the peace being imminent.

The Magistrate thereupon passed an order, after being satisfied that a breach of the peace was likely to occur, summoning the parties to appear before him, stating that the question arising was whether a portion of certain *khorray* land, north of the cultivated part of a certain deara, was in possession of the Suddowah or the Rajpore Factory. After hearing the evidence on both sides he found that the Suddowah Factory had failed to prove possession of the land in dispute, and that the Rajpore Factory

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* Criminal Motion No. 406 of 1886, made against the order passed by W. B. Martin, Esq., Deputy Magistrate of Gopalgunge, dated the 3rd of July, 1886.

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were in possession, and directed that they should be retained in possession until ousted by order of a competent Civil Court.

The Manager of the Suddowah Factory applied to the High Court and obtained a rule *nisi* calling upon the Manager of the Rajpore Factory to show cause why the order of the Magistrate above referred to should not be set aside.

[362] The grounds on which this rule was obtained and the arguments of Counsel thereon are not set out owing to the view taken by the Court at the hearing on a perusal and consideration of the entire evidence in the case, *viz.*, that the evidence of possession was extremely unsatisfactory; that an important witness as to the fact of possession had not been examined, although his examination was applied for; and that therefore a proper trial of the issue of possession had not been held; and that the parties had, by proceeding under s. 145 of the Criminal Procedure Code, endeavoured to obtain a decision as to the boundaries between their respective estates.

Mr. *Woodroffe* and the *Officiating Standing Counsel* (Mr. *Bonnerjee*), showed cause.

The Advocate-General (Mr. *Paul*) and Mr. *Pugh* in support of the rule.

ORDER.

The order of the Court (PETHERAM, C. J., and CUNNINGHAM, J.) was delivered by

CUNNINGHAM, J.—We have considered this case at great length, and, departing from the ordinary rule which the Court prescribes to itself in cases of revision. we have thought it desirable to go into the whole of the evidence in the case with the view of putting ourselves in full possession of all the facts appearing upon it, and we have also kept in mind the circumstance, which is constantly brought before us in these cases, that, as between the two parties to the present dispute, s. 145 of the Code of Criminal Procedure is being used for a purpose wholly alien to that for which it was originally intended, and one calculated to produce, in whosesoever favour it is made, very unexpected and unfair results—in fact, that a squabble about some grass is to be turned into an important judicial decision as to the boundary of two large estates. That is a state of things which we regard with great disapproval and which it is the object of this Court to discourage as far as possible, and as we see in this case that the decision, whichever way it went, is calculated to have this effect in a very high degree, we have felt it necessary to scrutinize, with great minuteness, the legal grounds upon which the decision rests and the adequacy of the evidence which supports the decision at which the Magistrate has arrived.

[363] Referring to a recent case, *Raja Babu* v. *Muddun Mohun Lall* (1), and to an observation made by the Chief Justice on that occasion, Mr. *Bonnerjee* has urged before us that we are not at liberty to decide anything except whether there was, or was not, any evidence to justify the finding of the Court below. We think it therefore desirable, before dealing with the present case, to point out the true meaning of that observation. The question before the Court then was, not such a question as we have before us now, but whether the fact of a large amount of attention having been directed by the Court below on the question of title ought to invalidate its decision. The observation made in that ruling with

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reference to what is the ordinary procedure of this Court in revision cases, as to findings of fact, does not, we consider, militate against the view that we have power in revision, if we think right, to consider the whole evidence.

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We do not propose at present to consider in detail the whole of the evidence on which the conclusion of the Magistrate was based. With regard to the question of jurisdiction, we had, for a considerable time, some hesitation as to whether there were any grounds which would give the Magistrate jurisdiction to hold the enquiry. There was certainly, in the first instance, a complaint showing a likelihood of a dispute; upon that there was an order to the Police to hold an enquiry, and the report made to the Magistrate, in compliance with that order, though it did not certainly state very categorically the grounds which would show a likelihood of such a dispute as was necessary to give the Magistrate jurisdiction under s. 145, may, we think, on the whole, be taken as sufficient to confer jurisdiction on the Magistrate under that section.

We next come to consider the evidence as to possession. Now this evidence, though voluminous, is yet, to our minds, extremely unsatisfactory. Having given it the best consideration that we can, we cannot get over various circumstances which appeared in the course of the enquiry which make us feel extremely doubtful as to the justice of the conclusion at which the Magistrate has arrived, and especially with regard to the [**364**] omission to examine a most material witness. We cannot, on the proceedings, as they now stand, consider that it is in any degree satisfactory or that there has been, in any way, what we can consider proper trial of what we think was an important issue when we have the fact before us that the witness, whose evidence we think was likely to be of a very material character, was never brought before the Court, although the first party asked to have him brought.

In these cases the tribunal trying the case is not under the necessity which a Court trying a civil case, or ordinary criminal cases, is under of coming to a conclusion at all. The Legislature contemplates circumstances in which it may be desirable for such a tribunal as that of a Deputy Magistrate, presumably unacquainted with the conduct of civil proceedings and strictly a criminal tribunal, to say that the facts of the case do not enable him to come to a conclusion, and looking at the circumstances of this case and the conflicting nature of the evidence, and the various other circumstances which were before the Magistrate, we think that the wise and proper course for him to have adopted would have been to have accepted the liberty which the Code gave him of not coming to a conclusion as to the fact of possession, and to have passed an order under s. 146, and as we have the power, in revision, to make the order which the lower Court ought to have made, we alter the order of the Magistrate from an order under s. 145 to one under s. 146 of the Code of Criminal Procedure, and direct that the property, the subject of dispute, be kept under attachment by the Magistrate until a competent Civil Court shall have determined the rights of the parties thereto or the person entitled to the possession thereof.

T. A. P. *Order varied.*

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PRIVY COUN-CIL.

14 C. 365 (P.C.)= 14 I.A. 30=11 Ind. Jur. 275=4 Sar. P.C. J. 772.

14 C. 365 (P.C.)=14 I. A. 30=11 Ind. Jur 275=4 Sar. P.C.J. 772.

[365] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

THE MAHARANI OF BURDWAN *v.* KRISHNA KAMINI DASI AND OTHERS.

[16th and 17th December, 1886 and 5th February, 1887.]

Sale for arrears of rent—Construction of Regulation VIII of 1819, *s.* 8, *para.* 2—*Publication of copy or extract of such part of the notice of sale as may apply to the tenure of the defaulter.*

Publication of the notice of sale of a tenure under Reguation VIII of 1819 is required to be in the manner prescribed in s. 8, cl. 2; and personal service on the defaulter is not sufficient. The objects of directing local publication of the notice, *viz.*, to warn the under-lessees of the sale proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant katcheri or to serve it personally.

If there is a katcheri on the land of the defaulting putnidar, meaning the land which is to be sold for arrear of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that katcheri, and if there is no such katcheri on the land held by the defaulter, the copy or extract must be published at the principal town or village on the land.

In the description of this in cl. 2, as "the notice required to be sent into the mofussil," the word "mofussil" is opposed to the sadar katcheri of the zemindar, and refers to the subordinate estate, which is the subject of the sale proceedings.

Where a zemindar, selling the tenure of a defaulting putnidar under the Regulation, had caused to be struck up the requisite petition and notice at the Collector's katcheri, and the notice at the zemindar's katcheri, but not the copy or extract which is directed by the Regulation to be similarly published at the katcheri, nor had published it at any other place upon the land of the defaulter: *Held* that the zemindar had not observed a substantial part of the prescribed process, and that this was for the defaulting putnidar "a sufficient plea" within the meaning of the Regulation.

[R., 17 C. 471 (480); 19 C. 703 (717); 27 C. 308; 22 A. 270 (277) (F.B.); 13 C.L.J. 404 (408)=16 C.W.N. 805 (808)=10 Ind. Cas. 90 (93).]

APPEAL from a decree (6th April, 1883) of the High Court affirming a decree (31st December, 1881) of the Subordinate Judge of Hooghly.

The present question was whether there had been before the sale of the respondent's putni taluk for arrears of rent due to the zemindar, represented by the appellant, a sufficient publication [366] to satisfy the requirements of Regulation VIII of 1819, s. 8, cl. 2 (1), of the notice of

(1) The second clause of s. 8 of Regulation VIII of 1819, relating to the mode in which zemindars are to be allowed to bring to sale tenures in which the right to sell for arrears is reserved by stipulation, enacts the following:—

On the first day of Baisakh, that is, at the commencement of the following year from that of which the rent is due, the zemindar shall present a petition to the Collector containing a specification of any balances that may be due to him on account of the expired year from all or any talukdars or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the katcheri with a notice that, if the amount claimed be not paid before the 1st of Jeth following, the tenures of the defaulters will on that day be sold by public sale in liquidation. Should, however, the 1st of Jeth fall on a Sunday, or a holiday, the next subsequent day not a holiday shall be selected instead. A similar notice shall be stuck up at the sadar katcheri of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual

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the intended sale, and whether the High Court had rightly decreed that the sale should be set aside on the ground that the publication of the notice had not been duly effected.

The tenure sold under the Regulation was mehal Amerpore in the Hooghly zillah, within the zemindari of his late Highness Aftabchand Mahatab Bahadur, Maharaja of Burdwan, who, in his lifetime, had made a putni settlement of that mehal with Ishwarchandra Kur, now deceased, late husband of Krishna Kamini Dasi, the plaintiff in the suit, and with Srinarain Kur, also deceased, and now represented by his son Radhabullub Kur.

The sale, which was for default in payment of rent for the half-year ending 1287 B. S. (the end corresponding to 11th April 1881), the arrears amounting to Rs. 6,475-14-11, took [367] place on the 1st Jeth 1288 (13th May, 1881); and the putni was bought by Bijoy Krishna Mukerji, the highest bidder for Rs. 35,500.

The present suit was instituted on the 21st May, 1881, by the respondent Krishna Kamini Dasi against the zemindar, joining with him as defendants the purchaser and Radhabullub Kur, her co-sharer in the putni. It was to have the sale set aside as having taken place "without publication of the notice at the katcheri of mehal Amerpore or in some principal village of the said lot." And whether there had been a sufficient compliance with the Regulation was the principal question raised by the issues.

From the evidence it appeared that, as the defaulting putnidars of mehal Amerpore had other properties in the neighbourhood, they had a more frequently used katcheri, called "dihi katcheri," at Mahanad, distant eight or nine miles from the confines of Amerpore. Two darputnidars, who were tenants of the largest sub-tenures that were in Amerpore, were always in the habit of paying rent at the "dihi katcheri" at Mahanad, while the katcheri within the Amerpore limits was only used for the purpose of receiving the rents of the smaller tenants, which, when received, were paid into the "dihi katcheri" at Mahanad.

The petition of the zemindar was duly "stuck up" in the Collector's katcheri, and a similar notice at the zemindar's own sadar katacheri. But no notice was taken to the mehal Amerpore, nor was any published on it. Instead of being taken there it was taken to the dihi katcheri at Mahanad, and at the latter it was personally received by Radhabullub Kur, one of the joint putnidars, and he directed Jodonath Bose, their joint servant, to sign the receipt for it, addressed to the Maharaja, the zemindar, as follows:—

Receipt of notice.

"Lot Amerpore in zillah Hooghly included in zemindari pergunnah Burdwan, &c., talukdar Srinarain Kur.

"The arrears of rent of this lot for the second half of the year 1287 B.S., with road cess and public works cess not having been paid, application has been made before the Collector of zillah Hooghly for realisation of Rs. 6,475-14-11 pie, under the provisions [368] of Regulation

case, shall be by him sent to be similarly published at the katcheri, or at the principal town or village, upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or his manager for the same, or in the event of inability to procure this the signatures of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot.

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VIII of 1819, according to the directions contained in Act V of 1853 and the letter No. 57 of the Honourable the Board of Revenue, dated the 31st January 1874, and Act IX of 1880 of the Bengal Council, and the 1st of Jeth next has been fixed as the day before which the said arrears must be paid. Now the notice in the name of the talukdar of that lot having been legally served, has reached me in this mofussil place through the peon of your zemindari katcheri, in consequence of which I execute this receipt, having received this notice. The 11th Bysack 1288 B.S."

The Subordinate Judge was of opinion that, as there was a mal katcheri of the defaulters upon the mehal which was in arrear, and as Mahanad was not in lot Amerpore, nor a principal town or village on the land of the defaulter, therefore the receipt of notice by the latter at Mahanad was not sufficient to satisfy the requirements of the Regulation. The suit was therefore decreed and the sale ordered to be set aside.

The appeal to the High Court came before a Divisional Bench (GARTH, C. J., and MACPHERSON, J.), and the question whether the notice had been sufficiently published was referred to a Full Bench: the referring order and the judgment of the Full Bench, which consisted of GARTH, C. J., MITTER, J., MCDONELL, J., PRINSEP, J., and TOTTENHAM, J., appear in the report of the hearing before the Full Bench (1). In accordance with the opinions of the Full Bench that the requirements of the Regulation had not been satisfied, and that the sale could not be maintained, the appeal was dismissed.

On this appeal,—

Sir *H. Davey, Q. C.*, and Mr. *T. H. Cowie, Q. C.* (Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* with them), appeared for the appellant.

The respondents did not appear.

For the appellant it was argued that there had been a substantial compliance with the requirements of the Regulation. The notice was served personally on one of the defaulting putnidars, who was manager for both, and the servant of both had signed the receipt. Regard must be had to the position of the [369] party complainant. This was not any darputnidar or sub-tenure holder suffering indirectly from the insufficiency, if any, in the notice; but was one of the putnidars who had been effectively served with notice personally. It was submitted that this prevented the plaintiff from taking advantage of the failure to publish at the katcheri at Amerpore, which practically was less useful for the purposes of notice than Mahanad. The purposes of s. 8 had been answered by a mode of service, if not prescribed, quite effectual, and it could hardly be said that personal service of the notice was not, as far as the putnidar was concerned, effectual merely because another mode of publication was provided.

[LORD HOBHOUSE asked if the requirement could be satisfied without publication on the land. It was not a question of the sufficiency of proof but of the sufficiency of the thing proved.] It was argued that the publication was sufficient as it had been made. Reference was made to *Lootfonissa* v. *Kowar Ram Chunder* (2); *Sona Beebee* v. *Lall Chand Chowdhry* (3); *Baikantnath Singh* v. *Maharaja Dhiraj Mahatab Chand* (4); *Mungazee Chuprassee* v. *Shibo* (5); *Gouree Lall* v. *Joodhisteer*

(1) 9 C. 931. (2) S. D. A. (1849) 371. (3) 9 W. R. 242.
(4) 9 B. L. R. 87=17 W. R. 447. (5) 21 W. R. 369.

Hajrah (1); *Ram Sabuk Bose* v. *Kaminee Koomaree Dossee* (2); *Maharaja of Burdwan* v. *Tarasoondari Debia.* (3). 1887 Feb. 5.

On a subsequent day, 5th February, 1887, their Lordships' judgment was delivered by

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JUDGMENT.

Lord Hobhouse.—The only questions on which it is necessary for their Lordships to express any opinion in this case are, first, what is the true construction of the Regulation VIII of 1819, s. 8, para. 2; and, secondly, whether the Maharaja of Burdwan, who is the selling zemindar, has done what is necessary for a sale under that Regulation.

The material facts are not in dispute. The requisite petition and notice were stuck up at the Collector's katcheri and the [370] requisite notice at the zemindar's katcheri. The copy or extract which is next directed by the Regulation to be similarly published was not stuck up at the plaintiff's katcheri at Amerpore or anywhere else in Amerpore, which is the putni taluk in question. Service of that notice was effected on Radhabullub, the plaintiff's nephew and co-sharer in the taluk, at her katcheri in Mahanad, about nine mlies from Amerpore. The plaintiff's Mahanad katcheri is in the same house with that of Radhabullub. It has been strongly urged at the Bar that this service must be taken to be service on the plaintiff herself; but their Lordships do not think it necessary to decide this matter, which, for the purposes of the judgment, they will assume in favour of the zemindar. Would such a service relieve him from giving notice on the lands at Amerpore?

The directions of the Regulation are, that a copy or extract of the notice which is stuck up at the zemindar's katcheri "shall be by him sent to be similarly published at the katcheri or at the principal town or village on the land of the defaulter." It is argued that these terms do not require publication on the land of the defaulter but that they are satisfied by publication at his katcheri, wherever it may be. And it must be allowed that the grammar of that sentence, taken alone, admits of such a construction.

The High Court have decided four points: first, that, if there is a katcheri on the land of the defaulting putnidar, the notice must be published there; secondly, that by the land of the defaulter is meant that land which the zemindar is seeking to sell for default of rent; thirdly, that if there is no such katcheri, the notice must be published at the principal town or village on the land in question; and, fourthly, that it must be published in the manner required, and that service on the putnidar is not sufficient. In all four of these propositions their Lordships agree.

To hold otherwise might defeat some of the substantial objects of this Regulation. It appears from the preamble that one of the objects is to establish "such provisions as have appeared calculated to protect the under-lessee from any collusion of his superior with the zemindar, or other, for his ruin, as well [371] as to secure the just rights of the zemindar on the sale of any tenure." And immediately afterwards occurs the statement that it has been deemed indispensable to fix the process by which the said tenures are to be brought to sale. The object of directing local publication of notices is to warn the under-lessees of the contemplated proceedings which may result in sweeping away their property, and also

(1) 1 C. 359=25 W. R. 141. (2) 2 I. A. 71=14 B. L. R. 394.
(3) 10 I. A. 19=9 C. 619.

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to act as advertisements to persons who may bid at the sale. Both these objects might, and in many cases would, be frustrated if it were sufficient to publish notice at any katcheri which the putnidar may happen to possess, however distant it may be, or to serve it personally on the putnidar.

Moreover the notice in question is described as "the notice required to be sent into the mofussil." The word mofussil is doubtless opposed to the sadar katcheri of the zemindar. It may be used to signify the subordinate estate which is the subject of the proceedings, and in their Lordships' opinion it does point to that estate.

Then it is suggested that this suit is brought by the putnidar, and that an objection founded on the interests of the under-lessees is not available to her. But that suggestion proceeds on a misconception of the nature and force of the objection. Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the zemindar to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the zemindar. The zemindar has neglected to observe a substantial portion of that process. There is therefore material irregularity in his procedure, and of that irregularity the putnidar is entitled to avail herself as a "sufficient plea" within the meaning of the Regulation. Of course there may be cases in which one, who might otherwise be entitled to avail himself of an irregularity, has so conducted himself as to have waived or forfeited his right. But no such case is suggested here.

It remains to look at some decided cases which were cited as authority against the foregoing conclusions.

[372] In the case of *Lootfonissa Begum* v. *Kowa Ram Chunder* (1) the prescribed formalities had not been observed by the zemindar, and the sale by him was set aside. But in the course of their judgment the Sadar Dewanny Adawlut expressed an opinion that the katcheri of the defaulter may be any katcheri in which the collections of the tenure are made. Their Lordships, however, observe that the learned Judges do not cite the words of the Regulation correctly. They appear to mix up the sentence which relates to the mode of publication with the next one, which relates to the evidence of it,—two very distinct things. Moreover they rely on the presence of the comma placed after the word katcheri. Even if the punctuation were of the importance ascribed to it, it so happens that as the sentence is pointed the word "katcheri" may be applied to the whole expression "upon the land of the defaulter" just as easily as to the last three words only. But their Lordships think that it is an error to rely on punctuation in construing Acts of the Legislature. They find that the reasons given do not support the conclusion, from which they feel no difficulty in dissenting.

In the case of *Mungazee Chuprasse* v. *Shibo* (2) a Division Bench of the High Court decided, with much hesitation, that the Regulation was satisfied by publication at a katcheri of the defaulter, which, though not on the land to be sold, was on adjacent land and was the office at which all the business of the estate to be sold was carried on. If that decision were right it would not govern this case, in which there has been no publication in the mofussil at all. Independently of that difference

(1) S. D. A. Rep. (1849) 371. (2) 21 W. R. 369.

the decision appears to have been rested on the dictum of the Sadar Dewanny Adawlut in 1849, and on the reason given for that dictum. But for the reasons above given their Lordships prefer the conclusion that the katcheri meant is one on the land to be sold, and that if there is none, as was the fact in the case under consideration, the publication should be in the principal village on that land preferably to a katcheri on other land. If there should be no village at all an adjacent katcheri might be the proper place of publication, but no such case appears to have occurred.

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[373] The only case cited which is directly in favour of the contention in this case is that of *Gouree Lall* v. *Joodhisteer Hajrah* (1), where it was decided that the Regulation was satisfied by service of notice at the house of the defaulter. But the authority of that decision is undermined by its being rested mainly on the case of *Sona Beebee* v. *Lall Chand Chowdhry* (2), and the recognition of that case by this Committee in *Ram Sabuk Bose* v. *Monmohini Dossee* (3). The same case has been again recognised by this Committee in *Maharajah of Burdwan* v. *Tarasoondari Debia* (4), but it is no authority for the proposition for which it is cited. It has been above pointed out that the formalities which the zemindar has to observe, and the evidence by which that observance has to be proved, are two totally distinct things. All that Sir B. Peacock decided was that, if the observance of the requisite formality was distinctly proved, it was not necessary to have the mode of proof which the Regulation directs. In the case of *Maharajah of Burdwan* v. *Tarasoondari Debia* (4), this Committee found that the question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir Barnes Peacock decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with. Mr. Justice Glover rests his decision wholly on that of Sir B. Peacock, and its recognition by this Committee. And their Lordships observe that Mr. Justice Romesh Chunder Mitter, who adds other reasoning, is a party to the judgment now appealed from, apparently without dissent.

The result is that their Lordships will humbly advise Her [374] Majesty that this appeal should be dismissed and the judgment of the High Court affirmed.

Appeal Dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

C. B.

(1) 1 C. 359=25 W. R. 141.
(2) 9 W. R. 242.
(3) 2 I. A. 71 (77)=14 B. L. R. 394.
(4) 6 I. A. 19=9 C. 619.

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FEB. 24.

ORIGINAL CIVIL.

14 C. 374.

14 C. 374.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SUPRAMANYAN SETTY *v.* HURRY FROO MUG.*

[24th February, 1887.]

Practice—Costs—Attorney's lien—Lien—Attaching creditor—Fund in Court attached.

A sum of money had been paid into Court as admittedly due to the plaintiff in a certain suit; the plaintiff not having satisfied in full his attorney's taxed bill of costs the attorney applied for payment out of the fund in Court. Previously to this application the fund had been attached by a third party. *Held* that the attorney was entitled to enforce his lien as against the attaching creditor for all costs incurred up to the date of attachment; that the attaching creditor was then entitled to be satisfied before the attorney could claim payment out of the balance in Court of any sum remaining due to him on account of his costs.

THIS was an application by Babu Nobin Chund Bural, attorney for the plaintiff in the above suit, on notice to the gomastah of the plaintiff, and to Messrs. Beeby and Rutter, attorneys for one Lubbah, for an order directing the payment out to him of a sum of Rs. 2,027-6 (being the balance due to him on account of taxed costs) from a sum of Rs. 2,291-10-6 standing to the credit of the above suit in the hands of the Accountant-General of the Court.

The taxed costs above referred to had been costs decreed in favour of the plaintiff in the above suit, which was one on an account stated, and in which the defendant had admitted a sum of Rs. 2,291-10-6 to be due to the plaintiff and had paid that amount into Court. The defendant in the above suit had made no payment on account of the sum decreed against him and, inasmuch as the plaintiff himself was living out of the jurisdiction in Madras, the plaintiff's attorney (having only received a [375] part payment from the plaintiff on account of his costs) made the present application to obtain payment of the balance due to him.

The application was opposed by one Lubbah, who had on the 18th June, 1886, attached the sums standing to the credit of the above mentioned suit in execution of an *allocatur* for certain costs incurred by Lubbah in opposing a claim made in the suit of *Setty* v. *Setty*, suit No. 465 of 1885 (the plaintiff in that case being also the plaintiff in the above mentioned case) to certain goods, the property of Lubbah, which had been attached in suit No. 465 of 1885 by the plaintiff as being the goods of the defendant in that suit.

Mr. *Stokoe*, for Babu Nobin Chund Bural.

Mr. *Bonnerjee*, for the attaching creditor.

Mr. *Stokoe*.—The attorney has a lien on the fund in Court for his costs; he is entitled to actively enforce that lien to the extent of his costs of the particular suit under which the fund arises; (2) Daniell's Chancery Practice (6th ed.), 1975 to 1986; *see* also *Lloyd* v. *Mason* (1); *Hamer* v. *Giles* (2); *Nawab Nazim of Bengal* v. *Heralall Seal* (3).

Mr. *Bonnerjee*.—The attorney has no further lien after the fund has practically ceased to be the fund in question, *i.e.*, after attachment. The money has not been acquired through the diligence of the attorney. I rely on *Hough* v. *Edwards* (4).

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* Suit No. 390 of 1883.

(1) 4 Hare 132.
(2) L. R. 11 Ch. D. 942 (947).
(3) 10 B. L. R. 444.
(4) 26 L. J. Exch. 54; 2 Jur. N. S. 814.

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ORDER

Trevelyan, J.—The question is whether the attorney has a lien in priority to the attaching creditor for costs incurred subsequent to the attachment.

It is admitted by Mr. Bonnerjee that the attorney is entitled to a lien for any costs incurred prior to the attachment. There is apparently no authority on the point. It seems to me to be wrong to decide that the attorney can go on holding this fund subject to a lien for his costs subsequently incurred. It seems to me what is attached is the right of the judgment-debtor at [376] the time of the attachment, that is, the money subject to the lien for costs then incurred. Babu Nobin Chund Bural will be entitled to be paid the amount due to him for costs up to the 18th June 1886, the date of the attachment. Then Mr. Bonnerjee's client will be entitled to any balance that may remain as far as his claim extends; any further balance, if any, to Babu Nobin Chand Bural in satisfaction of his claim for costs. Costs of both parties to be paid out of the fund in the first instance.

Attorney for the applicant: Baboo *Nobin Chand Bural.*

Attorney for Lubbah: Messrs: *Beeby* and *Rutter.*

T. A. P.

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14 C. 376.

APPELLATE CIVIL.

Before Sir. W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Cunningham.

Pat Dasi (*Plaintiff*) v. Sharup Chand Mala and another (*Defendants.*)* [7th March, 1887.]

Decree, Evidence of satisfaction of—Adjustment of decree without certifying—Civil Procedure Code, 1882, s. 258—Proof of payment of decree otherwise than by certificate—Fraudulent execution of decree after adjustment.

Where a decree has been satisfied out of Court, and the payment has not been recorded in accordance with s. 258 of the Civil Procedure Code, it is nevertheless open to the *quondam* judgment-debtor, when suing to have a sale made by the *quondam* decree-holder after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under that section.

[Diss., 21 C. 437 (447); 20 A. 254 (256)=18 A.W.N. 37; **Commented on,** 15 C. 557 (562); **R.,** 13 A. 339 (342); 13 C.W.N. 710 (717)=1 Ind. Cas. 871=11 C.L.J. 254=37 C. 107 (116).]

This was a suit for confirmation of possession of certain property and for a declaration that an auction sale of the said property might be set aside as invalid.

It appeared that one Shib Prosad Pal had obtained a decree against the present plaintiff, Pat Dasi, for arrears of rent of a certain under-tenure, and that Pat Dasi had satisfied this decree [377] in full out of Court, the payment never having been duly certified to the Court in accordance with the provisions of s. 258 of the Civil Procedure Code;

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* Appeal from Appellate Decree, No. 1272 of 1886, against the decree of R. Towers, Esq., Judge of Midnapore, dated the 9th of April 1886, reversing the decree of Baboo Revati Churn Banerjee, Munsif of Contai, dated the 6th of May 1885.

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APPELLATE CIVIL.

14 C. 376.

that, notwithstanding the decree had been satisfied, Shib Prosad Pal took out execution and sold the under-tenure and other lands belonging to Pat Dasi in one lot, of which one Sharup Chand Mala became the purchaser. There was, however, no evidence to show that the auction-purchaser was aware that the decree had been satisfied.

Pat Dasi then brought this present suit against Sharup Chand Mala and Shib Prosad Pal for the purposes above mentioned.

The defendants both contended that the plaintiff not having taken objection to the sale in the execution proceedings was not entitled to ask to have the sale set aside by suit; and defendant Sharup Chand Mala further contended that, even if Shib Prosad Pal had granted a receipt in full satisfaction of the decree, the money was paid out of Court and had not afterwards been certified to the Court, and that therefore his position as auction-purchaser could not be affected, the decree remaining virtually unexecuted.

The Munsif held that the suit was one based on an allegation of fraud and would lie; that the procedure adopted by the decree-holder in executing his decree was irregular, the under-tenure not having been first put up for sale; and that on that account the sale ought to be set aside. He therefore reversed the sale and declared the plaintiff's right to the land sued for, confirming him in possession thereof.

The auction-purchaser, Sharup Chand Mala, appealed to the District Judge, who considered that the finding of the Munsif as to irregularity in the sale was a finding on an objection which could be only taken in the execution proceedings, and that having regard to the case of *Kristo Ram Roy* v. *Janokee Nath Roy* (1), it was doubtful whether the fact of the under-tenure not having been first sold was an irregularity at all. He further held, citing the cases referred to under s. 312 of O'Kinealy's Code, that a sale under a decree obtained by fraud could not be set aside when the auction-purchaser was not a party to the fraud, and [**378**] that the plaintiff's remedy lay in a suit for damages. He therefore reversed the decree of the Munsif.

The plaintiff appealed to the High Court.

Baboo *Rash Behari Ghose*, for the appellant, contended that the decree of the Munsif was correct, citing *Lalit Mohun Roy* v. *Binodai Dabee* (2) as dissenting from *Kristo Ram Roy* v. *Janokee Nath Roy* (1). He further contended that the cases cited in the note to s. 312 in O'Kinealy's Civil Procedure Code were no bar to the plaintiff's suit, and that the District Judge in relying on those decisions as being a bar to the suit had acted wrongly.

[PETHERAM, C. J.—The question seems to me to be, can the judgment-debtor prove the payment of the decretal money otherwise than by the certificate referred to in s. 258 of the Code.]

Mr. *Twidale*, for the respondent, contended that the auction-purchaser was not a party to the fraud, and that, therefore, the sale to him ought not to be reversed; that s. 258 clearly laid down that no adjustment of a decree should be recognized by the Court unless certified to it, and that the certificate referred to in that section is the only evidence of any adjustment of the decree; that there is authority for holding that a sale in execution of a decree, which decree is subsequently set aside on appeal, stands good.

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(1) 7 C. 748. (2) 14 C. 14.

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APPELLATE CIVIL.

14 C. 376.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and CUNNINGHAM, J.) was delivered by

PETHERAM, C. J.—This is a suit which is brought by a person to have it declared that the auction sale of his property made in execution of a decree is invalid, and that his possession of it is valid as against the auction-purchaser.

The facts of the case are that the decree was obtained against this plaintiff by one of the defendants for a certain sum of money; that after it had been obtained the present plaintiff satisfied the decree by payment, but he did not have the payment certified under the provisions of s. 258 of the Code of Civil Procedure; and that, notwithstanding such payment, the execution-creditor went on and put up the property for sale, and it was purchased by the other defendants in this suit. Under [**379**] these circumstances the owner of the property, the person who paid the money and who now finds that his property has been sold behind his back, brings this suit for the purpose of having it declared that the sale is of no effect as against him; and the only question is whether he can prove that payment otherwise than by a certificate under s. 258.

It is contended, on behalf of the purchaser, that this section prescribes the only mode in which such payment could be proved for any purpose whatever, in any suit whatever, and before any Court whatever; in other words, that the section alters the law of evidence on that point, and renders this transaction not provable in the ordinary way but only by that certificate.

It is true that the words of the section are of a kind that they may be susceptible of that meaning, but it seems to us that if the legislature intended to make such a great change in the law as that would imply, they would have expressed it in words that would leave the matter free from all doubt, and inasmuch as the words of the section are ambiguous in this sense, that they are susceptible of the large meaning and also susceptible of the meaning that the payment shall be proved in other ways than that prescribed in the section, we think that it is the duty of the Court to give them this meaning and not the larger meaning, which would have such an effect, and which would be a kind of legislation which one would not expect to find in the third clause of a section relating to execution proceedings.

Under these circumstances we are of opinion that it was competent to the plaintiff to prove this payment in the way he has proved it, and having proved it to the satisfaction of both the lower Courts it follows that the decree in the former suit was satisfied and was inoperative against the owner of the property, and therefore the plaintiff is entitled to a decree confirming him in possession as against the purchaser and declaring that the sale under this satisfied decree is void and of no effect.

Under these circumstances we decree this appeal with costs as against the defendant No. 2.

T. A. P. *Appeal allowed.*

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APPELLATE CIVIL.
14 C. 380.

14 C. 380.

[380] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

KOILASH CHUNDER ROY AND ANOTHER (*Decree-holder*) v. JODU NATH ROY AND OTHERS (*Judgment-debtors.*)*
[19th January, 1887.]

Bengal Tenancy Act, s. 148 (h)—Decree for arrears of rent, Assignment of—Execution of decree by Assignee.

The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (*h*) an assignee who proceeds to execution afterwards; but execution cannot be refused where, before that Act came into operation, the assignment had been recognized by a Court of execution under s. 232 of the Civil Procedure Code.

[Cons., 1 C. L. J. 500.]

A DECREE for arrears of rent was obtained by Joykali and Srish Chunder Sirkar Chowdhry. On the 18th June 1885 Koilash Chunder Roy obtained an order from the Civil Court in the proceedings in execution of that decree, recognizing him as assignee of the rights of Srish Chunder Sirkar Chowdhry, to a 4 anna share. In September 1885, Joykali applied to execute the entire decree. In consequence of an informality that application was returned for amendment, and finally it was not presented and granted by the Court until the 10th November. In the meantime the Bengal Tenancy Act came into operation on the 1st November. On the 27th March Koilash petitioned to the Civil Court stating that he and Moti Lall had, in June 1884, purchased the rights of Joykali, and asked that their names might be substituted in her place so that they might be allowed to execute the decree. The Subordinate Judge disallowed the objections of the judgment-debtors, which were raised under s. 148 (*h*) of the Bengal Tenancy Act, but the District Judge on appeal held that execution could not proceed in consequence of the assignments which had been made by the original decree-holders. He accordingly ordered the attachment of the property to be withdrawn and the sale to be stayed *sine die*. The decree-holders appealed to the High Court.

[381] Baboo *Bhobani Churn Dutt*, for the appellants.

Baboo *Gurudas Banerjee* and Baboo *Girija Sunker Mazumdar*, for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.), after setting out the facts as above, proceeded as follows:—

JUDGMENT.

Section 148 (*h*) declares that, "notwithstanding anything contained in s. 232 of the Code of Civil Procedure, an application for execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become, and is vested in him." In this case it is admitted that the exception stated does not exist. We have, therefore, to consider, first, whether the assignment of the rights of Srish Chunder, which was admitted by the Court of execution under s. 232 before the Bengal Tenancy Act became law, entitles

*Appeal from Order, No. 373 of 1886, against the order of J. Crawfurd, Esq., District Judge of Nuddea, dated the 14th of August 1886, reversing the order of Baboo Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 7th of August 1886.

the assignee to proceed to execution in respect of the rights of the assignor; next, whether the assignment of the rights of Joykali, said to have been made before the operation of the Bengal Tenancy Act but not notified to, or recognised by, the Civil Courts until after the Act, entitles the assignee to the assistance of the Court in executing the decree; and, lastly, whether the application for execution made by Joykali can proceed.

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Now, in respect of the rights of Srish Chunder, we are of opinion that, inasmuch as the Civil Court, by an order regularly passed under s. 232 before the Bengal Tenancy Act came into operation, permitted Koilash Chunder to execute the decree as one of the decree-holders, the Bengal Tenancy Act does not apply. The effect of this order, in our opinion, is to substitute Koilash Chunder as a decree-holder in the place of Srish Chunder, the original decree-holder, and after that order was made under s. 232 it is not for the Court executing the decree to consider any circumstances under which it was made. The application of s. 148 (*h*) is not retrospective so as to affect that order. It contains rather a prohibition to the Courts to abstain from granting any application for execution of a decree for arrears obtained by a landlord which may be made by an assignee unless under exceptional circumstances. But the mere fact that any assignments were made before the Bengal Tenancy Act [**382**] came into operation would not entitle the assignees to ask the Court of execution to recognize them now.

We are next of opinion that the application for execution now before us made by Joykali cannot proceed. We cannot find that that application was ever allowed under s. 231, and therefore we must take it that Joykali had no authority to execute the entire decree. As the matter is not before us we abstain from expressing any opinion whether Joykali and Koilash Chunder jointly or either of them separately, under permission given under s. 231, can execute the decree. The appeal is therefore dismissed. Each party to pay his own costs.

K. M. C. *Appeal dismissed.*

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14 C. 382.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

DOYA CHAND SHAHA (*Defendant No.* 1) *v*. ANUND CHUNDER SEN MOZUMDAR (*Plaintiff*.)* [7th January, 1887.]

Onus of proof—Transferability of tenure—Resumption.

There is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for khas possession on the ground that a tenure sold was not transferable must establish his case as an ordiinary plaintiff.

[**N.F.**, 15 C. 89 (92); **R.**, 13 M. 60 (64); 25 C. 896 (907) (**F.B.**),]

ANANDA CHUNDER SEN brought a suit for khas possession of a plot of land which had been purchased in execution of a decree by Doya Chand Shaha, the principal defendant. Ananda alleged that the other defendants had held the land as his tenants, and inasmuch as their interest in it was not of a transferable nature, Doya Chand as auction-purchaser of that

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*Appeal from Order, No. 268 of 1886, against the order of Baboo Promotho Nath Banerji, Subordinate Judge of Mymensingh, dated the 23rd of June 1886, reversing the order of Baboo Rash Behari Bose, Munsif of Ghosegoan, dated the 5th of April 1886.

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interest was a mere trespasser, and thus liable to be evicted from the land. Doya Chand contended, among other things, that the holding was a *mokurari* one and transferable both by law and custom. Upon the question whether the predecessors in title of Doya Chand had a saleable interest in the disputed land, neither party gave any evidence, and the Munsif was of opinion that the burden of proof lay on the plaintiff in the ordinary [383] way, and the fact of the defendant's admission that the plaintiff was the landlord did not make any difference. On appeal the Subordinate Judge, differing from the Court of first instance, held that the defendant having set up a *mokurari* title, and admitted the title of the plaintiff as the landlord, the onus lay upon him, and remanded the case for trial on the merits.

An appeal was preferred from that order to the High Court.

Mr. *Handley* (with him Baboo *Kashi Kant Sen*), for the appellant.

Baboo *Srinath Das* and Baboo *Mokund Nath Roy*, for the respondent.

The Court (PRINSEP and BEVERLEY, JJ.) delivered the following judgment:—

JUDGMENT.

The plaintiff sues to recover khas possession of certain lands now in the occupation of defendant No. 1. He states that the other defendants were his tenants, and that defendant No. 1 has purchased in execution of a decree the rights of those tenants which were not transferable. The sole question on which the case was tried by both the lower Courts and which is now argued before us is on whom the onus, under such circumstances, would lie, whether it is for the defendant to prove that he acquired the right to hold the land inasmuch as the tenure was a transferable tenure, or whether the plaintiff is not bound to start his case by showing that the tenancy of defendants 2, 3 and 4 was not transferable, and that consequently he had a right to re-enter on their relinquishing the land in favour of defendant No. 1. In the course of the argument some cases have been cited from the *Weekly Reporter*, but it is impossible for us to apply the law laid down in those cases because in none of them are the facts stated. We are of opinion that the case of *Dwarka Nath Misser* v. *Hurish Chunder* (1) is not applicable. In that case it was admitted or found that the defendants had occupancy rights, and the learned Judges of this Court in their judgment proceeding on the Full Bench case, *Narendra Narain Roy* v. *Ishan Chundra Sen* (2) held that it was for the defendant to prove that such right was transferable. There is nothing in that case [384] to establish the proposition now contended for, that it is for the tenant or the person who claims to be the tenant to establish his rights to retain the lands in any suit brought against him by the zemindar or whenever the zemindar may think proper to call upon him to show his title. In our opinion the plaintiff is bound to start his case. There is no presumption that any tenure held is not a transferable tenure. We therefore affirm the judgment of the first Court and set aside that of the lower appellate Court, the suit being dismissed with cost throughout.

K. M. *Appeal allowed.*

(1) 4 C. 925. (2) 13 B. L. R. 274.

14. C. 384.

APPELLATE CIVIL.

1887 Feb. 10.

Appellate Civil.

14 C. 384.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

DWARKA MOHUN DAS (*Judgment-debtor*) v. LUCKHIMONI DASI (*Decree-holder*).* [10th February, 1887.]

Attachment—Execution of decree—Partnership debt, Attachment of.

An uncertain sum which may or may not be payable by one member to another of a partnership, not shown to have been wound up, cannot be attached or sold in execution of a decree.

[**Diss.**, 13 M. 447 (450); **R.**, 20 C. 693 (694); 158 P.L.R. 1903.]

LUCKHIMONI DASI in execution of her decree attached and advertised for sale the debts which she represented were due to Dwarka Mohun Das, the judgment-debtor, from his co-partner upon a partnership account. Dwarka Mohun objected that the debt being unascertained was not attachable; but the Subordinate Judge disallowed the objection. On appeal the District Court agreed with the Sub-Judge, and held that the case did not fall either under cl. (*e*) or cl. (*k*) of s. 266 of the Civil Procedure Code.

Dwarka Mohun appealed to the High Court.

Baboo *Lal Mohun Das*, for the appellant.

Baboo *Harendra Nath Mukerjee*, for the respondent.

The judgment of the Court (PRINSEP and BEVERLEY, J.J.) was as follows:—

JUDGMENT.

The debtors apparently are partners in some firm. The [**385**] decree-holder seeks to attach and sell the interest of one of these debtors, which, in his application for execution of the decree, he terms to be a debt due to that judgment-debtor from the other judgment-debtor. The amount is uncertain. It is not even shown that the business of the firm has been wound up, nor is there any certainty that such a debt exists. We cannot therefore agree with the lower Courts that such an interest can be attached and sold in execution of the decree. The case of *Syud Tuffuzool Hossein Khan* v. *Rughoonath Pershad* (1) seems to us to be exactly in point. The order of the lower Court is therefore set aside. The debtor-appellant will receive his costs in all Courts.

K. M. C. *Appeal allowed.*

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* Appeal from Order, No. 423 of 1886, against the order of W. H. Page, Esq., Judge of Dacca, dated the 11th of November 1886, affirming the order of Baboo Beni Madhub Mittra, Subordinate Judge of that district, dated the 22nd of September 1886.

(1) 14 M. I. A. 40=7 B. L. R. 186.

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APPELLATE CIVIL.

14 C. 385.

14 C. 385.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

CHANDRA PRODHAN (*Judgment-debtor*) *v.* GOPI MOHUN SHAHA (*Decree-holder*).* [3rd February, 1887.]

Execution of decree—Arrears of rent, Decree for—Beng. Act VIII of 1869, s. 58—Application for execution—Suspended proceedings, Effect of.

G obtained an *ex parte* decree in 1882 for a sum less than Rs. 500 as arrears of rent. Execution was taken out on the 19th May 1885. On the 20th June *C*, the judgment-debtor, applied to have the decree set aside, whereupon the application for execution was struck off. On the 21st November *C*'s application for a re-hearing was rejected. On the 3rd February 1886 *G* applied for the execution of his decree.

Held that the decree-holder was entitled to execution, the application of the 3rd February being a continuation of the proceedings commenced on the 19th May, which had been suspended by the order of the Court of the 20th June.

[**F.**, 21 C. 387 (391); 23 C. 397 (402); 21 M. 261 (263); **Rel. on**, 13 Ind. Cas. 140; **R.**, 23 A. 13 (19)=20 A.W.N. 178; 4 O.C. 333 (339); 20 Ind. Cas. 244 (245); **D.**, 17 C. 268 (270); 20 B. 175 (178).]

GOPI MOHUN SHAHA obtained on the 21st July 1882 an *ex parte* decree for arrears of rent for a sum less than Rs. 500. Application for execution was made on the 19th May 1885. On the 20th June Chandra Prodhan, the judgment-debtor, applied [**386**] to set aside the decree, and the execution case was accordingly struck off. After repeated adjournments the application for a re-hearing was rejected on the 21st November, and on the 3rd February 1886, Gopi Mohun Shaha renewed his application for execution. Chandra Prodhan objected that, inasmuch as more than three years had elapsed from the date of the decree, execution was barred. The Munsif was of opinion that the execution could proceed, and held *inter alia* that the application of the 3rd February was an application to revive the proceedings commenced on the 19th May 1885, and that the order of the 20th June striking off the execution case was in the nature of an injunction pending the decision in another case—*Basant Lal* v. *Batul Bibi* (1).

On appeal the District Judge confirmed the order for execution.

Chandra Prodhan appealed to the High Court.

Baboo *Boido Nath Dutt*, for the appellant.

Baboo *Sharoda Churn Mitter*, for the respondent.

The Court (PRINSEP and BEVERLEY, JJ.) delivered the following judgment:—

JUDGMENT.

The decree now under execution for arrears of rent was passed on the 21st July 1882, for a sum less than Rs. 500. Execution was taken out on the 19th May 1885, and notice under s. 248 of the Code of Civil Procedure issued before the decree was actually put into execution. On the 20th of June the judgment-debtor objected to execution and applied to have the *ex parte* decree set aside. On the same day the application for execution was struck off. On the 21st of November following the application on behalf of the judgment-debtor to obtain a re-hearing of the

* Appeal from Order, No. 403 of 1886, against the order of H. Peterson, Esq., Officiating Judge of Dinagepore dated the 18th of August 1886, affirming the order of Baboo Sitikantha Mullick, Munsif of that district, dated the 22nd of May 1886.

(1) 6 A. 23.

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suit was dismissed. On the 3rd of February 1886, application was made to execute this decree. It is now objected under s. 58, Beng. Act VIII of 1869, that execution is barred inasmuch as more than three years have elapsed since the date of the original decree. If the application of the 3rd February 1886 be regarded as a fresh application to execute, no doubt it is barred; [387] but we are inclined to take the view expressed in *Kalyanbhai Dipchand* v. *Ghanshamlal Jadunathji* (1), and to hold that this application is a continuation of the previous application of the 19th May, 1885. Execution of the decree was suspended on the action of the judgment-debtor, and, although the law does not permit us to deduct the period during which it was so suspended in calculating the period allowed by the law of limitation, we think that we may properly take the application of the 3rd February, 1886, as an application to the Court of execution to withdraw the order passed on the 20th June, 1885, which suspended the execution in consequence of the objection of the judgment-debtor.

The appeal is therefore dismissed with costs (2).

K. M. C. *Appeal dismissed.*

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14 C. 387 (P.C.)=14 I.A. 63=11 Ind. Jur. 231=5 Sar. P.C.J. 1.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

SHEOLOCHUN SINGH (*Defendant*) *v.* SAHEB SINGH (*Plaintiff*).
[10th February, 1887.]

Hindu Law—Inheritance—Inheritance to property purchased by Hindu widow out of the income of her estate,

When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate.

The authority upon this matter is found in *Isridut Koer* v. *Hansbutti Koerain* (3), where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justifying alienation of the former.

[**Rel. on.,** 7 Ind. Cas. 27; **R.,** 14 C. 861; 16 C. 574; 25 M. 351 (356); 11 O.C. 310 (315); 16 C.W.N. 834 (836)=13 Ind. Cas. 691 (692).]

[388] APPEAL from a decree (14th September, 1883) of the High Court, in part affirming, and in part reversing, a decree (31st December, 1881) of the Subordinate Judge of Shahabad.

The question raised by this appeal was whether a gift by a Hindu widow, although ineffectual to confer a title, after her death, in properties which had belonged to her husband, might effectually transfer property

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(1) 5 B. 29.

(2) This case was followed in *Chandra Kant Bannerjee* v. *Surji Kanto Rai Chowdhury,* under the Tenancy Act; appeal from Order 419 of 1886 decided by PRINSEP and BEVERLEY, JJ., on the 4th February, 1887.

(3) 10 C. 324=10 I. A. 150.

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which, after his death, she and a co-widow, left by the same husband, had purchased out of the savings of the income of the joint estate held by them as widows.

The property, whence the income was derived, belonged to the estate of Sheodyal Singh, who died without issue in 1826, leaving two widows, Pranpiari Koer and Rekaba Koer. The widows remained in joint possession of his estate till the death of Pranpiari Koer in 1871, Rekaba continuing in sole possession, for her widow's estate, till the 19th October, 1875, when by deed of gift she gave to the defendant-appellant the entire moveable and immoveable properties which had belonged to her husband, together with those purchased by her, and her co-widow Pranpiari, out of their savings.

The purport of the deed of gift, or *atanama* executed by Rekaba on the 19th October, 1875, was that she and Pranpiari, desiring to carry out their husband's wishes as to the establishment of "more *thakurbaris*" and "*shivalas*," with other religious objects, and in accordance with the advice of members of their husband's family, had placed Sheolochun Singh as sole manager of the estates; also that Rekaba, the surviving widow, being now sixty years of age, desired to make, and by that deed, did make, "for the preservation of the *riasut*, and the name of her husband, for the *seba puja* of Sri Thakur, and for her husband's *sradh*," a gift of the entire immoveable and moveable properties, household furniture and other valuables left by Sheodyal Singh, together with what had been acquired by the widows, to Sheolochun Singh from generation to generation.

Saheb Singh, son of Jit Singh, claiming as *gotraja sapinda* of the late Sheodyal Singh, and one of his three nearest kinsmen, objected to mutation of names in the Collectorate records in regard to the interests in land which had belonged to Sheodyal; [**389**] and on the death of Rekaba on 2nd February, 1880, Saheb Singh brought the present suit against Sheolochun Sing, claiming a declaration that the deed of gift of 19th October, 1875, was void, as having been executed by a widow without authority, also claiming a one-third share of the property, with partition against the two other near relations of the late Sheodyal Singh, both of whom he joined as defendants, and claiming mesne profits.

Among the defences limitation was alleged, also the competence of the gift, it having been virtually for the spiritual benefit of a deceased husband. But the defence material to this report was the allegation that the widows had during their lives acquired certain of the mouzahs, specified in the schedule annexed to the plaint, with their own money, and that Rekaba was competent to alienate the property so acquired.

The opinion of the Subordinate Judge on the question of limitation, and his findings of fact, were in favour of the plaintiff; but he gave no decision on the last point, as he was of opinion that, whether the mouzahs in question were purchased out of income or out of the widow's savings, Rekaba was entitled to make the transfer, which she had made, of all but the land which had been in the possession of Sheodyal; also, as to the moveable property, he was under the impression that Rekaba had, in her lifetime, complete power to dispose of it. Accordingly he made a decree in favour of the plaintiff for so much of his claim as comprised the one-third of the land that had belonged to Sheodyal, dismissing the claim as to all that had been purchased by the widows and as to the moveable property.

On the defendant's appeal from this decree so much of it as related to the properties purchased after the death of Sheodyal to the moveables' and to mesne profits, was objected to by the plaintiff under s. 561 of the Code of Civil Procedure.

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The High Court (MITTER and WILKINSON, JJ.) dismissed the appeal and allowed the objections. They concurred with the lower Court that the suit was not barred by limitation, and as to certain findings of fact. But finding that all the properties purchased after Sheodyal's death had been acquired out of the income of property which had been his, they held that, if the [390] after-purchased property had been treated as an increment to the estate of the deceased husband by his widows, the latter had no power to alienate it except on the ground of necessity. On this point they referred to *Isridut Koer* v. *Hansbutti Koerain* (1), and found that the after-purchases had been so dealt with by the widows. They allowed mesne profits to the plaintiff, and also, referring to the judgment in *Bhugwandeen Doobey* v. *Maina Baee* (2), corrected the Subordinate Judge's impression as to the power of the widow over moveables. The plaintiff accordingly obtained a decree for a one-third share of the land, including the after-purchases, and of the moveables, also for mesne profits.

The judgment of the High Court was as follows:—

"As regards the objections taken by the plaintiff-respondent to the decree of the lower Court, it seems to us that there is no reason why he should not get a decree for mesne profits from the date of the death of Rekaba Koer to the date of delivery of possession. We accordingly direct that in that respect the decree of the lower Court be modified, and it be declared that the plaintiff is entitled to recover the said mesne profits, and that the amount thereof will be determined in execution of the decree.

"As regards the moveable property the lower Court has disallowed the claim on the ground that, according to Mitakshara law, a Hindu widow is entitled to alienate it; but in this respect he has fallen into an error.

"It was decided by the Judicial Committee in the case of *Bhugwandeen Doobey* v. *Maina Baee* (2), that a Hindu widow under the Mitakshara law has no power to alienate the estate inherited from her husband to the prejudice of his heirs, whether such estate consists of moveable or immoveable property. Therefore the decision of the lower Court on this point also will be set aside. The learned pleader, who appeared for the appellant, admits that there is no question as to the value of the moveable property claimed in the plaint. We accordingly declare that the plaintiff will be entitled to recover Rs. 1,128-5-4 pie [391] as the value of the one-third share of the moveable property of Sheodyal Singh.

"Then there remains the question whether Mussamut Rekaba Koer under the Hindu law was competent to alienate the properties purchased after the death of Sheodyal. With reference to this matter the parties joined issue upon a question of fact, *viz.*, whether or not these properties were ecquired after the death of Sheodyal out of the proceeds of his property. But it was admitted by the learned pleader for the appellant that upon the evidence there is no doubt that the properties in question were acquired out of the proceeds of Sheodyal's estate. That being so, the question between the parties is reduced to one of law, *viz.*, whether

(1) 10 C. 324=10 I. A. 150.

(2) 11 M. I. A. 487.

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these properties, which were acquired by the widows of Sheodyal out of the proceeds of his immoveable property, could be alienated by the said widows without any such necessity as would justify the alienation by a Hindu widow under the Hindu law.

"A very recent decision of the Judicial Committee upon this point has lately come out to this country. It was passed on the appeal of *Isridut Koer* v. *Hansbutti Koerain* (1), and the judgment was delivered on the 11th July, last. The effect of this decision is shortly this: If it be proved that a particular property acquired out of the income of the husband's estate has been added as an accretion to that estate, a Hindu widow has no power to alienate it unless there be any necessity which justifies the alienation; but, if the acquisition be of such a character that it may be reasonably held to be a portion of the income of the husband's estate still held in suspense in the hands of the widow, she has full disposing power over it as she has over any other income of that estate. This being the principle settled by the latest decision of the Judicial Committee of the Privy Council, we see no difficulty in determining the question raised before us. Upon the evidence before us there is not the slightest doubt that the properties in question were dealt with by the widows as accretions to their husband's estate. They were treated in the deed of gift precisely in the same way as the admitted properties of Sheodyal were treated. Acting, therefore, upon the [392] principle laid down by the Judicial Committee of the Privy Council in the case cited above, we are of opinion that the plaintiff's claim in respect of these properties also should be allowed."

On this appeal,—

Mr. *J. H. A. Branson*, for the appellant, argued that, on the principles declared in *Isridut Koer* v. *Hansbutti Koerain* (1), the widow's gift of the property acquired by herself, and her co-widow, out of their savings, should have been supported. The mouzahs which the widows purchased after the death of their husband were recorded separately from the rest of the property forming the estate which had been Sheodyal's. The separate ownership of these mouzahs having been at one time in the widows, they had not extinguished it by devoting the property to a purpose which was their own.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment, after Mr. *Branson* had been heard, was given by

SIR R. COUCH.—The suit, which is the subject of this appeal, was brought by the respondent, who claimed as one of the heirs of Sheodyal, who died in 1827, to recover from the appellant a third share of the property which had been left by Sheodyal at his death, and to which his two widows Pranpiari and Rekaba became entitled, and also a third of the properties which had been purchased by the widows with, as he alleged, the income of the property which they inherited. Pranpiari and Rekaba, in the first place, held the properties jointly, and Pranpiari died in 1870, leaving Rekaba surviving her and in possession of the whole of the estate. It appears that on the 19th October, 1875, Rekaba executed a deed of *atanama*, by which she professed to give to the appellant, who was the defendant in the suit, the whole of the property, not only that

(1) 10 C. 324 = 10 I. A. 150.

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which came to the widows from Sheodyal, but the properties which had been purchased by them; and it was also alleged that the defendant had been adopted by the widows with the permission of Sheodyal as his son.

Various issues were settled. The defence set up various matters, including the law of limitation, the adoption of the [393] defendant and the deed of *atanama*. All the issues were found in favour of the plaintiff, the respondent, except that with respect to the question whether the plaintiff was entitled to recover a share of the properties which had been purchased by the widows. The lower Court found that the widows were entitled to alienate that property, and consequently that he was not entitled to it. The High Court, when the case came before it upon appeal, upon this question said that upon the evidence before them there was not the slightest doubt that the properties in question, namely, the purchased properties, were dealt with by the widows as accretions to their husband's estate, and that they were treated in the deed of gift precisely in the same way as the admitted properties of Sheodyal were treated.

Their Lordships have been referred by Mr. Branson to the different parts of the evidence which he considered bore upon the question whether the properties were purchased by the widows out of the income of the descended property and whether their intention was to keep those properties distinct. Certainly the evidence is not such as would show that the High Court in coming to the conclusion they did were not quite justified by it.

The authority upon this matter is the case of *Isridut Koer* v. *Hansbutti Koerain* (1). At the conclusion of the judgment their Lordships state the matter which has to be looked at in deciding whether the property acquired or purchased by the widows is to descend with the husband's estate or is to be treated as a separate estate. They say: "Neither with respect to this object," namely, to change the succession, "nor apparently in any other way have the widows made any distinction between the original estate and the after purchases." Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, *prima facie*, it is the intention of the widow to keep the estate of the husband as an entire estate and that the property purchased would, *prima facie*, be intended to [394] be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way. There are circumstances here which would indicate that it was the intention of the widows to keep the estate entire, and that they did not intend that the husband's estate and the subsequently-purchased properties should go in a different line of succession, because their act, in what they did with regard to the defendant, was to make a gift to him of the whole of the property, and professing to do it so as to, what seems to be called, carry out the intentions of Sheodyal and found a *thakurbari*, with which the estate would be connected. The transaction appears to indicate that their intention was not to create separate estates, one to go in one way, and another in another, but to keep the whole as one entire property; and applying what is said in the case of *Isridut Koer* v. *Hansbutti Koerain* (1) to the present case, there do not appear to be circumstances which would show that there was any other intention than that the purchased property

(1) 10 C. 324=10 I. A. 150.

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should be accretions to the inherited property. The High Court has found that, and their Lordships see no ground for saying that the Court has not come to a proper conclusion from the evidence.

Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the High Court and to dismiss the appeal, and the appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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14 C. 395.

[395] CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF CHANDI SINGH AND OTHERS.
QUEEN-EMPRESS *v.* CHANDI SINGH AND OTHERS.*
[2nd April, 1887.]

Criminal Procedure Code (Act X of 1882), *ss.* 234, 537—*Separate charges for distinct offences.*

Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one *F*, were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment.

Held that the trial was illegal, and the defect was not cured by s. 537 of the Criminal Procedure Code.

[**Overruled**, 27 C. 839 (845); **F.**, (1900) P.L.R. 61 (62); **Expl.**, Rat. Unrep. Cr. Cases. 401 (402); 29 B. 449=7 Bom. L. R. 527 (545); 28 C. 104 (107, 108); **R.**, 10 M. L.J. 147 (167) (**F.B.**); 25 M. 61=2 Weir 271 (**P.C.**); 83 P.L.R. 1901; 15 C.L.J. 517 (581)=13 Cr. L.J. 609 (652)=16 C.W.N. 1105 (1136)=16 Ind. Cas. 257 (300).]

ON the 10th and 11th December two cases were sent up to the Magistrate by the Dalsing Serai Police. In the first of these Chandi Singh, Ferangi Singh, Batoram Singh, Bachu Singh and Bhagwan Singh were charged under s. 147 of the Penal Code with having committed, on the 5th December, the offence of rioting on a piece of land belonging to the Mow Factory. In the second case Ferangi Singh, Batoram Singh, Bachu Singh and Bhagwan Singh were charged under s. 447 of the Penal Code with committing, on the 9th December, criminal trespass on the same piece of land. These two cases were tried together in one trial by the District Magistrate of Durbhanga, and passing one judgment in the two cases he convicted and sentenced the accused named in the first mentioned case, each to two years' rigorous imprisonment, and further sentenced the accused in the secondly mentioned case to undergo a further imprisonment of three months for the offence committed under s. 447 of the Penal Code. The prisoners appealed to the Sessions Judge, who summarily rejected their appeal under s. 421, stating that the trial had been rightly held under s. 234 of the Criminal Procedure Code. The prisoner moved

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* Criminal Motion No. 55 of 1887, against the order passed by A. C. Brett, Esq., Sessions Judge of Tirhoot, dated the 7th of February, 1887, affirming the order passed by J. C. Price, Esq., Magistrate of Durbhanga, dated the 8th of January, 1887.

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the High Court to have the conviction set [396] aside, and obtained a rule calling upon the other side to show cause why the convictions should not be set aside.

Mr. *Gregory* and Baboo *Ram Charan Mitter* showed cause.

Mr. *M. P. Gasper*, in support of the rule.

ORDER

The order of the Court (Petheram, C. J., and Ghose, J.) was delivered by

Petheram, C. J.—We think that this rule must be made absolute and made absolute on the legal ground alone. With reference to the merits of the case they have not been gone into, and therefore this Court is not in a position to form any judgment whatever, but the ground upon which we base our judgment is that these two charges have been tried in one trial, and that is an illegal proceeding under s. 233 of the Code of Criminal Procedure.

The charges were, first of all, a charge against five men of having committed a riot on the 5th December, 1886, and against four out of the five men of having committed criminal trespass on the 9th December, 1886. These two charges were tried together in one trial and were decided by one judgment.

In our opinion this proceeding was illegal within the terms of s. 233, and does not, as the Judge supposes, come within the terms of s. 234. The only matter which is common to both charges is that the dispute in each case arises out of the same land, but the charges are absolutely distinct, and the persons charged are not the same body of men. It is quite true that there were some of the persons common to both charges, but the second charge did not include all the persons charged under the first charge.

Under these circumstances we think that the trial was illegal, it having been a trial which is prohibited by the terms of the law as contained in s. 233, and we do not think that s. 537, which cures errors, omissions, or irregularities, is intended to cure, or does cure, an absolute illegality. For these reasons we set aside the trial and the conviction, and direct that the prisoners be discharged from custody.

T. A. P. *Rule absolute.*

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14 C. 397.

[397] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

Nobodip Chunder Shaha (*Plaintiff*) *v.* Ram Krishna Roy Chowdhry and another (*Defendants*).* [13th April, 1887.]

Instalment bond—Default in one instalment the whole amount to fall due—Waiver—Limitation Act (XV of 1877), sch. II, art, 75.

The mere fact that a creditor has done nothing to enforce a condition in an instrument, under which the whole debt became due on failure in the payment

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*Appeal from Appellate Decree, No. 2070 of 1886, against the decree of H. Peterson, Esq., Judge of Dinagepore, dated the 2nd of August, 1886, affirming the decree of Baboo Juggobundhoo Gangooly, Subordinate Judge of that district, dated the 22nd of March, 1886.

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of one instalment, is no evidence of waiver within the meaning of art. 75 of the Limitation Act.

[R., 5 M.L.J. 241 (243); 20 B. 109 (113); 368 C. 394=9 C.L.J. 226=13 C.W.N. 1004=1 Ind. Cas. 49; D., 24 C. 281 (283).]

The plaintiff sued to recover Rs. 1,500 on a *kistibundi* (instalment bond) executed by the defendant in favour of one Modhu Sudun Chowdhry on the 9th January, 1882, Modhu Sundun Chowdhry having sold his rights under the *kistibundi* to the plaintiff on the 5th December, 1882.

Under this *kistibundi* the defendant had stipulated to pay the sum of Rs. 2,350 with interest in 23 fixed instalments, the first of such instalments falling due in Joisto 1289 (from 14th May to 14th June, 1882) and the last in Aughran 1294 (from 14th November to 14th December, 1887); and had further stipulated that, on default of any instalment, the whole amount recoverable under the *kistibundi* should then become due.

The first instalment was duly paid within the time fixed; the second of such instalments due in Bhadro 1289 (from 16th August to 15th September, 1882) was accepted by the plaintiff's vendor after the due date in Assin 1289 (from 16th September to 17th October, 1882); the third instalment due in Aughran 1289 (from 16th November to 14th December, 1882), was not paid; and the plaintiff on the 11th February, 1886, sued the defendant (Modhu Sudun Chowdhry being made a *pro forma* defendant) to recover the instalments due from Falgun 1289-(12th February to 13th March, 1883) to Aughran 1292 (15th November to 14th [398] December, 1885), not including in his claim the remainder of the instalments falling due from 1292 to 1294 (1885—1887); and stating that the third instalment was not included in his claim inasmuch as that instalment was, at the time of suit, barred by limitation.

The chief defendant (who alone appeared in the suit) contended that the plaintiff not having claimed the total amount due under the *kistibundi* the suit was bad, and pleaded limitation.

The Subordinate Judge found the facts to be as above stated; and held that the plaintiff's cause of action arose on the 15th December, 1882 on failure of the payment due in Aughran 1289, and that he should have sued to recover the whole of the amount due under the *kistibundi* within three years from that date, and that, not having done so, the suit was barred under art. 75 of sch. II of the Limitation Act.

The plaintiff appealed to the District Judge on the ground that the terms of the *kistibundi* made it optional, and not obligatory, on the creditor to sue for the whole amount, and that the suit fell under art. 74, art. 75 only contemplating cases where the whole amount is not only forfeited by a single default but where also, the entire amount is sued for. The District Judge dismissed the appeal, affirming the judgment of the lower Court.

The plaintiff appealed to the High Court.

Baboo *Sharoda Churn Mitter* for the appellant contended that art. 75 did not apply, and that it was optional on the part of the plaintiff on default of any instalment either to sue for such instalment or for the total amount due under the *kistibundi*, and that what was done by the plaintiff amounted to a waiver of his right to sue for the whole amount.

Baboo *Guru Das Banerjee* for the respondent contended that the suit was barred, and that there had been no waiver, citing *Cheni Bash Shaha v. Kadum Mundul* (1), *Sethu* v. *Nayana* (2) and *Mumford* v. *Peal* (3).

(1) 5 C. 97. (2) 7 M. 577. (3) 2 A. 857.

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JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

PETHERAM, C. J.—This is an action brought by the plaintiff against the defendants upon a bond executed by the defendants [399] in his favour to secure payment of a sum of money by instalments; and the bond contains a proviso, the effect of which is that, in the event of any of the instalments being unpaid, the whole amount shall become due at once......

The instalments have been unpaid for some time, and, as a matter of fact, the time the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action would become barred; and upon that state of things the question that arises is, whether the mere fact that the creditor has done nothing but simply allowed the matter to sleep, without enforcing his remedy against the debtor, is any evidence of waiver within the meaning of art. 75 of the Limitation Act.

We do not think it necessary to say what opinion we might have formed on this matter if it had not been already decided by judicial authority, because it has been so decided and is concluded by that authority. The decisions which have been reported, *viz.*, *Cheni Bash Shaha* v. *Kodum Mundul* (1), *Sethu* v. *Nayana* (2) and *Mumford* v. *Peal* (3), are clear authorities to show that, in the opinion of the Courts in this country, such a condition of things would be no evidence of waiver. The law on this subject must, therefore, in my opinion, be treated as having become settled. The Court below has held in this case that the last default was made so long ago that the time that has elapsed since then would be enough to bar the remedy. That Court has accordingly followed the authority of these cases, and has decided that the remedy is barred in this case; and, as I said before, without expressing any opinion which we might have entertained upon this point if it had been new matter, we think that, as it had been considered settled law in this country for so long a time, it is not desirable that this matter should be referred to the Full Bench and further questions raised upon it.

Therefore, following the decisions referred to in this case, we dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

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14 C. 400.

[400] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

SUBODINI DEBI (*Defendant*) *v.* CUMAR GANODA KANT ROY BAHADUR AND TWO OTHERS (*Plaintiffs Nos.* 1, 2 *and* 3)*

[2nd March, 1887.]

Parties—Civil Procedure Code, ss. 27 *and* 32*—Limitation—Institution of suits—Change of parties.*

The change of parties as plaintiffs, in conformity with the provisions of s. 27 of the Code, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under s. 32.

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* Appeal from Appellate Decree No. 1428 of 1886, against the decree of Baboo Parbati Kumar Mitter, Subordinate Judge of Jessore, dated the 14th of April, 1886, affirming the decree of Baboo Chunder Coomar Dass, Munsif of that district, dated the 21st of December, 1885.

(1) 5 C. 97. (2) 7 M. 577. (3) 2 A. 857.

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[F., 22 B. 672 (676); 8 Ind. Cas. 890; **Cited,** 149 P. R. 1907; **Commented upon,** 21 B. 580 (584); **Cons.,** 69 P.R. 1906=118 P.L.R. 1906; 1 S.L.R. Civil 191 (195); **R.,** 3 O.C. 347 (349); 7 M.L.T. 185=33 M. 115=5 Ind. Cas. 931; **D.,** 25 B. 433 (465); 19 C.L.J. 5 (6, 7).]

R. J. F. STEVENS, as the "authorized manager" of the Rajahs of Chanchra, instituted a suit for arrears of rent. It was objected on the part of the defendant that the suit was bad, inasmuch as it was brought by a person who had no interest in the matter. The Munsif held that not only had the suit been brought by the right plaintiff, but that upon the petition of the Rajahs the Court had struck off the name of the agent (Stevens) from the record. On appeal the Subordinate Judge agreed with the Court of first instance, adding that whatever defect there might have been in the original plaint was cured at a later stage when the name of the agent was struck off.

The defendant appealed to the High Court.

Baboo *Jogesh Chunder Roy*, for the appellant.

Baboo *Amarendro Nath Chatterjee*, for the respondents.

The judgment of the Court (WILSON and O'KINEALLY, JJ.) was as follows:—

JUDGMENT.

It appears that this suit which was one for rent was originally brought in the name of Mr. Stevens as the authorized manager of Rajah Ganoda Kant Roy Bahadur and others. At a later stage in the suit an amendment was made by striking out Mr. Stevens and substituting his employers as plaintiffs in the case. We must presume that to have been done on sufficient materials under the express provisions of s. 27 of the Code of Civil Procedure, under which section, if a suit is brought in the name of the wrong person as plaintiff, the name of the right person may be substituted, provided the conditions of the section are complied with. **[401]** It is said, however, that the change was made at such a time that, if the suit had been then brought for the first time in the names of the proper persons, it would have been barred by limitation, and the suggestion is that therefore this suit is barred. The answer to that is that this suit is the original suit and was brought in time; the change of parties as plaintiffs does not affect the question of limitation. There is a difference between substituting a new person as plaintiff under s. 27 and the addition of a new person as a defendant to a suit. Section 32 expressly says, speaking of defendants, that the proceedings as against them shall, for the purposes of the Limitation Act, be deemed to have begun only on the service of summons, that is the summons servable on the added defendants. There is no such provision as regards persons who are made plaintiffs under s. 27. This point therefore fails.

We dismiss this appeal with costs.

K. M. C. *Appeal dismissed.*

14 C. 401.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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APPELLATE CIVIL.

14 C. 401.

LALA PARBHU LAL AND ANOTHER (*Two of the Defendants*) v. J. MYLNE (*Plaintiff*) AND OTHERS (*Remaining Defendants*)*
[25th February, 1887.]

Res Judicata—Estoppel—Auction-purchaser—"Representative"—Mortgage—Adoption—Hindu Law, Mitakshara—Evidence Act (*I of* 1872), *s.* 115—*Limitation Act* (*XV of* 1877), *sch. II, arts* 118, 140, 141.

A purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act.

A, a Hindu, governed by the Mitakshara School of Law, died on the 12th May, 1867, leaving him surviving a widow *B* and a brother *R*, who was admittedly the next reversioner. In July, 1867, *B* purported to adopt a son *D* to *A*, and subsequently in September, 1867, obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of Rs. 9,000, and to secure its repayment executed a mortgage of seven mouzahs in favour of *M* as guardian of *D*. The money was advanced and mortgage executed at the instigation of *R* and with his consent, and upon his representation that *D* was the duly adopted son of *A*, and it was admitted that the money was specifically advanced for, as well as applied towards, **[402]** the payment of decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1878. On the 14th August, 1880, *M* instituted a suit against *D* upon his mortgage, and in that suit he made *S* a party defendant as being the purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June, 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the morgaged mouzahs. In the proceedings taken in execution of that decree *M* was opposed by *L*, who was afterwards held to be a *benamidar* for *S*, who claimed that he had on the 8th November, 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against *R*. On the 29th February, 1884, *L*'s claim was allowed, and on the 11th August, 1884, *M* brought this suit against *L*, *S*, *R*, and *D*, and the decree-holders in the suits against *R*., for a declaration of his right to follow the mortgaged property in the hands of *S*.

It was found as a fact that adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity; and that *L* was the *benamidar* of *S*. It also appeared that *M* had himself become the purchaser of one of the mortgaged mouzahs. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage money from the five mouzahs in the hands of *S*. *L* and *S* appealed, and *M* filed a cross appeal, alleging the adoption to be valid and binding on *S*. It was contended that *S* as the representative of *R* was estopped from denying the validity of *D*'s adoption, and thus having been a party to *M*'s first suit the question as to the liability of the mouzahs to satisfy the mortgage lien was *res judicata* as against him. It was also contended that the five mouzahs should not be saddled with the whole of the mortgage-debt, but that the mouzah in the hands of *M* should bear its proportionate part thereof.

Held, that as *S* was merely a party to *M*'s original suit as purchaser of one mouzah, and as he, subsequently to the institution of that suit, acquired *R*'s interest in the five mouzahs, and as *R* was not a party to that suit nor was his interest represented in any way, the decree was in no way binding against *R*, and therefore *S* was not barred by *res judicata* from setting up the interest of *R* in the five mouzahs so acquired by him.

Held, further, that though *R* was estopped by his conduct from disputing the validity of the adoption, or of *M's* rights as mortgagee, *S* being an auction-purchaser was not bound by *R*'s acts, and was not estopped from disputing the adoption, as he derived his title by operation of law adversely to R, and was thus in a different position from a person claiming under a voluntary alienation.

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*Appeal from Original Decree No. 413 of 1885, against the decree of Baboo Koilas Chunder Mookerjee, Rai Bahadur, Subordinate Judge of Shahabad, dated the 11th of April 1885.

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Held, also, that though *B* purported to execute the mortgage as guardian for *D*, though *D* was not the adopted son of *A*, the substance of the transaction and not the form had to be looked at, and as *B* had full power to alienate for legal necessity, the mortgage was still binding on the estate of *A;* and, further, that even if there had been no legal necessity, **[403]** having regard to the fact that it was made with the consent of *R*, the next reversioner, it equally created a valid charge upon the property, but that the mouzah in the hands of *M* must bear its share of the mortgage debt, and that the decree of the lower Court was wrong in declaring that the five mouzahs in suit were to bear the whole amount of the debt.

It was further contended that *D* had acquired an absolute title by more than twelve years' adverse possession from the date of his adoption in 1867 before the purchase by *S* in 1880.

Held, that as *B* died within twelve years of the alleged adoption although under art. 118, sch. II, Act XIV of 1877, (which came into force before the adoption could become perfected by efflux of time), a suit for a declaration that an adoption was invalid should be brought within six years from the date when the adoption becomes known to the plaintiff, still having regard to the provisions of arts. 140 and 141 the next reversioner was not thereby prevented from suing to obtain possession within twelve years from the date of the widow's death or when the estate fell into possession, and therefore that *S* was not barred by limitation from disputing *D*'s title.

Quære.—Whether the ruling in *The Collector of Madura* v. *Moothoo Ramalinga Sathupathy* (1) applies to cases governed by the Mitakshara Law in Northern India, and whether an adoption made by a widow after the death of the husband without his express consent, but with the consent of his near kindred, is valid, or whether the recognition of the adopted son by the next reversioner would likewise render the adoption valid.

[**F.**, 20 C. 236 (239); 21 B. 376 (379); 17 A. 167 (171); 24 A. 195 (198)=22 A.W.N. 10; 26 A. 40 (47)=23 A.W.N. 163; **Expl. & Disappr.**, 10 C.L.J. 150=1 Ind. Cas. 264; **Doubted,** 5 C.L.J. 61 N.; 7 C.L.J. 644 (647); **R.,** 16 C. 355 (360); 18 C. 188 (198); 24 C. 62 (75) (**F.B**); 25 C. 354; 11 C.P.L.R. 49 (53); 21 B. 159 24 B. 260 (**F.B.**); 1 Bom. L.R. 799; 3 O.C. 347 (349); 33 B. 311=11 Bom. L.R. 26=5 M.L.T. 228=1 Ind. Cas. 106; 39 C. 513 (521)=15 C.L.J. 369 (375)=16 C.W.N. 475 (480)=13 Ind. Cas. 698 (702).]

THIS was a suit for a declaration that certain properties in the hands of the defendants were liable to sale in satisfaction of a mortgage decree obtained by the plaintiff on the 26th June 1882 against one Dalpati Singh, who was also made a defendant in this suit.

The facts of the case were as follows: One Dyal Singh had three sons, Ripubhunjun Singh, Gumanbhunjun Singh and Aribhunjun Singh, of whom both Gumanbhunjun Singh and Aribhunjun Singh died on or about the 12th May, 1867, of cholera within an interval of a day. The plaintiff alleged that previous to his death Aribhunjun Singh gave permission to his wife Dulhin Bishnath Koer to adopt Dulpati Singh, the third son of his brother Gumanbhunjun Singh, and that he was thereafter accordingly duly adopted on the 6th July, 1867, or about two months after Aribhunjun's death, with the consent of his agnates, including the elder brother Ripubhunjun Singh. Aribhunjun Singh was a minor of the age of about fifteen or sixteen at the time of his death.

[404] On the 13th July, 1867, Dulhin Bishnath Koer applied for a certificate to be granted to her in respect of Dulpati Singh's property under Act XL of 1858, and a certificate of guardianship was granted to her on the 9th September, 1867. At the time of Aribhunjun's death he was heavily indebted, and both before and after his death numerous decrees were obtained against him and his estate. On or about the 15th November, 1872, Bishnath Koer applied for assistance from the plaintiff

(1) 12 M. I. A. 397.

to pay off some of these decrees, and obtained a loan of Rs. 9,000 from the plaintiff James Mylne for that purpose, and to secure repayment, executed, with the sanction of the District Judge, the mortgage in respect of which the suit was brought in her capacity of guardian of Dulpati Singh. The money so obtained by her was used in paying off some of the decrees obtained against Aribhunjun's estate. Bishnath Koer died on 4th February, 1878, or within twelve years of the date of the alleged adoption. On the 14th August, 1880, the plaintiff instituted a suit on his mortgage bond against Dulpati Singh (Baijnath Sahai defendant No. 2 in the present suit) and Lala Chuni Lal and Manick Chand, alleged *benamidars* of Baijnath Sahai. In that suit Baijnath Sahai was joined as defendant on the allegation that he was the actual purchaser of the share of Dulpati Singh in mehal Teknia, one of the mehals included in the plaintiff's mortgage bond.

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On the 26th June, 1882, the plaintiff obtained a decree in that suit declaring him entitled to recover the amount claimed by sale of the mortgaged properties. After having obtained that decree the plaintiff proceeded to execute it by attaching all the properties included in his mortgage with the exception of two, namely, the said mehal Teknia and a mehal named Simeria, which had been already purchased by himself. Thereupon a claim was preferred by Lala Parbhu Lal, as the plaintiff alleged on behalf of Baijnath Sahai, based on the ground that he had purchased the properties sought to be sold at the instance of the plaintiff in execution of two decrees held by Sawaruth Panday and others, and Rujju Lal against Ripubhunjun Singh on the 8th November, 1880, and was in possession of the same. On the 29th February, 1884, the claim was allowed, and accordingly on the 11th August, 1884, the plaintiff brought the present suit, making Lala Parbhu Lal, Baijnath Sahai, [**405**] Dulpati Singh, Ripubhunjun Singh, Sawaruth Panday, Dhumaruth Panday, Mokund Panday and Rujju Lal defendants.

The plaintiff alleged that his decree of the 26th June, 1882, upon his mortgage was binding upon Dulpati Singh as well as upon the estate of Aribhunjun Singh, and that Ripubhunjun Singh having himself put forward and represented Dulpati Singh as the duly adopted son of Aribhunjun, and having induced the plaintiff to advance the Rs. 9,000 upon such representations, was equally bound by the decree, and that being so the Panday defendants and Rujju Lal were also bound by the mortgage and decree and were not entitled to defeat his claim. He further alleged that Baijnath Sahai was the real purchaser of the right, title and interest of Ripubhunjun Singh and that Lala Parbhu Lal was merely his *benamidar*, and that he had actually carried on the claim proceedings in the latter's name.

The decrees, in execution of which the properties had been sold at the instance of the Panday defendants and Rujju Lal, were dated the 7th December, 1863, and 13th February, 1879, and had been obtained upon bonds dated the 18th November, 1862, and 17th July, 1875, respectively, and the plaintiff alleged that the bonds and decrees obtained on them were collusive and fraudulent, and that the Panday defendants and Rujju Lal were also mere *benamidars* of Baijnath Sahai.

The plaintiff further stated in his plaint that in the claim case the defendant Lala Parbhu Lal had alleged that Dulpati Singh was not the duly adopted son of Aribhunjun Singh; that Bishnath Koer succeeded to her husband's estate; and that on her death Ripubhunjun Singh succeeded as reversionary heir, and that in consequence the properties in suit could not

be sold as belonging to Dulpati; but the plaintiff denied such allegations and contended that the estate of Aribhunjun Singh had all along been in the possession of Dulpati Singh, and that neither Bishnath Koer nor Ripubhunjun had ever succeeded thereto or been in possession thereof; and that even if Dulpati Singh was not the duly adopted son he had acquired a good title by twelve years' adverse possession as against both Bishnath Koer and Ripabhunjun Singh, and that the latter and his representatives were therefore precluded from setting up any title thereto, and that they were further [406] estopped by the conduct of Ripubhunjun Singh from questioning the title of Dulpati Singh.

The plaintiff further contended that, even if Dulpati Singh was not the adopted son of Aribhunjun Singh, the widow Bishnath Koer was fully competent as representative of her husband's estate to mortgage it for legal necessity, and that the mortgage to him was not only made for legal necessity but was also made with the full acquiescence and at the instance of Ripubhunjun Singh, the then next reversionary heir, and was therefore binding on him and all claiming through him.

Baijnath Sahai in his written statement denied that the other defendants, who were alleged to be his *benamidars*, were so, and that he had purchased any of the properties *benami* in the name of Parbhu Lal; and he contended that he had nothing to do with the suit. Lala Parbhu Lal denied that he was *benamidar* for Baijnath Sahai, and disputed the validity of the adoption, and also denied that the estate of Aribhunjun was heavily indebted or bound by the plaintiff's mortgage. He contended that Dulpati alone was liable, and his properties alone subject to the mortgage. He further contended that he was in no way bound by Ripubhunjun's acts and that Dulpati's possession could not be held to be adverse under the circumstances: and that as Bishnath Koer only died on the 4th February, 1878, the right of the reversionary heirs of Aribhunjun to his estate could not be held to be barred as twelve years had not elapsed from that date. He also denied that there was any legal necessity for the loan. He further contended that, as the plaintiff had himself purchased mouzah Simeria, one of the mouzahs the subject of his mortgage, he could not enforce his whole lien against the other properties but must bring in that mouzah to bear its proportionate part of the burden.

The Panday defendants and Rujju Lal also disputed the adoption, and denied that they were *benamidars* of Baijnath Sahai, or that their bonds or decrees were collusive or fraudulent.

Ripubhunjun Singh died pending the suit, and before any witnesses had been examined.

The lower Court gave the plaintiff a decree, declaring the five mouzahs in suit liable for the mortgage debt, and providing that any balance there might remain due to the plaintiff after [407] those five mouzahs were sold should be saddled upon Simeria and Teknia. It also gave the plaintiff his costs against Parbhu Lal and Baijnath Sahai and made the other defendants pay their own costs. The grounds upon which the lower Court granted this decree are sufficiently stated in the judgment of the High Court.

Against this decree Parbhu Lal and Baijnath Sahai appealed to the High Court, and the plaintiff preferred a cross appeal against the finding of the lower Court that Dulpati Singh was not the duly adopted son of Aribhunjun Singh, and contended that at all events the lower Court was in error in holding that Ripubhunjun Singh and those claiming through

him were not estopped by his acts from disputing the validity of the adoption.

Mr. *P. O'Kinealy*, Mr. *C. Gregory*, Munshi *Mahomed Yusoof* and Baboo *Saligram Singh*, for the appellants.

Mr. *J. T. Woodroffe*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Abinash Chunder Banerji*, for the respondents.

The following cases and authorities were cited and relied on at the hearing of the appeal.

For the appellants:—Bigelow's Law of Estoppel, page 492; *Freeman* v. *Cooke* (1); *Richards* v. *Johnston* (2); *Baboo Banee Pershad* v. *Moonshee Syud Abdul Hye* (3); *Poreshnath Mookerjee* v. *Anathnath Deb* (4); *Sreeman Chunder Dey* v. *Gopal Chunder Chuckerbutty* (5); *Faez Bax Chowdhry* v. *Fakiruddin Mahomed Ahasan Chowdhry* (6); *Lalla Roodro Pershad* v. *Binode Ram Sein* (7); *Mussamut Ameeroonnissa Khanum* v. *Mussumat Ashrufoonnissa* (8); *Chowdhrani* v. *Tariny Kanth Lahiry* (9); *Dinendronath Sannyal* v. *Rameoomar Ghose* (10); *Anathnath Deb* v. *Bishtu Chunder Roy* (11); *Sreemutty Gourmony Dabee* v. *Reed* (12); *Srinath Kur* v. *Prosunno Kumar Ghose* (13); *Kokilmoni Dassia* v. *Maniek Chundra Joaddar* (14); [408] *Jagadamba Chowdhrani* v. *Dakhina Mohun* (15); *Basdeo* v. *Gopal* (16); *Nobokishore Sarma Roy* v. *Harinath Sorma Roy* (17); *Bux Ali Sowdagur* v. *Essan Chunder Mitter* (18); *Raja Shumshere Mull* v. *Ranee Dilraj Konwar* (19); *The Colletor of Madura* v. *Moothoo Ramalinga Sathupathy* (20).

For the respondents:—*Soorjomonee Dayee* v. *Suddonund Mohapatter* (21); *Baneepershad* v. *Baboo Maun Singh* (22); *Poreshnath Mookerjee* v. *Anathnath Deb* (4); *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (23); *Maharajah Dheeraj Mahtab Chand Bahadoor* v. *Bulram Singh* (24); *Azam Bhuyan* v. *Faijuddin Ahamed* (25); *Nobin Chunder Chuekerbutty* v. *Issur Chunder Chuekerbutty* (26); *Amirtolal* v. *Rajoneekant Mitter* (27); *Srinath Kur* v. *Prosunno Kumar Ghose* (13).

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

This was a suit brought by the plaintiff-respondent in this appeal, to have it declared that certain properties mortgaged to him by a deed executed by Mussamut Dulhin Bishnath Koer on behalf of Dulpati Singh, her adopted son, during his minority are really owned by the latter as adopted son of the late Aribhunjun Singh who was the husband of Bishnath Koer; and are liable to be sold in execution of the plaintiff's decree obtained upon the said mortgage bond on the 26th of June, 1882.

The properties in question having been attached in execution of that decree were released by the Court on the 29th February, 1884, in accordance with a claim put forward by the defendant No. 2, appellant before us, who had purchased the same at auction in November, 1880, in execution of decrees held by other persons against Ripubhunjun Singh. The

(1) 2 Exc. Rep. 654. (2) 4 H. & N. 660. (3) 25 W. R. 192.
(4) 9 I. A. 147. (5) 11 M. I. A. 28. (6) 9 B. L. R. 456.
(7) 10 W. R. 321. (8) 14 M. I. A. 433. (9) 8 C. 545.
(10) 8 I. A. 65. (11) 4 C. 783. (12) 2 Tay, and Bell 83.
(13) 9 C. 934. (14) 11 C. 791. (15) 13 I. A. 84=13 C. 308
(16) 8 A. 645. (17) 10 C. 1102. (18) W. R. F. B. 119.
(19) 2 Sel. Rep. 169=6 I. D. (O. S.) 523.
(20) 12 M. I. A. 397 (438). (21) 12 B. L. R. 304. (22) 8 W. R. 67.
(23) 7 C. 199. (24) 13 M. I. A. 479. (25) 12 C. 594.
(26) 9 W. R. 505. (27) 15 B. L. R. 10.

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sale certificates are dated the 20th of January, 1881. This suit was brought [409] in August 1884 within one year after the decision of the claim case.

Ripubhunjun Singh was the brother of Aribhunjun; and in the absence of any son of the latter would admittedly have been the sole reversionary heir upon the death of the widow, Mussamut Bishnath Koer, which took place in 1878.

That the properties in suit did belong to the separate share of Aribhunjun is not now disputed, and the difficulty of the case as now before us lies in the questions raised as to the validity of the adoption of Dulpati Singh; and as to the right of the defendants-appellants to impugn it at the present day, he having been since 1868, and still being, *de facto* owner, as adopted son of Aribhunjun Singh, of the estate left by him. The appellants are two of the defendants, *viz.*, Parbhu Lal, the person who succeeded in the claim case, and one Baijnath Sahai, who was made a defendant on the allegation that Parbhu Lal was his *benamidar*, and that even the decree-holders, in execution of whose decrees the sales to Parbhu Lal had taken place, were also his *benamidars*. He appeals, apparently, because the lower Court, holding that Parbhu Lal was his *benamidar*, made him jointly liable for the plaintiff's costs, the suit being decreed in favour of the latter. Ripubhunjun Singh was made a defendant, but he died during the pendency of the suit and before any witnesses had been examined.

Baijnath Sahai was one of the defendants in the plaintiff's respondent's previous suit on the mortgage bond; being so made because he had purchased the mortgagor's interest in one of the mouzahs mortgaged to plaintiff—not, however, one of those embraced by the present suit.

In consequence of this circumstance the plaintiff contended that the subject of the present suit was *res judicata* as against both Baijnath Sahai and his alleged *benamidar* Parbhu Lal; and the lower Court was of opinion that they were in fact bound by the decree of June 26th, 1882, which affirmed the mortgage lien against all the mouzahs. The other findings of the lower Court which have been impugned in this appeal or in the cross objections to the judgment taken by the plaintiff-respondent were as follows:—

[410] It found against the plaintiff on the issue as to the validity of the adoption of Dulpati Singh, and against him it found that the defendants Parbhu Lal or Baijnath Sahai, as auction-purchaser of the rights and interest of Ripubhunjun, were not estopped by the conduct of the latter from denying the validity of the adoption.

On the other hand the Court found in favour of the plaintiff that, though Dulpati was not validly adopted, yet he had acquired a good title to the property by more than 12 years' adverse possession before the purchase of the properties in suit by the defendant Parbhu Lall. It found also in plaintiff's favour that the loan for which the mortgage was executed was made for the purpose of liquidating debts for which Aribhunjun's estate was liable, such debts being of a legitimate character; and that the mortgage was made by Bishnath Koer with the consent of Ripubhunjun, the reversioner, in the absence of a validly adopted son: and held that there was thus a valid charge created in plaintiff's favour against Aribhunjun's estate, whether Dulpati Singh had been legally adopted, or whether, in the absence of such adoption, the deed be regarded as that of the widow herself, made with the consent of the reversioner, and thus

operating as a valid transfer of the property. Upon these considerations the lower Court decreed the plaintiff's suit.

The mortgage bond, it is to be observed, covered seven mouzahs, of which five only are the subject of this suit. For, of the other two, the one named Simeria has already been purchased by the plaintiff in execution of another decree, and the one named Teknia, so far as Dulpati Singh was concerned, has been purchased long ago by defendant Baijnath Sahai.

The present decree of the lower Court makes the other five mouzahs wholly liable for the mortgage debt, and provides that any balance left outstanding after their sale shall be saddled upon Simeria and Teknia by apportionment; and the appellants object to this form of decree even if the mortgage be held to be valid.

We now proceed to deal with the various points necessary for the decision of the appeal.

During the hearing, after the learned counsel for the appellants [411] had concluded his opening address, we intimated our concurrence with the lower Court in the finding that the defendant Parbhu Lal was the *benamidar* of Baijnath Sahai; and the reasons given by the Subordinate Judge commend themselves generally to our judgment. We do not commit ourselves to all that he wrote upon this subject; but we may state shortly that the evidence satisfies us that Parbhu Lal was himself a man of no means, and that the money used for the purchase was Baijnath Sahai's and the very fact that the two have joined in this appeal goes to confirm our impression that Parbhu Lal has no interest in the matter apart from Baijnath.

We are, however, unable to concur with the lower Court in the opinion that the decree in the mortgage suit, dated 26th June, 1882, is a *res judicata* as against Parbhu Lal and Baijnath Sahai, as to the liability to sale of the five mouzahs now in suit. It is true that Baijnath was a defendant in that suit; but he was so made only as representing the mouzah Teknia. In that suit he had nothing to do with the five mouzahs, which are the subject of the present one. The mortgage suit was instituted in July, 1880, but the title to these mouzahs, sold as Ripubhunjun's to Parbhu Lal, did not vest in him until the 20th of January, 1881, the date of the sale certificates. Ripubhunjun was not made a party to that suit as he ought to have been, and his interest was in no way represented, nor did the plaintiff choose to bring in Parbhu Lal as defendant in the suit, although the sale to that person was made subject to the plaintiff's mortgage. The decree, therefore, could not bind Ripubhunjun, nor could it bind Parbhu Lal or Baijnath.

We have next to consider the plea of estoppel against the defendant-appellant, founded on the conduct of Ripubhunjun Singh. It is said that he by his representations that Dulpati Singh was the adopted son of Aribhunjun, and that there were pressing debts due by the estate of Aribhunjun, induced the plaintiff to advance to Mussamut Bishnath Koer the money which formed the consideration for the bond executed by her as guardian of Dulpati Singh. That this was so we can have no doubt upon the evidence of the plaintiff, and of other witnesses. It is expressly stated also by Ripubhunjun himself in his [412] deposition made in Parbhu Lal's claim case on the 27th of February, 1884, he being dead when this suit was tried, a copy of that deposition was put in, and is exhibit No. 65 for the plaintiff. The learned counsel for the applicants contended, upon authorities which he laid before us, that, inasmuch as it was clear upon the plaintiff's own showing that in

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making the loan he had not acted exclusively upon the representations of Ripubhunjun Singh, there would be no estoppel even against *him;* and that even if Ripubhunjun would be estopped from denying the adoption, yet the purchaser at an execution sale of the right and interests of Ripubhunjun would not be estopped. He showed that an execution-creditor would not be estopped, and submitted that a purchaser was in no worse position. The learned counsel relied upon the English cases of *Freeman* v. *Cooke* (1) and *Richards* v. *Johnston* (2), and cited as an authority Bigelow's Law of Estoppel, and he referred to the Indian case of *Baboo Banee Pershad* v. *Moonshee Syud Abdool Hye* (3), and to a case relied on by the other side also, namely, *Poreshnath Mookerjee* v. *Anathnath Deb* (4), and *Anathnath Deb* v. *Bishtu Chunder Roy* (5).

On the other side Baboo Mohesh Chunder Chowdhry for the respondent treated the last-named case as in his favour, as it held that a mortgagee purchasing the mortgaged property in execution of his own decree was estopped by the same considerations which would have estopped his mortgagor from denying a particular state of things as to the property mortgaged. He also referred us to an unreported judgment of a Division Bench of this Court in S.A. No. 572 of 1884, in which the learned Judges held, in a similar case in which Ripubhunjun Singh was concerned, that not only he but his creditor would be estopped by his conduct from denying the adoption of Dulpati Singh. That case was the converse of the present one; for the plaintiffs were judgment-creditors of Ripubhunjun, and sought to make liable for his debts property which had been sold in execution of a decree against the minor Dulpati Singh and purchased by the defendants. The learned Judges in that case said that, in the absence of fraud [**413**] and collusion between Ripubhunjun and Mussamut Bishnath Koer, there could be no doubt that the plaintiff in that suit was in no better position than Ripubhunjun would have been if he had sought to recover the property, and they proceeded to hold that Ripubhunjun, by his silent acquiescence and conduct in recognizing Dulpati as adopted son, would have been debarred from suing to recover the property. We find ourselves quite unable to accept this dictum in regard to estoppel, so far as the defendant, the auction-purchaser, is concerned. For estoppel is purely a personal bar operating against the person whose conduct constitutes it, and against his privies and representatives. That it will not operate as against a simple money-creditor as such is established by the case of *Richards* v. *Johnston* (2), cited by the learned counsel for the appellants. The case of a mortgagee would seem to be different, for he derives his title directly from the debtor, and will be bound by the previous conduct of the debtor in respect of the property mortgaged—See *Poreshnath Mookerjee* v. *Anathnath Deb* (4). But what we have to decide in the present case is, whether, assuming that Ripubhunjun was estopped from denying the validity of Dulpati's adoption, the purchaser of his right and interest at a sale in execution of a decree is similarly estopped by the conduct of Ripubhunjun. The simple question is whether the execution-purchaser is the representative of Ripubhunjun within the meaning of s. 115 of the Indian Evidence Act.

It seems to us that he is not so merely in his capacity as purchaser in execution. The case last cited—*Poresnath Mookerjee* v. *Anathnath Deb* (4)—shows that, if he had also been mortgagee of the property from

(1) 2 Ex. Rep. 654. (2) 4 H. & N. 660. (3) 25 W.R. 192.
(4) 9 I.A. 147. (5) 4 C. 783.

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Ripubhunjun, he might be held to be his representative under s. 115; but we are aware of no authority for holding that the simple fact of purchase at an execution sale will make him the representative for the purpose of that section of the judgment-debtor. On the contrary the execution-purchaser derives his title by operation of law adversely to judgment-debtor. See *Dinendronath Saunyal* v. *Ramcoomar Ghose* (1); see also *Mussumat Imrit Koer* v. *Lalla Debee Pershad Singh* (2).

[414] We may refer also to the case of *Srimati Ananda Mayi Dasi* v. *Dharandra Chundra Mookerjee* (3), in which their Lordships of the Judicial Committee say, at page 127: "The title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagee, or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor."

Upon these considerations then we hold in favour of the appellants that they are not the representatives of Ripubhunjun in such a sense as to be estopped by any conduct of his from disputing the validity of the adoption of Dulpati Singh.

It appears to us that the plaintiff must stand or fall by the mortgage bond upon which his decree of the 26th June, 1882, was based. He can succeed only if that bond created a valid charge upon the properties mortgaged. If the adoption of Dulpati Singh was good in law, then there can be no question, but that the mortgage bond executed by his adoptive mother, who was his duly appointed guardian under Act XL of 1858, and had obtained the sanction of the District Judge to her executing the bond, created a valid charge. But if the adoption was bad in law, it would still have to be considered whether the bond may still be a valid one by reason of Dulpati Singh's title to the property having since become perfected as against Ripubhunjun by lapse of time and adverse possession, or by reason that, in the absense of a valid adoption, Mussamut Bishnath Koer, the widow, fully represented the estate of Aribhunjun for the legal necessities of which she executed the bond in question with the assent of the reversioner. And we are disposed to think that it is really upon this last-named ground that we ought to uphold the judgment of the lower Court in favour of the plaintiff. As regards the adoption, the lower Court has disbelieved the evidence adduced in support of the proposition that Aribhunjun before his death received the child Dulpati, and made him over to his wife, desiring her to adopt him. The evidence on this matter has been disbelieved on each occasion [415] when the fact has been attempted to be proved, and it is impossible to avoid seeing how suspicious it is, especially in the absence of evidence from particular members of the family, who, had the fact been true, would have been the first to come forward to prove it on a previous occasion when the question was raised in 1877, but who did not do so, and who were dead when this suit was tried in 1885. We refer especially to the widow Bishnath Koer and Ripubhunjun himself, and there is at least some *a priori* improbability in the story that the boy Aribhunjun seized with cholera while returning to his home after his marriage ceremony, and dying the following day, should have been able to turn his thoughts to the subject of adopting a son, and should have gone through the forms of receiving the child and placing it in the lap of his young wife.

(1) 8 I.A. 65. (2) 18 W.R. 200. (3) 8 B.L.R. 122.

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We are certainly not prepared to reverse the finding of the lower Court on this point.

But it is contended that under the Mitakshara law the consent of the husband is not necessary, under all circumstances, if the adoption takes place after his death, as was the case in the present instance. It is urged that, after a man's death without issue, the consent of his near kindred is sufficient to authorize an adoption by his widow; and that their consent will operate as his own, since it was incumbent upon him as a religious duty to have a son, and it must be presumed that he accorded his sanction to his widow to adopt a son if she had none of her own. The authority for this contention is in a passage of the Viramitrodoya, p. 115, of Baboo Golab Chunder Sircar's translation. This, no doubt, is an authority recognized in the Benaras School; and the doctrine has received judicial sanction in respect of adoptions in the Dravida country in Southern India—See *The Collector of Madura* v. *Moothoo Ramalinga Sathupathy* (1). But we are not aware that this doctrine has been recognized judicially as efficacious in Northern India, though Sir Thomas Strange seems to have thought that it was applicable wherever the Benares School of law prevailed. As far as we are aware the doctrine has not been hitherto sanctioned by usage in the part of the country to which the present [**416**] case belongs; and there is the authority of the Dattaka Mimansa (sec. I, paras. 15, 16, and the following paras.) which is opposed to it. And moreover it was negatived in the case decided by the late Sudder Dewany Adawlut, in *Raja Shumshere Mull* v. *Ranee Dilraj Konwar* (2), though in that case the Viramitrodoya was quoted by the pundits. We should, therefore, hesitate to decide that this adoption was good in law without any express consent of Aribhunjun. We prefer, however, not to decide the question at all in the present case; as also another cognate question, which was raised by Baboo Mohesh Chunder Chowdhry, whether the recognition of the adoption by Ripubhunjun, the then reversioner, would render the adoption valid, because we think this appeal may be satisfactorily disposed of on another ground.

The lower Court was of opinion that Dulpati Singh had acquired an absolute title by more than 12 years' possession, from the date of his alleged adoption in 1867, before the purchase of the defendant Baijnath in 1880 of the rights of Ripubhunjan in the property; and that on this ground the defendants could not resist the claim of the plaintiff to have the property sold as Dulpati's.

We are not prepared to accept this view of the matter, for, unless Dulpati Singh's title had become perfected by limitation before Bishnath Koer's death, the reversioner Ripubhunjun would, under the present law of limitation, Act XV of 1877, art. 141, be entitled to 12 years within which to bring his suit for recovery of possession of the estate. The adoption in this case took place in 1867, and the widow died in 1878, *i.e.*, within 12 years from the adoption. No doubt the sale to the defendant took place in 1880, or more than 12 years after the adoption; but it is obvious that this circumstance would not affect or alter the rights of the parties. It was, however, contended for the plaintiff that the adoption having been allowed to remain unquestioned for more than 12 years, it would not be competent to Ripubhunjun to set it aside, and that he could not recover the estate from the hands of Dulpati Singh without setting aside the adoption; and in [**417**] support

(1) 12 M.I.A. 397. (2) 2 Sel. Rep. 169=6 I.D. (O.S.) 523.

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of this view the decision of the Judicial Committee in the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1) was relied upon. Now, it is to be observed, that this decision was passed with reference to the provisions of the Limitation Act IX of 1871, which in art. 129 provided that *suits to set aside an adoption* should be brought *within* 12 *years from the date of adoption.* The adoption as already noticed took place in 1867, and before the title under the adoption could become perfect by efflux of time under the Act of 1871, the law of 1877 (Act XV) was passed, which in art. 118 provides that suits, *for obtaining a declaration* that an alleged adoption is invalid, should be brought within *six years from the date when the adoption becomes known to the plaintiff.* Taking this article along with arts. 140 and 141, it appears to us that, when a person claiming to be the next reversionary heir, and being aware of an adoption having taken place seeks to obtain a bare declaratory relief in the lifetime of the widow, he is bound to bring his suit within six years from the time of his knowledge; but that this would not prevent the reversioner from suing to obtain possession of the estate, when it falls into possession, or when the widow dies, if the suit is commenced within twelve years from that time. In such a suit, the party claiming under the adoption might set it up in answer to the plaintiff's case, and when set up, the validity or otherwise of the adoption would be investigated and the case accordingly determined. We observe that the title of the defendant, as representing the interest of the reversioner, accrued within two years of the time when the succession opened out, and he is the party now in possession of the property. It is the *plaintiff* who seeks to apply the law of limitation against him. And we are in no way prepared to hold that in a case like this the law of limitation can be successfully pleaded.

Nevertheless, we are of opinion, as already stated, that the plaintiff is entitled to succeed in this suit upon the ground that it being assumed that the adoption of Dulpati Singh was invalid, the widow Bishnath Koer was competent for legal [**418**] necessity to mortgage the estate of Aribhunjun. We concur with the lower Court in finding that there was at the time of the mortgage such pressing necessity as justified her in raising money on mortgage for the benefit of the estate. And we find that the deed was executed by Bishnath Koer in her own name though she represented herself to be the mother and guardian of Dulpati Singh, her adopted son. Her deed would be binding on him if he really held the position ascribed to him; and if he did not, we think her deed must equally, under the circumstances, be held to have bound the estate and the reversioner. She executed the deed ostensibly as holding the *de facto* title of manager only; but that deed will not be the less binding if she really possessed at that time the *de jure* title to the property. This doctrine seems to us to be clearly expressed by the Judicial Committee of the Privy Council in the oft-quoted case of *Hunooman Pershad Pandey* v. *Mussumat Babooee Munraj Koonwaree* (2).

In that case the mortgage-deed had been executed by the widow describing herself as proprietor. It was held that, though she was in fact only manager on behalf of her son, yet the mortgage was binding upon the latter, being one that in her capacity of manager she might properly have executed for the benefit of his estate. It seems to us that in this case there is still stronger reason for holding that, whereas the widow's

(1) L. R. 13 I. A. 84=13 C. 308. (2) 6 M.I.A. 393.

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title was even better than that set out in the mortgage-deed, to mortgagee is not to be defeated for that reason.

But, apart from this view of the matter, it seems to us that the transaction ought to be supported upon another ground. The estate being, according to the defendant's case, in the widow Bishnath Koer, she could have, even if there was no legal necessity, alienated it, with the consent of the then reversionary heir, to anybody she pleased. And in the event of this being done, the alienation would be binding upon the reversioner, whoever he might be, when the succession opened out [see the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) decided by Full Bench of this Court]. Now it appears perfectly clear upon the evidence that Ripubhunjun Singh, who was then the sole reversionary [**419**] heir, not only induced the plaintiff to lend the money but brought about the transaction, and took an active part in the execution of the mortgage-deed; and there can be, therefore, no doubt that the transaction was entered into by the widow with the consent of Ripubhunjun Singh. True it is, as already noticed, that the deed purported to be on behalf of the minor Dulpati Singh, but what we have to look to is not the *form* but the *substance* of the transaction. It appears to us that, considering the transaction from a proper point of view, it created a valid charge upon the property, and the result is that the defendant, the purchaser of the right, title and interest of Ripubhunjun Singh, who, failing the adoption, became the heir upon the death of the widow, would only take the property subject to the said charge.

We think, therefore, that the plaintiff is entitled to the decree he has obtained declaring his right to follow the properties in suit for the satisfaction of the mortgage debt. But we are of opinion that the decree was wrong, in so far as it ordered that the whole debt should, in the first instance, be saddled on the five mouzahs in suit, and that they should be sold for the recovery of the whole amount; other properties included in the mortgage deed, and one of which is now in the possession of the plaintiff himself, being relieved for the present of their share of the burden.

Mouzah Simeria Ojha with Putti Simeria Ojha is now the property of the plaintiff, and mouzah Teknia had become the property of the defendant Baijnath Sahai subject to the mortgage, before the plaintiff brought his first suit on the mortgage bond. We think that the defendant-appellant is entitled to demand that the portion of the mortgage property which is now the plaintiff's should bear its fair proportion of the debt. And we observe that in the plaint there was no prayer for any such decree as the lower Court has made, as to the order in which the mortgage property is to be sold in satisfaction of the debt. We must therefore cancel this portion of the decree, and we remit the case to the lower Court that it may take an account of the value of the various properties mortgaged, and apportion the proper share of the debt to each of the mouzahs covered by the [**420**] mortgage, and declare the plaintiff entitled to charge the remaining mouzahs mortgaged with their proportionate share of the debt; and to make a final decree accordingly.

With this slight modification we affirm the judgment of the lower Court with costs of this appeal.

H. T. H. *Decree varied and case remanded.*

(1) 10 C. 1102.

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Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

KHAJA MAHOMED ASGHUR (*Defendant*) v. MANIJA KHANUM *alias* BAKKA KHANUM (*Plaintiff*).* [21st March, 1887.]

Mahomedan Law—Dower—Evidence—written contract, Effect of failing to prove when alleged.

A suit was brought by a Mahomedan wife for dower alleged to be due to her under a *kabinnamah* executed by her husband at the time of the marriage. She alleged the amount of dower to be Rs. 10,000, of which Rs. 5,000 was prompt and Rs. 5,000 deferred, and she claimed to be entitled to the whole on the ground that she had lawfully divorced her husband in pursuance of power reserved to her in that behalf by the *kabinnamah*... At the hearing she failed to prove the *kabinnamah*, but the Court gave her a decree, holding that there was evidence to show that a dower of Rs. 10,000 was usually payable in the plaintiff's family, and that, in the absence of evidence to the contrary, the whole amount must be considered prompt but as the plaintift only claimed Rs. 5,000 as prompt, the decree was limited to that amount.

Held, that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint nor admitted by the defendant, the suit being based upon a written agreement, which the plaintiff failed to prove.

[R., 129 P.L.R. 1904=2 P.R. 1905.]

THIS was a suit brought by the plaintiff to recover her dower to the amount of Rs. 10,000 settled, as alleged in the plaint, by a *kabinnamah* executed by her husband, the defendant, on the occasion of her marriage. Rs. 5,000, it was alleged, was prompt dower and the other Rs. 5,000 deferred dower.

The plaintiff alleged that the *kabinnamah* reserved to her power to divorce her husband, and she alleged that she exercised that power and gave him notice to pay up the whole amount of the dower. As to the prompt dower she alleged that her [421] cause of action arose in the year 1288 (1881-82), the date of the first notice to pay the prompt dower, and as to the deferred dower, from the time of the *talak*, the 29th Bysack 1290 (11th May, 1883).

The *kabinnamah* was not produced. The plaintiff alleged in her plaint that it was in the custody of her father; and a summons was served upon him to produce it. He stated that he had no recollection of its ever having been executed, and said that all papers pertaining to his family had been made over to his son, whom he had appointed mutawali of his whole estate. The son was cited as a witness. He stated that he knew nothing about this *kabinnamah*, and that probably none had been executed.

The plaintiff herself being examined on commission stated that she had only once seen this document some five or six years after her marriage, her marriage having taken place when she was twelve or thirteen years old, and she being now past forty. She only knew of the contents by hearsay, and had only seen the document in a folded-up state in her father's possession.

Two witnesses were cited by her who deposed to the execution of the *kabinnamah* and as to the sum fixed for dower.

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* Appeal from Original Decree, No. 135 of 1886, against the decree of Baboo Beni Madhub Mitter, Rai Bahadur, Subordinate Judge of Dacca, dated the 22nd March 1886.

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The lower Court admitted this secondary evidence of the contents of the document, but when it came to deliver judgment it found that the evidence did not prove the execution of any such document at all, and it found that there was no trustworthy evidence as to the plaintiff's alleged right to divorce her husband. But the lower Court was of opinion, upon the evidence of the two witnesses who attempted to prove the document and its contents, that the amount of dower was Rs. 10,000, which evidence the Court considered was supported by the admissions of the defendant and by the evidence of the witnesses called by him, which tended to show that the custom of the plaintiff's family was that a dower of Rs. 10,000 should be fixed on the occasion of daughters marrying; and the Court held that the defendant had contracted to pay that sum.

The lower Court then went on to determine how much of the dower was prompt and how much deferred; and referring to the authorities cited before it—Macnaghten's Principle of [**422**] Mahomedan Law, p. 217; *Mirza Bedar Bukht Mohummed Ali Bahadur* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadur* (1); *Mussamat Bebee Jumeela* v. *Mussamut Mulleeka* (2); Bailie's Digest of Mahomedan Law, pp. 91-92; Hedaya, p. 87; Tagore Law Lectures, 1873, pp. 352, 359, 360—came to the conclusion that, in the absence of any definite evidence upon the point, the whole dower should be held to be prompt; but inasmuch as the plaintiff had claimed to have only Rs. 5,000 prompt dower, and she was not entitled to claim any deferred dower by reason of the divorce of her husband, which she was not competent to effect, it made a decree for Rs. 5,000 only as prompt dower due to her.

Against that decree the defendant now appealed.

Munshi *Mahomed Yusoof* and Munshi *Serajul Islam*, for the appellant.

Baboo *Durga Mohun Das* and Baboo *Lal Mohun Das*, for the respondent.

The case of *Sheikh Akbar* v. *Sheikh Khan* (3) was referred to at the hearing of the appeal.

JUDGMENT.

The judgment of the High Court (Tottenham and O'Kinealy, JJ.), after stating the facts, proceeded as follows:—

It is clear to us upon the facts of the case that the plaintiff would be entitled to receive some dower, and probably not less than Rs. 5,000, if she had framed her suit in such a way that the Court could give it to her; but we find ourselves, to our regret, unable to sustain the decree of the lower Court. The suit was brought upon a written contract and upon nothing else. That written contract was not produced, and in the opinion of the lower Court the evidence admitted was not sufficient to establish its execution, and as to that finding we see no reason to differ from the Court below. In the first place it is very difficult to say whether the plaintiff made out any case for the admission of secondary evidence. We are not convinced that there ever was any valid written document in existence, and we are [**423**] certainly not convinced that, if there was, it was in the possession of her father or her brother the Nawab Ashanoollah. That being so we think that the lower Court was not right in decreeing the suit upon the basis of the oral contract not

(1) 19 W.R. 315. (2) W.R. (1864) 252. (3) 7 C. 256.

alleged by the plaintiff and not admitted by the other side. If it could be held that the conduct or pleadings of the parties in the suit led the Court below to treat the question at issue as one depending on the existence of any custom in the family to give a dower of Rs. 10,000, and if the evidence of that were sufficient to establish it, we might have been able to leave the decree undisturbed. But we do not find that, in reality, although the issue laid down was a tolerably wide one, the defendant went into evidence as to the custom of the family in fixing the dower. The evidence as to which the defendant went to the trial with regard to custom was as to what portion of her dower was prompt and what portion deferred, and as to the custom of reserving the right of divorce to the wife.

We think that the plaintiff has failed to establish the case set up by her, and that she cannot obtain a decree upon the basis that she did not set up.

We reverse the decree of the Court below and dismiss the plaintiff's suit with costs.

H. T. H. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

E. TAYLOR AND ANOTHER (*Plaintiff*) *v.* THE COLLECTOR OF PURNEA (*Defendant*).* [15th February, 1887.]

Land Acquisition Act (X of 1870), ss. 15, 30 and 55—District Court, Powers of—Compensation, its principle and measure—Lands severed from a factory.

The Land Acquisition Act provides for two classes of reference to the Judge, one to assess compensation under s. 15 and the other to apportion compensation under s. 38. The power of the District Court limited to the determination of these questions and questions of title incidental thereto. There is no power in the Judge or the High Court in appeal to decide on any such reference a question arising under s. 55.

[424] Land taken under the Act is taken discharged of all easements, and the loss of easements must be taken into account in assessing compensation for injurious affection.

[**F.**, 16 M. 321 (323); **R.**, 17 M. 371 (372).]

THIS appeal arose out of the acquisition of certain plots of land for the purposes of the Behar and Assam State Railway under Act X of 1870. The lands were situated in the village of Manihari, pergunnah Kakjoul, in the district of Purnea, and appertained to an indigo factory, of which Edward Taylor and Amelia Jane Taylor were the joint proprietors. After the usual preliminary proceedings and service of notices under s. 9, the Deputy Collector was unable to come to an arrangement with the proprietors, and referred the matter to the Judge under s. 15 of the Act. The proprietors, thereupon, preferred their claim, raising various objections to the findings of the Deputy Collector, and in answer thereto a written statement was filed on behalf of Government. The points mainly urged by the claimants were: (1) that the premises in question being an indigo factory it was not open to the Government to take up only a portion of them, but the Government was bound to take up and make compensation for the whole; (2) that additional compensation was due for damages caused by destruction and removal from the

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* Appeal from Original Decree, No. 90 of 1886, against the decree of F. W. V. Peterson, Esq., Judge of Purneah, dated the 1st of February, 1886.

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land of clumps of *harota* bamboos, forming a bamboo tope or preserve; (3) that compensation was also due as damages for the severance of the land acquired from the other lands. On behalf of Government it was, among other things, pleaded: (1) that s. 55 did not apply to the case and the Government was not bound to take up the whole premises; (2) that the compensation for the bamboos allowed by the Deputy Collector was unreasonably high; (3) that there had been no such severance as was alleged by the claimants, nor had there been loss or damage in consequence of any severance.

Upon the first question the decision of the Judge was to this effect:—

"I have to consider whether, under the provisions of s. 55, the Government is bound to take over the entire Manibari concern. One assessor gives his opinion on the point in favour of the plaintiff, the other against him. The matter would be easy of determination were the interpretation to be put on the words "house, manufactory or other building" that allowed by conventional usage; but it is argued for the plaintiff that [425] "manufactory" is a comprehensive word, and includes various adjuncts and accessories of the factory. In the present instance these, it is contended, would be the plot A with its bamboos, plot E as part of the lower compound, the drain which occasionally fills the tank in the upper compound, and the private road which communicates between the two compounds. In support of this contention the English rulings to be found at page 75 of Mr. Beverley's book (The Land Acquisition Act with Introduction and Notes) are relied upon. It appears to me that, so far as it is possible to form an opinion from these notes, the majority of the cases cited can be shown to differ completely from the present case, and only in two are the circumstances faintly analogous. To take the first case: the garden and orchard attached to a mansion are such adjuncts that, if taken away, they cannot be replaced—the essence of such adjuncts is that they are situated where they are; they make a part of the mansion. The test laid down in *Fergusson* v. *London, Brighton and South Coast Railway Co.* (1) is in reference to houses, and could not possibly be applicable to an indigo concern. The sale in the present case has passed several outlying jotes and kamats: it would be preposterous to contend that, if a portion of one of these had been taken up for a public purpose, the Government would be bound to buy the concern. In the case of *Marson* v. *London, Chatham and Dover Railway Co.* (2) the publicans appear to have been totally shut in. Nothing of the kind happens here. In the case of *Furniss* v. *Midland Railway Co.* (3) that which regularly supplied a reservoir, the water of which was one of the motive powers used in working the factory, had been completely obstructed. To cut off the water-supply was to stop partially the working of the factory. Here the drain is used only to fill a tank, the water of which is not used in the manufacture of indigo, and besides which there exist two other sources for the supply of water for general purposes, *viz.*, a well and a jhora, *vide* Mr. Reily's deposition. Furthermore the drain is only used on rare occasions when there is a flood, and if there is a high flood the drain is superfluous, the flood water entering the tank through a culvert. It did so enter in the past year, the railway embankment notwithstanding. Mr. Reily, under whose control this factory was for twelve or thirteen years, says that twice he had the drain cleared of obstructions *at the*

(1) 2 N. R. 503, 506. (2) L. R. 6 Eq. 101. (3) L. R. 6 Eq. 473.

request of the villagers. Mr. Baxter, the railway engineer, says the tank can be replenished otherwise than through the drain. There is a total absence of evidence on the main point, *viz*., whether the drain is at all essential to the existence of a proper supply of water in the tank. Admittedly it is used only on the rarest occasions, but there is nothing to show that even on these rare occasions, the tank could not be filled by other means in actual existence at the present time. The case then of *Furniss* is clearly distinguishable from this case. [426] There remain the two cases of *Salter* v. *Metropolitan District Railway* (1) and of *The Governors of S. Thomas' Hospital* v. *Charing Cross Railway Co.* (2). With reference to these it is to be noted, firstly, that they relate to land connected with houses; and, secondly, that those houses were situated in a city; it may fairly then be inferred that land "within the same ambit or circuit," and land "which can be fairly considered part of the house as a residence," were lands within an enclosure, not merely within a ring-fence. The very existence of an enclosure was the strongest evidence that all within that enclosure formed one tenement; and furthermore, from the simple position of the land, it might be asserted without fear of contradiction that every bit of land within that enclosure was absolutely necessary and essential to the full enjoyment of the premises connected with that land, otherwise the land would not have remained unbuilt on. In neither of Mr. Taylor's compounds is there any thing approaching to an enclosure. The two cases then which do, in a remote degree, bear an analogy to the case under trial relate to houses situated in an exceptionally advantageous position, and therefore cannot be held to govern a case like the present one. The general principle which appears to be enunciated in the above rulings, and which would give a reasonably wide meaning to the words "house, manufactory or other building," is that, in order to be included in the term "house," the land taken up should, whilst forming an integral portion of the premises, be essential and necessary to the full enjoyment of the property. It might well be that, to the full enjoyment of a residence in a town or in crowded suburbs, a piece of land, the bare land, is essential. In the case, however, of a "manufactory" the land must be put to some use distinctly connected with the manufactory. The use must be something inseparable from the particular land acquired. It is not sufficient that what the land produces is a material employed in the process of manufacturing. It is not necessary to the working of plaintiff's factory that he sould have the particular bamboos grown on plot A; he has to separate them from that land and take them elsewhere before he can use them. With possibly additional expense and inconvenience (facts to be considered under cl. 3 of s. 24) he can get bamboos severed from other lands and brought to him. The possession of plot A, then, obviously is not necessary to the working of the factory. In plot E indigo grows. The same remarks apply to it, though it is not even hinted that the loss of the quantity of indigo grown on it is likely in any way to affect the factory. Further it is said that, after depositing the indigo plaint, carts and bullocks used to stand and rest on plot E. It is not, however, shown that other parts of the compound could not be and were not used for that purpose, nor is it even shown that the loss of this particular plot of land, so far as regards its use as a resting place for carts, is such as to affect, except very slightly and in an indirect manner, the working of the factory. I think it would [427] be straining the

(1) L. R. 9 Eq. 432. (2) 30 L. J. Ch. 395.

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law to an unwarrantable length to hold that an entire indigo concern is to be purchased by Government on behalf of the community, because a small plot of land taken up was occasionally used as one of possibly many resting places for the carts and bullocks employed in the carriage of indigo. The law no doubt should be construed liberally in favour of a person situated as is the plaintiff, but between liberality of construction and an unreasonable straining of the law there is a wide difference. I am inclined to think that the provisions of cls. 2 and 3 of s. 24 are intended to cover every damage short of that resulting from a total or a partial stoppage of the working of a manufactory. The acquisition by Government of plots A and E, and the carrying of the private road over instead of under the embankment, certainly do not materially affect the working of the plaintiff's factory. I find, therefore, that s. 55 does not apply to this case."

With regard to the second and third questions the Judge allowed the claimants Rs. 1,400 as the price of bamboos, and gave Rs. 180 as compensation for the severance of the land according to the provisions of s. 24, cl. 2 of the Act.

The claimants appealed to the High Court, and the Collector of Purnea, on behalf of Government, filed a memorandum of objections under s. 561 of the Civil Procedure Code.

Mr. *Woodroffe* (with him Mr. *R. E. Twidale*), for the appellants.

The Advocate-General (with him the *Senior Government Pleader* and Baboo *Ram Charan Mitter*), for the respondent.

The High Court (WILSON and O'KINEALY, JJ.) delivered the following judgment:—

JUDGMENT.

This appeal arises out of an assessment of compensation made under Act X of 1870, the Land Acquisition Act, by the District Judge of Purnea.

It appears that, before the year 1884, the claimant Mr. Taylor was lessee of an indigo factory at Manihari. On the 15th February in that year, he or his wife purchased the property from those under whom he had previously held the leasehold, and thus became the owner of the property. The Government found it necessary for the purposes of a railway to acquire a portion of the land held by him as part of, or in connection with, the factory. We are here concerned with three plots, which are shown on the map and marked A, B and E. On the 4th March, [428] 1884, the proper officer published the general notification required under s. 9, paragraph 1 of the Act. On the 20th March, acting under the powers given to them by s. 17 of the Act, the officers of Government took possession of these lands. At various dates between the month of October 1884 and January 1885, the personal notices, as we may call them, required by s. 9 were served upon the parties interested. After that the Deputy Collector appointed for this work proceeded, in the manner required by s. 11 and the following sections of the Act to make the necessary equiries into the value of the lands taken for the purposes of compensation.

On the 23rd June three references under s. 15 of the Act, because there were three plots, were made to the District Judge for the purpose of assessing compensation. On the 24th August the claimants put in their claim in writing. It is enough to say with regard to that claim that it raised three points or classes of points. First, it alleged that the lands, which it was proposed to take, or some of them, formed part of the

factory, within the meaning of s. 55 of the Act, and that, therefore, inasmuch as Mr. Taylor objected to a part being taken, the Government was not at liberty to take less than the whole. The second point or group of points raised was with regard to the amount of compensation property payable for the lands actually taken supposing the contention under s. 55 was not to prevail. And the third class of points raised was as to the amount of compensation properly payable for the injury done to, or, to use the language of the Act, for " injurious affection " of, the remaining property not taken. On the 12th January 1886, a written statement on behalf of the Government was put in. It is enough to say as to it that practically it took issue with the claimant's claim upon all the various matters.

The case came on for hearing, and on the 16th January 1886, the two assessors delivered their opinions, in which they differed very widely on all the points. The learned Judge delivered his judgment on the 1st February following. In that judgment he has dealt with each of the questions or classes of question to which we have referred.

With regard to the first question he has held that s. 55 does not [**429**] apply to the case. As to that it appears to us that the decision cannot stand, because in our judgment neither the Collector nor the Judge under the reference to him, nor we on appeal from those proceedings, have power to decide any such question. It must be borne in mind that this Act confers a special and limited jurisdiction upon various classes of people to decide certain questions, and they have only power to decide those questions with which the Act enables them to deal. We need not trouble ourselves with the sections dealing with the powers of the Collector. We have to do with those sections which affect the powers of the Judge. The act provides for two classes of reference to the Judge, and the Judge can decide only those things which arise out of those references. The first class of reference is to award compensation under s. 15; the second class of reference is for the apportionment of compensation under s. 38; and an appeal to this Court from those decisions is given in certain limited cases. The result is that the Court has power under proper references to decide what compensation shall be awarded, and to whom it shall be paid. And it must be taken now on the decisions that for those purposes the Judge has power to decide questions of title; that can no longer be disputed since the decision of the Privy Council in *Raja Nilmoni Singh Deo Bahadur* v. *Rambandhu Rai* (1). But none of those sections, to which we have referred, give any power to decide the question which arises under s. 55, whether the Government has a right to take what it proposes to take at all. There is no express power in any section given to decide that question, and it does not arise by any reasonable inference under a reference to award compensation or a reference to apportion compensation. It is not necessary for us to say how that question can properly be raised; it may be, and very likely is, that the only way is by a suit brought for the purpose, as was certainly done in *Kharshedji Nasarvanji Cama* v. *The Secretary of State in Council* (2) under the earlier Act. That part, therefore, of the Judge's decision is not reeversed, because we have no power, as we have already said, to express any opinion, but it is set aside as being in excess of his jurisdiction.

Next comes the question of compensation for the lands taken. [**430**] The mode in which the lands have been valued for this purpose is this. The land has been valued as if it were bare land; and the crops

(1) 7 C. 388. (2) 5 B.O.C.J. 98.

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upon it have been valued separately. So far as the valuation of land is concerned, regarded in that light, we see no reason to differ from the view which the learned Judge has taken. As to the crops other than the bamboos there is no serious contention, as Mr. Advocate-General assents that Rs. 310 should be allowed. We think that a slight error has been committed with regard to the land on which the bamboos stood. The learned Judge has valued the bamboos, that is to say, the bamboo stems then on the land, at Rs. 1,400. We think that what he ought to have done was to value them, not as so many bamboo stems there, but as growing bamboos, which would produce cutable bamboos in future, as they have done in the past. Taking (what we think is the fair result of the evidence) the production of bamboos at 500 per annum, and taking the price, which has been assessed by the learned Judge, Rs. 20 per hundred, and taking the number of years purchase which he has taken, namely, 20 years, we arrive at Rs. 2,000. To that extent the compensation should be increased.

But it is obvious that the really important question in the case is the proper measure of compensation for injurious affection of the property which has been left in Mr. Taylor's hands. To appreciate that we must see what the position of the property was. It consisted of an upper factory situated on high land at a considerable distance from the river, and of a lower factory close to the river. The land between these two parts belonged to other persons, but there was a roadway connecting these two parts of the factory. That roadway was in a part of its length a public road, as for the rest it is clear on the evidence that it was a private road belonging to the factory.

The next thing which it is necessary to notice is that there was a water-channel running from the river through the lower factory, and through the intervening land into the upper factory and into a tank there. And in portions of the year that channel had the effect of filling the tank in the upper factory from the river. The third thing which it is necessary to notice is this, that on the evidence of all parties it is absolutely essential to the [**431**] working of the lower factory that the foul water which runs to waste after the manufacture of indigo should have some means of escape other than into the river, because all the witnesses agree that if discharged into the river it would, in an important part of the year, have the effect of deteriorating the manufacture of the indigo, for which water is taken from the river. Before the railway was made, there was such an escape in a north-easterly direction from the lower factory. There is one other thing which it is necessary to notice, that indigo is manufactured at the lower factory and then carried to the upper factory, where it is stored and kept. These are the principal matters for which compensation is demandable on the ground of injurious affection. There is one other very important matter, which will be considered later on.

It appears to us that in the Court below there has been some misapprehension as to the legal position of the parties in this case. It is clear under the express terms of the Act that, whether land is taken in a summary way under s. 17, or in the more deliberate method contemplated in the earlier sections, whatever land the Government takes under the Act, it takes it as its absolute property free from all incumbrances. Therefore, when the Government took the plot E, they so took it; and it is plain that the right to the water channel to fill the tank in the upper factory, the right of drawing away the foul water from the lower factory on to other people's lands to the noth-east, through the land now taken by

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the railway, and the right of way, were all incumbrances within the meaning of the Act. The result is that the moment the Government took possession of the lands these incumbrances as a matter of right instantly ceased to exist. That was the position of the parties in point of law. It appears to us that those who acted for the Government fully understood that that was so, because the letters of the engineers repeatedly told Mr. Taylor that he had no right at all. And this appears more strongly from what passed when Mr. Taylor memorialised the Government of Bengal with regard to the matter. He enumerated all these particular things among others as causing special inconvenience, and he asked that his case might be specially dealt with. The answer to that was one which embodied [**432**] a prefectly correct view of the law. Colonel Trevor, in his letter, discussed the points which Mr. Taylor had raised, and gave his reasons for thinking that the injury was not so great as it seemed to Mr. Taylor. At the close of his letter, paragraph 9, the legal position is defined clearly and correctly. It says: "After full consideration of all that you have urged, and of what is stated in the engineer's report, His Honour has come to the conclusion that there is no ground for his interference with the ordinary course of law. Section 24 of the Land Acquisition Act provides for compensation being paid for all damage to property of the kind you complain of." After that, no doubt, the engineers appear to have been desirous of mitigating these evils as far as they could; and Mr. Taylor seems to have been willing to accept if he could any effective substitute for those rights. Accordingly it was at one time proposed that there should be a culvert under the railway to carry the water into the upper factory. It was also proposed that there should be a passage under the railway for the escape of foul water. It was at one time proposed (and this was partially carried out) that there should be a subway for the private road. But the engineers, presumably on engineering grounds, thought that these arrangements could not be safely continued or carried out, and accordingly they closed the culverts and they closed the subway. The result is that not only is there no legal right to any of these things, but as a matter of fact there is no longer a water-channel, and as a matter of fact there is no longer any means of carrying off the foul water in the way in which it was formerly carried. As to the road there is no way on the level of the old road. We do not know what roadway has been made; but we know that at the time when Mr. Baxter, the engineer, gave his evidence, he intended that there should be a roadway or passage over the railway. If that roadway continues Mr. Taylor has no right to it; all that he can do is to use it, so far as the railway authorities find it convenient to allow him to do so, consistently with the proper working of the railway. That is how the matter stands as to the roadway. Now let us see what Mr. Taylor has got with regard to the carrying off of the foul water. He has not got anything as of right. All that appears on the evidence is that on one [**433**] occasion, when Mr. Taylor found himself in a position of extreme difficulty from the accumulation of foul water in the lower factory, the engineer cut a channel by which he was allowed to drain off that water into an open pit situated somewhere near the line. So far as the evidence goes this was done on one occasion; Mr. Taylor certainly cannot claim it as of right, and there is nothing on the evidence to enable us to say whether, as a matter of fact, he has been or is allowed to continue this practice of drainage.

Now all we have to see with regard to these matters is on what principle compensation for damages ought to be assessed. Mr. Taylor

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asserted that the practical result would be that his factory was no longer capable of being profitably worked; and one of the assessors was clearly of that opinion. With regard to one of these matters, namely, the means of escape for foul water, the Judge was of opinion that, unless there was a right to means of draining off the foul water, it would prove fatal to the working of the factory. The evidence shows that that would be so; and inasmuch as we hold that Mr. Taylor has not now any such right, we think this circumstance practically fatal to the successful working of the factory hereafter. The objection as to the loss of roadway is nearly as fatal, because it is clear on the evidence that during the busy season there was a great deal of traffic on this road. It has been shown that about 300 carts have to pass from the lower factory to the upper factory in the day. It must make a great difference in the working of the factory if, instead of having his own road on the level by which to send his carts when he pleases, the proprietor can only take them over a railway, and only when the railway authorities find it consistent with their duty to allow him to do so. And applying one's common sense to the matter it is clear that it must greatly diminish the value of the factory. The loss of the water-channel for filling the tank appears to us of comparatively minor importance, because from Mr. Reily's evidence it appears that the upper factory cannot be worked by itself.

The result appears to us to be that the lower factory cannot, after the railway has been made, be profitably worked; [**434**] and Mr. Reily's evidence makes it clear that the upper factory without the lower factory cannot be worked. All these considerations taken together seem to us to show what amount of mischief has been done to the factory, and that this factory, which was formerly a factory capable of being worked at a profit, has now become incapable of being so worked.

And the matter becomes more serious when we look at another great danger to which the lower factory has been exposed by the railway embankment. It stands very close to the river Kosi. We have it in evidence that, at the period when the river is fullest, the water of the Ganges dams back the water of the Kosi, and either leaves it stagnant or actually causes it to flow back. The result of course is that there was always a liability to damages to the factory buildings, and we only require to look at the map to see that this liability has been greatly increased by the railway embankment. It has been carried along behind this factory and partly over it, so that the flood water from the overflow of the river which used to flow off the factory on the lower land behind cannot do so now. The result of thus damming up the flood water must be to increase the depth and the duration of every flood on the factory as is evident from looking at the physical character of the place. But further we have specific evidence of what has happened. The evidence shows that, during the period when the factory was under Mr. Reily, there was a flood in 1871 and another in 1879. After the railway embankment was made there was another flood in 1884. We have it on the evidence of Mr. Baxter that the flood of 1879 was the highest flood ever known, and the flood of 1884 a foot lower. Whereas, if we look at the evidence of what happened at the factory, we find that the flood of 1884 rose among the factory buildings two or three feet at least higher than the flood of 1879. The result is that the lower factory is now far more liable to danger from flood than before.

There is one other trifling matter of compensation which it is necessary to notice. Compensation has been given in respect of the upper fac-

tory for the increase of expenditure in future years upon bamboos by reason of their having to be fetched from a distance instead of from an adjoining bamboo clump. [435] Rs. 500 has been allowed for that. Taking the view we take of the principle on which compensation should be assessed, to allow this sum would be giving compensation twice over.

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The result is that the case must go back to the District Judge to try two issues, first, what was the value of the lands and buildings, excluding of course the lands taken by Government, before the railway was made and when they were capable of being profitably used for factory purposes; and, secondly, what is the value of the same lands and buildings now, taking them as lands and buildings which cannot be profitably used for the purposes of a factory. The District Judge is asked to return his findings within two months from the time when the record reaches his Court.

We think that 15 per cent. should be allowed on the value of the lands plus the crops, including the bamboos.

K. M. C. *Case remanded.*

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14 C. 435.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

SUDHENDU MOHUN ROY AND OTHERS (*Defendants*) v. DURGA DASI AND OTHERS (*Plaintiffs*).* [21st February, 1887.]

Misjoinder—Plea of misjoinder, when sustainable—Suit against several persons claiming under different titles, Effect of—Civil Procedure Code, ss. 31 *and* 53.

A, as auction-purchaser in a revenue sale, brought a suit against a number of persons for possession of some *chur* land. The defendants claimed portions of the land under different titles and pleaded misjoinder. The Court upon the amin's report gave *A* the option to amend the plaint by withdrawing the suit against any particular sets of the defendants. *A* elected to go to trial on the suit as brought:

Held, that under the circumstances it was necessary for the Court to adjudicate on the question of misjoinder.

Held, also, that the plaintiff was not entitled to join in one suit all the persons, on the ground that they obstructed his possession, unless he was able to show that those persons acted in concert or under some common title.

Held, further, that having regard to the provisions of ss. 31 and 53 of the Civil Procedure Code, the proper order of the Court should have been to reject the plaint, and not dismiss the suit on the ground of misjoinder.

[R., 127 P.R. 1892; 16 A. 279 (282)=14 A.W.N. 82; 13 C.P.L.R. 9 (14); 6 C.W.N. 585 (588); 1 P.R. 1905=83 P.L.R. 1905; 18 Ind. Cas. 852 (853); 24 M.L.J. 664 (675).]

[436] THIS was a suit for the possession of a tract of *chur* land appertaining to certain *taluks* which the plaintiffs had purchased at a revenue sale. A large number of persons was joined as defendants, who set up various titles and objected to the suit on the ground, among others, of multifariousness. The Court deputed the Amin for the purpose of a local investigation; and from the report of that officer it appeared what portion of the land was in possession of which set of defendants. The Subordinate Judge being satisfied that the defendants had made a *bona fide*

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*Appeals from Orders Nos. 326 and 327 of 1886, against the orders of W. H. Page Esq., Judge of Dacca, dated the 1st of June 1886, reversing the orders of Baboo Moti Lall Sircar, Subordinate Judge of Dacca, dated the 16th of April, 1885.

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defence in setting up separate titles with respect to separate plots asked the plaintiffs to choose against which set of defendants and which land they would proceed; but the plaintiffs insisted upon proceeding with the suit as framed. The Subordinate Judge found that the defendants had not, as alleged in the plaint, combined and made a common cause in preventing the plaintiffs from taking possession, and upon the authorities of *Baboo Motee Lal* v. *Ranee* (1), *Tara Prosunno Sircar* v. *Koomaree Debee* (2) *Haranund Mozoomdar* v. *Prosunno Chunder Biswas* (3), dismissed the suit holding that, inasmuch as there were groups of defendants who showed different titles and would have to give different evidence, they could not all be joined in one suit. On appeal the District Judge, differing from the Court of first instance, remanded the case for trial on the merits—*Sheikh Omar Ali* v. *Sheikh Weylayet Ali* (4); *Janokinath Mookerjee* v. *Ramrunjun Chuckerbutty* (5); *Haranund Mozoomdar* v. *Prosunno Chunder Biswas* (3). An appeal was preferred from this decision (in which was included another suit between the same parties in a similar matter) to the High Court. The two cases were heard together.

Mr. *Bell* and Baboo *Aukhil Chunder Sen*, for the appellants.

Baboo *Srinath Das* and Baboo *Kalichurn Banerjee*, for the respondents.

Mr. *Bell* discussed the following cases: *Sheikh Omar Ali* v. *Sheikh Weylayet Ali* (4); *Haranund Mozoomdar* v. *Prosunno* [437] *Chunder Biswas* (3); *Raja Ram Tewary* v. *Luchmun Prosad* (6); *Baboo Motee Lal* v. *Ranee* (1); *Imrit Nath Jha* v. *Roy Dhunpat Bahadur* (7); *Messrs. Jardine, Skinner & Co.* v. *Ranee Shama Soonduree Debia* (9); *The Darley Main Colliery Company* v. *Mitchell* (9); *Munshi Moniruddin Ahmed* v. *Babu Ram Chand* (10).

The following was the judgment of the Court (Prinsep and Beverley, JJ.):—

JUDGMENT.

The plaintiffs in these two suits are purchasers at a sale held for arrears of Government revenue, and they sue for possession of a tract of *chur* land which they say belongs to their estate and froms mouzah Kusundia. They also state that this land was measured and depicted in the Government Revenue Survey as portion of that estate; that afterwards it diluviated and has now re-formed on the same site. The plaintiffs further state that, on attempting to take possession of this land, they have been resisted by the defendants, and they accordingly bring this suit against a large number of persons, numbering 67, who, they say, have acted in concert and collusively. An objection was taken in the written statement of the defendants that the lands were obscurely described in the plaint, that the suit has been wrongly brought against several persons who claim to hold portions of this land under different titles, and the defendants also disputed the correctness of the survey maps on which the plaintiffs relied.

In the first Court, the only issue tried was that of multifariousness, and in order to ascertain the exact position of the parties, an Amin was directed to ascertain and show on a map the lands claimed by the plaintiffs and those portions which were claimed by the different

(1) 8 W. R. 64. (2) 23 W.R. 389. (3) 9 C. 763. (4) 4 C.L.R. 455.
(5) 4 C. 949. (6) B.L.R. Sup. Vol. 731=8 W.R. 15. (7) 9 B.L.R. 241.
(8) 13 W.R. 196. (9) 11 Ap. Ca. 127. (10) 2 B.L.R. 341.

sets of defendants separately from one another. The Subordinate Judge before trying the case gave the plaintiffs an opportunity of amending their plaint by withdrawing the suit as against any particular sets of defendants. But the plaintiffs persisted in the trial of the suit as it was brought, and preferred to abide by the consequences. [438] The Subordinate Judge first of all found on the evidence that the defendants did not combine and make common cause, in preventing the plaintiffs from taking possession. He also found that when the plaintiffs went to take possession and asked for *kabuliyats* from the tenants they were told that the tenants held the lands under different sets of defendants, that is to say, that they had no community of interest. He accordingly held that the suits were bad for multifariousness and dismissed them. In appeal, the District Judge considered that no inconvenience would be caused to defendants by the suits being tried in the form in which they were brought. He further remarked that the plaintiffs "had no means of ascertaining the quantity and boundaries of the land held by each separate defendant which they would have been required to specify if they brought separate suits." The District Judge accordingly remanded the cases for trial on the merits.

It is exceedingly undesirable that any suit should fail on account of any technical objection such as is now before us. But at the same time, when such an objection is raised, as in the present suits at the first hearing and at the earliest opportunity, and when serious inconvenience and expense is likely to be caused to defendants by suits such as have been found by the first Court to have been brought, it is impossible for the Courts not to adjudicate upon the objection and to relieve the defendants from the inconvenience and expense to which they must be subjected. No apportionment of costs in the decree which may be passed, if such a suit be tried out, can put the defendants in the position which they were entitled to hold in a suit properly brought. They are therefore entitled to require the Courts to relieve them from the certain inconvenience and expense to which the irregularity, if found to exist, must subject them. The plaintiffs' (respondents') pleader has attempted to support the manner in which the suits have been brought. He contends that the only issue for trial between the parties was the correctness of the survey proceedings under which this land was marked off as forming a portion of the estate purchased by the plaintiffs. We think that this is not a correct representation of the main issues in the suit, and that on the face of the plaint [439] many other issues must necessarily arise. It is clear from the findings before us that all the defendants had no community of interest in the present suit. It does not appear when they entered upon the lands claimed by the plaintiffs, but it is complained that, when the plaintiffs sought to enter upon the lands, they were opposed by the defendants, who were already in occupation of them. The fact that the plaintiffs' title was acquired by auction sale, and that they were unable to obtain possession of the lands which they maintain they purchased, does not give them the right to join in one suit all the persons who obstruct their possession, unless they can show that those persons acted in concert or under some common title. The first Court distinctly finds against the plaintiffs on the evidence on this point. The second Court did not consider it necessary to determine it because, in the opinion of the District Judge, the plaintiffs' case in any view was properly framed. After considering the authorities upon which the District Judge relies, and numerous other cases which have been cited by the learned

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counsel for the appellants, none of which are opposed to the contrary view, we cannot concur in the opinion arrived at by the District Judge. A separate suit should have been brought against each separate set of defendants who held parcels of land against the title set up by the plaintiffs by reason of an adverse title. The plaintiffs-respondents' pleader asks us to remand the case in order that his clients may have a finding from the lower Appellate Court whether the suits were rightly brought against the defendants on the ground that they acted in concert and in collusion in obstructing their possession. The lower Appellate Court has expressed no opinion on this point; but after hearing the evidence on the record read by the learned counsel for the appellants, we think that there is no evidence in support of this allegation. It is, therefore, altogether unnecessary to remand the case for this purpose, or to put the parties to the expense of further proceedings, which can have only one result. We may observe that, with regard to ss. 31 and 53 of the Civil Procedure Code, we think that the proper order on the findings of the first Court would have been not to dismiss the suits but to order that the plaints be rejected as being bad in form, such as [**440**] would not entitle the plaintiffs to claim the suits to be tried. The result is that the orders of the lower Courts must be set aside. The plaints will be rejected and the plaintiffs will pay the costs throughout.

K. M. C. *Remand order set aside.*

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

Bholanath Bandyopadhya (*Plaintiff*) *v.* Umachurn Bandyopadhya (*Defendant*) and Umachurn Bandyopadhya (*Defendant*) *v.* Bholanath Bandyopadhya (*Plaintiff*).*

[10th March, 1886.]

Sale for arrears of revenue—Act XI of 1859, *ss.* 37, 52—*Sunderbund Estate—District of which portion only is permanently settled—District, Meaning of—Beng. Regs. IX of* 1816 *and III of* 1828—*Estate—Beng. Act VII of* 1868.

The plaintiff was the auction-purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of an estate in the Sunderbunds on which the defendant was the holder of a *mokurari maurasi jungleburi* tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, and therefore within that Collectorate with regard to the provisions of Beng. Act VII of 1868, s. 10. The district of the 24-Pergunnahs is a permanently-settled district, but the portion of it forming the Sunderbunds was declared by Reg. III of 1828, s. 13, not to be included in the permanent settlement. The Sunderbunds tract was moreover under Reg. IX of 1816 formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled: *Held* that, whether the term "district" was used with reference to the jurisdiction of the Civil Courts or the Revenue Collector,

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*Appeals from Appellate Decrees Nos. 826 and 992 of 1885, against the decrees of J. G. Charles, Esq., Judge of 24 Pergunnahs, dated the 28th of January and 17th of February, 1885, affirming the decrees of Baboo Bulloram Mullick, Subordinate Judge of that District, dated the 10th of September 1883.

the plaintiff was the purchaser of an estate in a "permanently-settled" district within the meaning of s. 37 of Act XI of 1859, and not in a district "not permanently-settled" within s. 52 of that Act; and he was [441] therefore entitled to eject the defendant. The position of the estate within the district of the 24-Pergunnahs was not affected by the appointment of the Commissioner of the Sunderbunds as an officer specially invested with the powers of the Collector within a certain portion of that district. *Held* also that the defendants' tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859.

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Held, further, that though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Beng. Act VII of 1868.

THE plaintiff as the purchaser at a sale for arrears of revenue held under Act XI of 1859 by the Collector of the 24-Pergunnahs on 20th June, 1881, of an estate in the Sunderbunds recorded in the Collectorate as No. 2368, brought this suit after serving a notice to quit to eject the defendant, a tenure-holder on the estate, and to obtain possession of the land held by him or to have his tenure annulled. The plaintiff claimed the rights of a purchaser under s. 37 of Act XI of 1859 to eject the defendant, or in the alternative, under s. 52, to annul his tenure. The defendant denied the plaintiff's right either to eject him and obtain possession or to annul his tenure, claiming to be protected under s. 52 of Act XI of 1859 by reason of his tenure being a "plantation" within the meaning of that section.

The Subordinate Judge held that the plaintiff was not entitled to the rights of a purchaser under s. 37, and could not therefore eject the defendant, but that the defendant's tenure was not protected under s. 52: he made a decree therefore for annulment of the defendant's tenure.

The defendant appealed, and the plaintiff filed cross objections to the effect that he was entitled, whether the case fell under s. 37 or s. 52 of Act XI of 1859, to eject the defendant.

On appeal as to these points the Judge gave the following judgment:—

It seems to be admitted that the plaintiff purchased Sunderbunds estate No. 2368 at an auction sale held by the Collector of the 24-Pergunnahs on the 20th of June, 1881, under Act XI of 1859.

The rights of auction-purchasers at such sales in the lower provinces of Bengal are regulated by ss. 37 and 52 of that Act, and one of the chief grounds for contention in the present suit is which of these sections is applicable to the case.

[442] Section 37, Act XI of 1859, explains the rights of purchasers of entire estates in the "permanently-settled" districts of Bengal, Behar, and Orissa, while s. 52 of that Act provides for purchasers of estates in a district "not permanently settled." The distinction drawn by the Act itself is thus most clearly defined between *permanently-settled* and *non-permanently-settled* districts. The Subordinate Judge, observing that the word "district" is nowhere defined in the Act, has held, with reference to the marginal references to these two sections, that the word "district" is equivalent to the word "estate." In my opinion this finding of the lower Court is quite indefensible, not only with regard to the common acceptation of the word "district," but especially with regard to the definition of the word "estate," in Beng. Act VIII of 1868, as that definition is declared to be also applicable to Act XI of 1859. The use of the word "estate" in the two sections under review may be more intelligible than the use of the word "district," and might even put an end to all difficulties; but it is contrary to all the canons of construction that the

1886 March 10. obvious meaning of words contained in the body of a Statute should be entirely altered in order to bring the context into harmony with a mere marginal reference.

Appellate Civil. The question then arises, what is the correct definition of the word "district" in Act XI of 1859. From a comparison of the Codes of Civil and Criminal Procedure, Beng. Act IX of 1880, and other Acts passed by the Indian Legislatures, it appears to be clear that "district" for civil, criminal and revenue purposes respectively are equivalent to the

14 C. 440. jurisdictions of the Chief Local Civil, Criminal and Revenue authorities.

Under ordinary circumstances, in regulation districts the Collector, and in non-regulation districts the Commissioner, is the local administrative head in the revenue matters, so that generally speaking the local jurisdiction of a Collector in the regulation districts of Bengal is a district for revenue purposes. This definition of the word "district" is in accordance with the definition of the word "jurisdiction" in Beng. Act VII of 1868, s. 1, which is also applicable to Act XI of 1859. Under ordinary circumstances the whole jurisdiction of a Collector in Lower Bengal is subject to permanent settlement, but the four districts of the 24-Pergunnahs, Nuddea, Jessore, and Backergunge, include portions of a jungle tract denominated the Sunderbunds, which tract is declared by s. 13, Reg. III of 1828, not to be included in any way in the arrangements of the permanent settlement. The district of the 24-Pergunnahs, as above defined, is therefore what may be called a composite district, consisting partly of a permanently-settled tract of country and partly of a temporarily settled tract. Moreover, this Sunderbunds tract was under Reg. IX of 1816 separated from the four revenue districts, within which it is still included for civil, criminal and fiscal purposes, and formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and is independent of the Collectors of the parent districts.

[**443**] Under these peculiar circumstances, and in the absence of any definition of a "permanently-settled district," I hold that these words are applicable to that portion of the jurisdiction of the Collector of 24-Pergunnahs, where the permanent settlement has been introduced, while the words "district not permanently settled" is applicable to that portion of the commonly called district of the 24-Pergunnahs which falls within the jurisdiction of the Commissioner of the Sunderbunds.

In accordance with this finding, I hold that s. 52, and not s. 37, Act XI of 1859, is applicable to the tenure in suit, which is admittedly contained within an estate situated in the Sunderbunds.

The second contention of the plaintiff's pleader is that the defendant is liable to ejectment even under s. 52 of the Revenue Sale Act. With regard to this contention I concur with the Subordinate Judge in the opinion that, while s. 52, Act XI of 1859, entitles auction-purchasers of estates in a district not permanently settled to avoid and annul all tenures which may have originated with the defaulter or his predecessors, it does not enable such purchasers forthwith to eject under tenants, and this seems to be an important distinction between ss. 37 and 52 of the Revenue Sale Act.

The second contention raised in connection with the defendant's appeal is also, in my opinion, quite untenable. The defendant's pleader urges that the word "plantation" includes the plantation of paddy, which is the chief crop on the defendant's tenure of 1,000 bighas; but it

seems to me to be quite clear, not only with reference to the ordinary signification of the word, but from the context of ss. 37 and 52, Act XI of 1859, that the word "plantation" used in these sections applies only to the planting of timber trees and not to the planting of paddy or other crops of a temporary nature.

The appeal was consequently dismissed and both parties appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Grish Chunder Chowdhry* and Baboo *Baikant Nath Doss* for the appellant in the plaintiff's appeal (No. 826) and for the respondent in the defendant's appeal (No. 992).

Baboo *Srinath Doss* and Baboo *Guru Das Banerji*, for the respondent in No. 826 and for the appellant in No. 992.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

JUDGMENT.

The plaintiff as an auction-purchaser at a sale for arrears of Government revenue of what is known as a Sunderbunds estate sues to eject defendant as holding without any valid title.

Defendant states that he obtained a *mourasi mokurari jungleburi* lease from plaintiff's predecessor, which plaintiff cannot avoid.

[**444**] The first objection raised is that, inasmuch as there has been no permanent settlement of the lands sold to plaintiff, it cannot be regarded as an estate. The definition of the word "estate" is given in Beng. Act VII of 1868, and that Act declares that this shall be applied to the Revenue Sale Law of 1859. The property purchased by plaintiff clearly falls within that definition.

The next objection raised by defendant is that the plaintiff is a purchaser within the terms of s. 52, Act XI of 1859, and that he (the defendant) is accordingly protected because he holds under a lease "of lands whereon plantations have been made." We have no doubt that no plantations have, in the proper interpretation of that word, been made by defendant, for it is admitted that the land was obtained for the cultivation of paddy after clearing away the jungle. We are unable to hold that such cultivation can be regarded as making a plantation.

The main point for decision in this case is whether the plaintiff is a purchaser within the terms of s. 37 or of s. 52 of the Revenue Sale Law, that is to say, whether he is the purchaser of an "estate in the permanently-settled districts of Bengal, Behar and Orissa," or of an "estate in a district not permanently-settled." If the plaintiff is a purchaser of the former description, he might be entitled to eject the defendant; whereas in the other contingency he would be entitled only to a decree annulling the defendant's tenure, and to demand rent at a higher rate under certain specified conditions.

There is no special definition of the term "district" applicable to the Revenue Sale Law. The District Judge has held that "the local jurisdiction of a Collector in the regulation districts of Bengal is a district for revenue purposes;" but although the land in suit falls within the district of the 24-Pergunnahs, a permanently-settled district "for civil, criminal, and fiscal purposes," the District Judge holds that the jurisdiction of the Collector, and therefore the district itself, "for revenue purposes," does not include the Sunderbunds and the lands in suit, because it was under Reg. IX of 1816 "formed into a separate jurisdiction for

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settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue and is independent of the Collector." He [445] consequently holds that the plaintiff is a purchaser of an estate in a district not permanently settled, that is, under s. 52, because it falls within the jurisdiction of the Commissioner of the Sunderbunds, within which no permanent settlement of the revenue has been made.

It is immaterial for us to determine whether the term "district" is used with reference to the jurisdiction of the Civil Courts or the Revenue Collector, and whether it is merely the English equivalent of the term "zillah" used in the older Regulations, because, in our opinion, the plaintiff's estate falls within the district of the 24-Pergunnahs with reference to both of these jurisdictions. We observe that the validity of the sale under which plaintiff's title has been acquired has never been questioned, and that this sale was held by the Collector of the 24-Pergunnahs and not by the Commissioner of the Sunderbunds. We accordingly take it that it was within the jurisdiction of the Collector to hold this sale. It is not disputed that the estate is borne on the general register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, so that it is clear that the estate must be deemed to be within that Collectorate in regard to the provisions of s.10, Beng. Act VII of 1868. Under such circumstances the position of the estate within the district of the 24-Pergunnahs seems clear, and we think that this has not been affected by Reg. IX of 1816, and the appointment of an officer, the Commissioner of the Sunderbunds, specially invested with the power of the Collector within a certain portion of that district. The Regulation does not provide that the Sunderbunds tracts should form a separate district, but it declares that it "has appeared advisable" to the Government "to appoint an officer for the performance of certain duties connected with the public resources in the tract of country ordinarily called the Sunderbunds." Consequently, even if the term "district" be interpreted to mean the jurisdiction of the Collector, it would in the present case put the land in suit within the jurisdiction of the Collector of the 24-Pergunnahs; and if the term "district" be regarded as the jurisdiction of the Civil Court—that of the District Judge—there is even less doubt on this point.

It is not disputed that the district of the 24-Pergunnahs is a [446] permanently-settled district, and this has been found by both the lower Courts, and it is also admitted that the estate in suit like all lands within the Sunderbunds is only temporarily settled. But the fact that a portion of a district is not permanently-settled would not affect the general character of the district itself. We think therefore that the plaintiff is within the terms of s. 37 of the purchaser of an entire estate in the permanently-settled district of the 24-Pergunnahs, and that, unless defendant can bring himself under one of the exceptions to that section, he must be ejected. We have already held that he does not come within the fourth exception, as he does not hold a lease of lands whereon plantations have been made. That is the only exception pleaded by the defendant, and as he has failed to establish that ground, plaintiff's suit must be decreed with costs in all the Courts, the orders of the lower Court being set aside.

J. V. W. *Appeal No.* 826 *allowed.*
Appeal No. 992 *dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

DHARMODAS DAS (*One of the Defendants*) *v.* NISTARINI *DASI* (*Plaintiff*).* [15th March, 1887.]

Hindu law—Gift—Delivery of Possession—Transfer of Property Act, s. 123—Immoveable and moveable Property.

Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by s. 123 of the Transfer of Property Act. The first para. of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary.

Semble.—The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer.

[**Diss.,** 3 C.P.L.R. 37 (38); 5 C.P.L.R. 63 (64); **F.,** 34 C. 853=6 C.L.J. 233 (236)=11 C.W.N. 956; 23 B. 234 (236); 25 A. 358 (366)=23 A.W.N. 70; **Appr.,** 20 C. 464 (468); **R.,** 12 A. 523 (527); 17 B. 486 (493); 27 C. 242 (249)=4 C.W.N. 405; 33 C. 1119=3 C.L.J. 616=10 C.W.N. 765 (769); 27 B. 31=4 Bom. L.R. 754; 5 O.C. 89 (90).]

THIS was a suit for possession of certain land claimed under a deed of gift executed in favour of the plaintiff by her father on the 26th Pous 1289 (9th January, 1883). The father died shortly afterwards, *viz.*, on the 4th Magh 1289 (20th January, [**447**] 1883). The deed was proved to have been executed, and there was no question that the gift was accepted, but it was not shown that possession of the property was delivered to the plaintiff during the lifetime of her father.

The suit was decreed by the Munsif. On appeal it was contended (among other grounds) that, as possession did not accompany the deed of gift, it was invalid under the Hindu law. As to this the Judge said. "With regard to this ground of appeal the appellant's pleader relies on the case of *Dugai Dabee* v. *Mothura Nath Chattopadhya* (1). This authority, however, seems to conflict with the case of *Moheshur Buksh Singh* v. *Gunoon Koonwur* (2), and in any case seems to me to be set aside by s. 123 of the Transfer of Property Act, which is applicable to Hindus. I accordingly hold that delivery of possession is no longer, if it ever was, necessary to make valid a gift of immoveable property among Hindus."

The defendant appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Anund Gopal Palit*, for the appellant.

Baboo *Boiddo Nath Dutt*, for the respondent.

The arguments sufficiently appear in the judgment of the Court (MITTER and BEVERLEY, JJ.) which, after shortly stating the facts as above, proceeded as follows:—

JUDGMENT.

Upon this state of things it is contended before us that delivery of possession not having been effected at all, the gift, according to Hindu law, is not valid. The District Judge, who has held that the gift is valid,

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* Appeal from Appellate Decree No. 1575 of 1886, against the decree of J.G. Charles, Esq., Judge of 24 Pergannahs, dated the 30th April 1886, affirming the decree of Baboo Atul Chunder Ghose, Munsif of Alipore, dated the 15th January 1885.

(1) 9 C. 854. (2) 6 W.R. 245.

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has relied upon s. 123 of the Transfer of Property Act in support of his conclusion.

It is contended before us that s. 123 does not at all abrogate that part of the Hindu law which requires that possession must be delivered in order to complete a gift, and in support of this contention s. 129 of the Transfer of Property Act is referred to. That section says: "Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Mahomedan law, or, save as provided by s. 123, any rule of Hindu or Buddhist law." Now [488] this section no doubt leaves intact the Hindu law except so far as it is touched by the provisions of s. 123 referred to above. We think that the District Judge is right in the construction which he has put upon s. 123 of the Transfer of Property Act. We may, however, state here that it is by no means clear under the Hindu law that, to make a gift of *immoveable* property valid and complete, delivery of possession is essentially necessary. What is laid down in the Hindu law is this, that to constitute a valid gift there must be acceptance by the donee, and one of the modes of acceptance in gifts of immoveable property is delivery of possession on the part of the donor and receipt of possession by the donee. Without going into the question of Hindu law, and assuming that law to be in favour of the appellant, *viz.*, that delivery of possession is essential under the Hindu law to complete a gift, we think that that law has been abrogated by s. 123 of the Transfer of Property Act. That section says: "For the purpose of making a gift of immoveable property the transfer must be effected by a registered instrument signed on behalf of the donor and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery."

Now in the case of moveable property the Hindu law was clear. According to Hindu law no gift of moveable property is valid unless the property given away is actually delivered by the donor to the donee. Section 123 is clear in this respect, that it has done away with the provision of the Hindu law requiring delivery of possession as regards moveable property. The second para. of s. 123 says that the transfer by gift of moveable property may be effected either by a registered instrument signed by the donor or by delivery. It cannot be reasonably contended that this para. of s. 123 still requires delivery of possession, although the gift may have been effected by the execution of a registered instrument. If that were so, the law would stand thus: "For the purpose of making a gift of moveable property the transfer may be effected, either by a registered document signed by the donor and by delivery of possession, or by delivery of possession." It would be unreasonable to hold that that is the law as regards [449] moveable property, for, if by delivery of possession alone a gift of moveable property becomes effective, the Legislature would not direct that it becomes effective by delivery of possession and something more. Therefore, as regards moveable property, it is clear that the gift of such property can be effected simply by a registered instrument. That being the meaning of the second para. of s. 123 of the Transfer of Property Act, it seems to us that the word "must," in the first para. of the section, means that the gift of immoveable property can be effected by the execution of a registered instrument only. The word "must" is used in the first para and the word "may" in the second para. "May" is used in the second para. because there are two effective modes of effecting a gift of moveable property, and in the first para. "must" is

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used because there is only one mode of effecting a gift of immoveable property. We, therefore, think that there is an express provision in s. 123 that a gift of immoveable property can be effected by the execution of a registered instrument, and that is the only mode of effecting it.

The view taken by the District Judge appears to us therefore to be correct, and this appeal must be dismissed with costs.

J. V. W. *Appeal dismissed.*

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14 C. 449.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

BENI MADHAB MITTER (*Plaintiff*) v. KHATIR MONDUL (*Defendant*).* [7th March, 1887.]

Registration Act, s. 60—Certificate of Registration—Document registered by officer having no jurisdiction—Admissibility of Evidence.

The Court can go behind a certificate of Registration, and where it finds that a document was registered by an officer who had no jurisdiction to register it, will refuse to receive it in evidence on the ground that it is not duly registered. *Ram Coomar Sen* v. *Khoda Newaz* (1) distinguished.

[**Rel. upon,** 29 C. 654 (662)=6 C.W.N. 856; **Appl.,** 1 N.L.R. 112. (114); **R.,** 16 C.P.L.R. 141 (143); 14 M.L.T. 237 (246)=1913 M.W.N. 525 (534)=20 Ind. Cas. 385 (392); **D.,** 6 C.W.N. 329 (330).]

THE following was the judgment appealed from, in which the facts are stated sufficiently for this report.

"This was a suit for recovery of rents based on a *kabuliat*. The defendant denied the execution of the kabuliat, and also stated that the kabuliat, not being registered in the proper office, was not admissible in evidence.

[450] "The lower Court dismissed the suit, holding that the document was not registered in the proper office. The plaintiff appeals.

"The only point to be considered in this appeal is, whether the registration of the document was legal so as to make it admissible in evidence. The document was registered in the Sub-Registrar's office at Chuadanga, and it would be admissible in evidence if the Sub-Registrar was competent to register it. It is an admitted fact that the lands covered by the *kabuliat* are situate within the limits of Thana Moheshpur which is beyond the limits of the sub-district of Chuadanga, and consequently the Sub-Registrar of Chuadanga was not competent to register the document. The document not being registered in the proper office is not admissible in evidence. The plaintiff attempted to prove that some of the plots, though appertaining to the hamlet called Balihuda in Thana Moheshpur were, in fact, situate within the local limits of Thana Jibunnuggur in Chuadanga, in order to give jurisdiction to the Chuadanga Sub-Registrar, but he failed to prove that fact. The document was not legally registered, and the Munsif was right in his decision. The appeal will be dismissed with costs."

The defendant appealed.

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* Appeals from Appellate Decrees Nos. 1365 and 1366 of 1886, against the decrees of Baboo Parbati Kumar Mitter, Subordinate Judge of Jessore, dated the 2nd April, 1886, affirming the decrees of Baboo Gopal Chunder Benerji, Munsif of Bongram, dated the 16th December 1885,

(1) 7 C.L.R. 223.

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Baboo *Bhobani Churn Dutt*, for the appellant contended that no defect in the registration of a registered document could affect its admissibility in evidence, the fact that it was registered in an office which had no jurisdiction over the land affected by that document does not nullify the effect of the registration, so as to make it inadmissible in evidence, and the lower Courts should consequently have accepted the certificate of the Sub-Registrar of Chuadanga as legally sufficient to prove that the *kabuliat* was duly registered in accordance with law. The cases of *Sheosunker Sahoy* v. *Hurdey Narain Sahu* (1), *Ram Coomar Sen* v. *Khoda Newaz* (2), and *Mukhun Lall Pandey* v. *Koondun Lall* (3) were referred to.

Baboo *Mohit Chunder Bose*, for the respondent.

The judgment of the Court (MITTER and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We think that the judgments of the lower Courts in this case are correct. Under s. 60 the certificate is adducible in evidence to prove that the document was duly registered by the particular officer whose signature it bears, but it has been shown that that officer had no jurisdiction to register it. That being so the document was not duly registered within the provisions of [**451**] the Registration Act. A decision was referred to in the course of the argument, *Ram Coomar Sen* v. *Khoda Newaz* (2), but we find that that decision is entirely based upon a Privy Council judgment *Mukhun Lall Pandey* v. *Koondun Lall* (3), and the Privy Council decision does not support the contention put forward in this case. There the document which was in question was registered by an officer who had jurisdiction to register it, but in this case the document has been registered by an officer who had no jurisdidtion to register it. That being so, the observations of their Lordships of the Judicial Committee upon which the decision proceeds are not applicable to this case. We dismiss these appeals with costs.

J. V. W. *Appeals dismissed.*

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14 C. 451.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

BAIJ NATH PERSHAD NARAIN SINGH AND ANOTHER (*Defendants*), *Appellants v.* MOHESWARI PERSHAD NARAIN SINGH AND ANOTHER (*Plaintiffs*) *Respondents.** [8th March, 1887.]

Mortgage—Foreclosure—Regulation XVII of 1806, s. 8—Provision as to the year of grace—Extension of time by mutual agreement—Transfer of Property Act, s. 2, cl. (c).

The year of grace allowed by s. 8, Regulation XVII of 1806, is a matter of procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already had under the section, and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely.

The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (*c*), s. 2 of the Transfer of Property Act.

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* Appeal from Original Decree No. 491 of 1885, against the decree of Moulvie Mahomed Nurul Hossein, Khan Bahadur, Subordinate Judge of Sarun, dated the 29th of June 1885.

(1) 5 C. 25=5 C.L.R. 195. (2) 7 C.L.R. 223. (3) 15 B.L.R. 228.

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14 C. 451.

Proceedings under s. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession, in pursuance thereof after the passing of the Transfer of Property Act. *Held,* that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force.

[**F.**, 20 B. 759 (762); **R.**, 11 M. 403 (405); **D.**, 14 C. 599 (603); 15 C. 357 (361).]

Ranjit Narain Singh by a deed of *baibilwafa*, or conditional sale, dated the 31st January 1879, conveyed his shares in certain [**452**] mouzahs to Moheshwari Pershad Narain Singh and another for a consideration of Rs. 5,000. The debt was stipulated to be repaid in the month of August following. After the expiration of the term the mortgagees took proceedings under s. 8, Regulation XVII of 1806, and notice of foreclosure was issued on the 20th January 1880. As the year of grace was drawing to a close, Ranjit Narain obtained an extension of time through the Court with the consent of the mortgagees. Ranjit Narain being still unable to pay the debt, the mortgagees, by a petition of the 8th September, 1881, made with the consent and under the signature of Ranjit Narain, granted the last extension of time till the 15th Aughran 1289 F.S. (21st November 1881). On the expiration of this period the debt still remained unpaid, but further steps appear to have been taken until the 19th July 1884, when Moheswari Narain Pershad and another brought a suit for possession, and " to enforce the forecloure " against the heirs of Ranjit Narain who were then in possession of the mortgaged property. The Court of first instance found the facts in favour of the plaintiffs and gave them a decree.

On appeal to the High Court it was contended (1) that the decree of the lower Court should have been according to s. 86 of the Transfer of Property Act; (2) that even if the case came within Regulation XVII of 1806 there had not been sufficient compliance with its provisions.

The *Advocate-General* (with him Mr. *O' Kinealy*, Baboo *Mohesh Chunder Chowdhry*, and Munshi *Mohamed Yusuf*), for the appellants.

Mr. *C. Gregory*, for the respondents.

The Court (Wilson and Beverley, JJ.) delivered the following judgment:—

JUDGMENT.

This was a suit brought upon a mortgage made in the old form by conditional sale. The time for paying the mortgage money expired, and the notice prescribed by s. 8 of Regulation XVII of 1806 was issued and served. The consequence was that the mortgagor's interest in the property became liable to be barred, and the mortgagees' title was in process of becoming absolute if the money was not paid within the year of grace prescribed by [**453**] the Statute. Before the year of grace had expired, the period for payment was enlarged by agreement between the parties, and several further extensions of time took place. Ultimately the final extension expired while the Regulation was in full force, and before the passing of the Transfer of Property Act. This suit was then brought by the mortgage claiming to have his title declared to have accrued to him absolutely by reason of default in payment within the time to which the period of grace had been extended, and asking for a decree such as he would have had if the Regulation had been still in force. The lower Court gave the plaintiff a decree accordingly, and against that decree the present appeal has been brought.

Two objections have been urged before us. First, it has been said that the title which the mortgagee acquires under the Regulation is a

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statutory title, and that in order to perfect that title every thing must be carried out in strict accordance with the Regulation; and, therefore, it is said, because there was an extension of time beyond the statutory year of grace, if the mortgagee intended to rely on such a title as he could acquire under the Regulation, he was bound to begin *de novo* with a new notice under the Regulation. It appears to us that that is not so. The character of the arrangement for the extension of time appears from the petitions printed at pp. 52, 54 and 55 of the Paper Book. These are petitions which show that the extended period had been conceded by the mortgagee; that the extensions were accepted by the mortgagor and they close with words to this effect: "In the event of your petitioner not paying the consideration money with interest and costs" (by such and such a date) "the equity of redemption, in respect to the property sold, shall be barred in favour of the purchasers." In other words they are petitions which show that the extension of time was obtained by the mortgagor on the express terms that the bar to his title in case of non-payment should be as effectual as if the time had not been extended. That is a matter of procedure as to which the parties were at liberty to make such agreement as they thought fit. It appears to us analogous to the case of a man whose property is liable to be sold under an attachment, and who obtains a postponement [454] of the sale on the terms that no fresh sale proclamation shall be necessary, a very common form of agreement and one to which the Courts have often given effect. It appears to us, therefore, that the objection based upon the extension of time is not a sound one. The subject has been considered in some of the decided cases. In *Brijo Mohun Suttyputty* v. *Radha Mohun Dey* (1), a similar question came before Sir Richard Couch, C.J. and Glover, J., and they held that the right of the mortgagee was not affected by his having given time; but, as pointed out by the Advocate-General, that case is not expressly in point because it would seem that in that case, before the extended time was given, the year of grace had expired, which is not the case here. Then there are two cases in which the point has arisen, but in which it was the mortgagor who was compelled to rely upon the extended time. There is one case *Dabee Rawoot* v. *Heeramun Mohatoon* (2) decided by Sir Barnes Peacock, C. J. and Loch, J., in which they held that the period of time having been enlarged by consent, the mortgagor was safe in paying his money into Court within the enlarged time. A similar decision was passed in *Zalem Roy* v. *Deb Shahee* (3) decided by Bayley and Kemp, JJ. These cases tend to show that it is within the power of the parties to bargain as they choose in the way of enlargement of time in cases under the Regulation, and that such extension of time is not fatal to the whole proceeding.

The next question is one of more general importance. It was contended that in this case the suit, having been brought after the passing of the Transfer of Property Act, was governed by that Act, and that the form of the decree to be given in the case ought to be the form of foreclosure decree prescribed by that Act, in ss. 86 and 87. Several cases were referred to in support of that contention. The first of these in point of date is *Ganga Sahai* v. *Kishen Sahai* (4). In that case the mortgage was of the kind governed by Regulation XVII of 1806, and it was executed while that Regulation was in force. Subsequently to the passing of the Transfer of Property Act, a suit of the nature prescribed by that Act was

(1) 20 W. R. 176. (2) 8 W.R. 223. (3) Marsh. 167. (4) 6 A. 262.

brought without any [455] previous proceedings having been taken under the Regulation, and the question before the Full Bench of the Allahabad Court was whether such a suit would lie. The majority of the Judges held that the suit lay; that the proceedings prescribed in the Regulation were matter of procedure, and not within the saving clause of the repealing section in the Transfer of Property Act, not falling within the words, "right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." The next case was one in this Court, *Pergash Koer* v. *Mahabir Pershad Narain Singh* (1). There the mortgage was again a mortgage governed by the Regulation, and executed while the Regulation was in force. Proceedings taken under the Regulation would have resulted, if these proceedings had been good as against all parties, in the acquisition of a complete title by the mortgagee. The suit was then brought after the passing of the Transfer of Property Act. It was found, however, on the trial of the case, that as against the defendant who was sued in the case, the proceedings purporting to be under the Regulation were invalid because he had not been made a party, and, accordingly, the first Court dismissed the suit. The question before the appellate Court was whether in that state of things the plaintiff was not nevertheless entitled to a decree in accordance with the provisions of the Transfer of Property Act. There, as in the Allahabad case, the Judges of this Court were dealing with a case in which no valid and effectual proceedings had taken place as between the parties to the suit under the Regulation; and it was held that the procedure under the Transfer of Property Act ought to be applied, and a decree in accordance with that Act granted, subject to this, that a year of grace was given to redeem instead of the different period contemplated by the Transfer of Property Act. The third case is a decision of a Full Bench of this Court, *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2). There again the mortgage was made under the Regulation. No proceedings had been taken under the Regulation, but after the passing of the Transfer of Property Act a suit was brought. The question which the Full Bench had to consider was, whether such a suit [456] would lie, that is to say, whether in the case of a mortgage, governed at the time of its making by the Regulation, the mortgagee may sue in the manner provided by the Transfer of Property Act; or whether, notwithstanding the passing of the Transfer of Property Act, which repealed the Regulation, the mortgagee was, by virtue of the saving clause, compelled to proceed under the Regulation as if the Transfer of Property Act had not been passed. The Court held that he was not, the matter being one of procedure.

All these cases differ materially from the present for this reason. In the present case, before the Transfer of Property Act was passed, proceedings had been taken under the Regulation. They were valid and effectual proceedings, and they had arrived at a close; that is to say, the period of grace had expired. Now, when that period of grace expired, the Regulation being still in force, what were the rights of the parties? The mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. It did not become his absolutely without a decree, but his right to such a decree immediately accrued. On the other hand the mortgagor, the moment the period of grace expired, ceased to have any right of redemption. These rights and liabilities appear to us

(1) 11 C. 582.

(2) 12 C. 583.

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to differ essentially from the matters, which, in the other cases, were held to be mere matters of procedure. It is impossible to say, in our judgment that anything can be described as a "right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability," if these words do not apply to an actually existing right to an immediate decree declaring the property to be absolutely the property of the mortgagee, and, on the other hand, the entire loss of any right to redeem the property.

We think, therefore, that the second ground of appeal fails as well as the first, and this appeal must be dismissed with costs.

K. M. C. *Appeal dismissed.*

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14 C. 457.

[457] SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

ATUL KRISTO BOSE *v.* LYON & CO. * [17th March, 1887.]

Limitation (Act XV of 1877), s. 13, Construction of—Goods paid for before delivery—Short delivery—Failure of consideration.

Money paid as the price of goods to be delivered hereafter is money received for the use of the seller, and it is only upon failure of consideration that the money so paid becomes money received for the use of the buyer.

When goods which have already been paid for are afterwards found to be short delivered, the failure of consideration takes place on the date of delivery, and limitation in respect of a suit to recover back the sum overpaid will be reckoned from that date.

The words "absent from British India" in s. 13 of the Limitation Act should be construed broadly, and not limited in their application only to such persons as have been present there, or would ordinarily be present, or may be expected to return.

Semble.—A defendant is within s. 13, notwithstanding his having carried on a trade or had a shop or a house of business under an agent in British India. *Harrington* v. *Gonesh Roy* (1) commented upon.

[**F.**, 72 P.R. 1891; **Appr.**, 2 C.W.N. 269=25 C. 496 (**F.B.**); **R.**, 9 C.P.L.R. 72 (74) 20 B. 767 (777).]

J. LYON and A. P. Lyon carried on business under the style of Jeremiah Lyon & Co., at 4, Lombard Court, Gracechurch Street, London. H. J. Joakim was their general agent in Calcutta, that is to say, he would receive orders in the form of indents from constituents in Calcutta, forward them to the Company in London, who would ship the goods, which would eventually come to Joakim's godowns. On the 2nd May, 1882, Atul Kristo Bose gave a certain order to Joakim in writing. Among other things to be sent out by the Company were "*one roll of vulcanised India-rubber sheets* and *core packing.*" The first of these items was to be repeated after a month. The first shipment came under invoice in the *Merkara.* Atul Kristo paid the draft drawn against the goods, but on opening the cases found 2 cwt. of *core packing* had been short shipped Joakim wrote on the 28th November, 1882, and informed the Company of the deficiency; subsequently a second [**458**] shipment came under invoice in the *Teheran.* This invoice purported, among other things, to send a case of vulcanised

* Small Cause Court Reference No. 1 of 1887, made by H. Millett, Esq., Chief Judge of the Court of Small Causes at Calcutta, dated the 28th of January 1887.

(1) 10 C. 440.

India rubber sheets, being the item which was ordered to be shipped a second time. On the 15th November 1882, Atul Kristo paid the draft drawn against this shipment to the amount of Rs. 543-0-7. Of this amount Rs. 539-1-0 was the value of the India-rubber, the balance being for other things sent. On the 22nd November 1882, the case, purporting to contain India-rubber sheets, was opened, and found not to contain India-rubber sheets at all, but the balance of the core packing which ought to have come by the first shipment. As this had already been paid for on the previous draft, it followed that the Rs. 539-1-0, paid as portion of the draft on the 15th November, had been overpaid. Atul Kristo then brought a suit in the Small Cause Court of Calcutta against Jeremiah Lyon & Co., on the 20th November 1885, to recover from them the sum of Rs. 539-1-0 as money had and received by the Company to the use of the said Atul Kristo, and a further amount by way of damages and interest. The defendants, among other things, pleaded limitation. The Chief Judge of the Small Cause Court, in referring the matter for the consideration of the High Court, observed: * * * "The real difficulties in this suit present themselves on the plea of limitation. This plea has taken various forms: Firstly, it is said that the suit being really for money had and received is barred. The money was so received on the 15th November 1882, and having regard to art. 62 of the Indian Limitation Act, the suit is no doubt barred. * * * * Against this it is contended that the date on which the goods were found not to be shipped must be the date on which the cause of action commenced. It would not, however, be proper to ignore the clear words of the Act which specify the period from which limitation begins to run. But it may be remarked that most suits for money had and received arise out of some circumstances collateral to the actual receipts of the money. In reply to the contention of limitation on the part of the defendants, it is urged that s. 13 of the Limitation Act comes into play, and certain arguments have been derived from the fact that reported decisions in England have laid down that time may be excluded if a defendant is "beyond the seas." These words are used in s. 19 of 4 Anne, c. 16. In [459] my opinion it is not necessary to consider the construction of such words, those of s. 13 of the Indian Limitation Act being different. They are, "the time during which the defendant has been absent from British India shall be excluded." Now absence implies some previous presence, and, having regard to the general purport of the Act, some presence after the time that limitation began to run. There has not as yet been any decision in India which definitely deals with the question. It has been found that the defendants have not been in British India since the period of limitation began to run; and that is the state of facts with which we have to deal, it being also worthy of remark that there is nothing to show whether Joakim's position was such that a summons could have been served on him. The Legislature in providing a law of limitation can never have intended that it should have been so framed as to give no limitation in favour of a defendant who had never been in British India, and yet it might be so contended. There is no hardship to the plaintiff here. He might have brought his suit in November, 1882, just as he brought it now in 1885. There is, on the other hand, some reason in saying that if a person in British India leaves the same with a cause of action hanging over his head he does so at his own risk. The position is very different where one contracting party knows well that the other contracting party is out of British India at the time his right to sue accrues. I am of opinion, therefore, that s. 13 of the Limitation Act does not come into

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force in this case. I have not referred to any of the cases cited, because none of them really touch this question, two being cases in which the defendant had been in British India after limitation commenced to run and the other was one in which the defendant had an agent who could be sued in British India. * * * Having regard to the views above expressed I would dismiss the suit as barred by limitation."

The two material questions referred to the High Court were: (a) Does the period of limitation run on the 15th November or on the 22nd November, 1882? (b) Is the suit barred by limitation under s. 13 of the Indian Limitation Act, 1877?

The plaintiff did not appear by counsel.

Mr. *Garth*, for the defendant.

[**460**] The opinion of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

OPINION.

The facts founded by the learned Judge of the Small Cause Court are not, we think, sufficient to enable us to say from what date the period of limitation should be reckoned. What is found is that, on the 15th November 1882, the plaintiff paid the price of a consignment of goods which he had ordered from the defendants, and that on the 22nd November the case, purporting to contain the goods ordered, was opened and certain of the goods found to be missing. And we are asked whether limitation in respect of a suit to recover back the sum overpaid is to be reckoned from the 15th or the 22nd November. We can only say, assuming, as is probably correct, that art. 62 applies to such a case, not necessarily from either. The money paid by the plaintiff was not, at the time he parted with it, received by the defendants for his use but for their own. It was when the consideration failed that, by operation of law, the money became money received to his use, and that, we think, is the date from which in such a case limitation runs. The consideration failed when the short delivery took place; and as the date of delivery is not found the material date is wanting, and we cannot answer the first question.

The second question is one of considerable importance. The facts bearing upon it are thus found:—

"Mr. H. J. Joakim was general agent for the defendants in Calcutta that is to say, he would receive orders in the form of indents from constituents in Calcutta, forward them to the defendants, who would ship the goods, which would eventually come to Mr. Joakim's godowns. The defendants J. Lyon and A. P. Lyon carry on business under the style of Jeremiah Lyon & Co., at 4, Lombard Court, Gracechurch Street, London. Both defendants had at times visited Calcutta and were known to Joakim, but neither had been in Calcutta since the 2nd May 1882, the date the order was given. They did not carry on business here personally, their visits being only temporary with a view to look after their own interests. In consequence of the defendants not being in Calcutta leave was, before suit was instituted, obtained by the plaintiff to sue in this Court." The cause of [**461**] action arose either wholly or in part in Calcutta. The question we are asked is: "Is the suit barred by limitation under s. 13 of the Indian Limitation Act, 1877?"

Section 13 says: "In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." This section occurs in Part III of the Act, which deals with the computation of the period of limitation, and the

language of the section corresponds to its position. It has to do not with the persons for or against whom limitation shall run but with the calculation of the time. In the present case the question is whether, between the accruing of the cause of action and the filing of the suit, the defendants were absent from British India. They were certainly not present in British India, and therefore it would seem they must have been absent, for apparently there can be nothing intermediate between presence and absence. But it has been contended that the word "absence" should be understood as applicable only to such persons as have been present, or would ordinarily be present, or may be expected to return. Thus the learned Judge of the Small Cause Court thinks that "absence implies some previous presence, and having regard to the general purport of the Act some presence after the time that limitation began to run." In argument before us various other restrictions upon the meaning of the word "absence" were suggested; that it should be held applicable only to persons who ordinarily reside in India; or, again, to persons who are temporarily absent and intend to return.

But the section in question is not intended to define the persons for or against whom limitation shall run but to direct the mode of computing time. And if we were to attempt to restrict the meaning of "absent" in such ways as are contended for, there is probably no limit to the number of suggestions that might be made and, as far as we can see, no reason for accepting one suggestion in preference to another. It may be worth noticing that the case, to which alone the learned Judge of the Small Cause Court would limit the operation of the section, is the precise case to which it was once held that it did not apply—*Narronji* [**462**] *Bhimji* v. *Magniram Chandaji* (1); though that case may be considered as overruled; *Beake* v. *Davis* (2); *Hanmantram Sahdhurain Pety* v. *Bowles* (3).

The decisions upon corresponding sections in English Acts strongly support the broader construction. The Statute 21 Jas. I, c. 16, s. 7, dealing with the case of plaintiffs, and 4 and 5 Anne, c. 3, s. 19 (revised Statutes), provided that, if the one or the other was "beyond the seas" when the cause of action accrued, an action might be brought within the limited period after the "return from beyond seas" of the one or the other as the case might be. The word "return" used in those Acts afforded at least as strong ground for some restriction upon the operation of the sections as anything in the Act now before us. But it was never held that that word imported a previous presence and departure. For this it is enough to refer to the decision of the Privy Council in *Ruckmaboye* v. *Lulloboye Mattichund* (4).

That was an appeal from the Supreme Court of Bombay and was decided on demurrer, so that the facts as alleged in pleading must be taken to be correct. The plaint described the plaintiff as "of Malwa," and alleged a conversion of her goods by the defendant in Bombay. The defendant pleaded limitation, relying on the Statute of James. To this there was a replication that, at the time when the cause of action accrued and till within six years before suit, she was residing in Malwa, outside the territories subject to the East India Company, and outside the jurisdiction of the Court. The Privy Council having first held that the Statute of James did apply to a suit in the Supreme Court, and that Malwa was within the meaning of the technical phrase "beyond seas,"

(1) 6 B. 103. (2) 4 A. 530. (3) 8 B. 561. (4) 5 M. I. A. 234.

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14 C. 457.

went on to decide that the replication was good. They thus applied the saving clause to a person resident in a foreign State, who was in foreign terriotory when and for years after the cause of action accrued. Another case was cited during the argument to which we think it right to refer, that of *Harrington* v. *Gonesh Roy* (1). In that case limtiation was pleaded, and in reply the plaintiff relied on s. 13 of the [**463**] Limitation Act, on the ground that the defendant had been in England ever since the cause of action accrued. Tottenham and Norris, JJ., who heard the case, held that s. 13 did not apply, on the ground, if we understand the decision aright, that "it seems, however, that Mr. Harrington (the defendant) is represented in this country by Mr. Crowdy, who, in the first instance, was made a defendant in the case as manager and mukhtear of the Bhagwanpore Factory." That case does not bear directly upon the present, for the learned Judge of the Small Cause Court finds that "there is nothing to show whether Joakim's position was such that a summons could have been served upon him." But the case does bear upon the method of construction to be applied to the section. And we think that, if the question there dealt with should arise again, that decision may have to be reconsidered. The case was not argued for the respondent. Attention does not seem to have been drawn to the fact that the words in the corresponding section of Act IX of 1871 (as in earlier Acts)—"unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure"—have been omitted in the present section; and the judgment of the Privy Council, in the case already cited, does not appear to have been referred to. In that case, to the replication of absence from British India, there was a rejoinder to the effect that, throughout the period in question, the plaintiff had carried on trade in Bombay, having a shop or house of business there under a munim or gumastha. Their Lordships held that rejoinder to be no answer, and it is not easy to see why the reasons given for so holding, at page 260 of the report, should not apply to the case of a defendant under the present Act.

It was pointed out in argument that, according to the construction which we place upon the Act, a man who was in England when a cause of action against him accrued, and has remained there ever since, may be liable after an indefinite time to be sued in a Calcutta Court. And it was contended that this was something absurd, something that the Legislature could not have intended, and that we ought to adopt some construction which would avoid it. The answer given by the Privy Council to a somewhat [**464**] similar objection in the case already cited is sufficient. The words of the section are express, and the case is within them. Moreover there is no more hardship than in the converse case of a man resident in Calcutta, who there incurs a liability to another person resident in Calcutta, who remain in Calcutta long enough for any suit against him to be barred by the law prevailing in Calcutta as well as ordinarily in England, who then goes to England and finds himself liable to be sued there any time within six years. And this is exactly what happened under the Statute of Anne in *Williams* v. *Jones* (2).

We answer the second question in the negative. The remaining questions it is unnecessary to answer.

Attorneys for the defendants: Messrs. *Dignam & Co.*

K. M. C.

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(1) 10 C. 440. (2) 13 East. 439.

14 C. 464=11 Ind. Jur. 414.

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Before Mr. Justice Tottenham and Mr. Justice Ghose.

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Lutchmiput Singh Bahadur, and on his death his son Chutterput Singh Doogur (*Plaintiff*) v. The Land Mortgage Bank of India, Limited (*Defendant.*)* [18th March, 1887.]

Mortgage—Lien—Covenants that mortgagee be entitled to enter—Entry, Right of—Mortgage deed in English form.

B executed a mortgage deed in the English form in favour of the *L* Bank containing amongst other covenants one providing that, upon default, the mortgagees would be entitled to enter into possession of the mortgaged properties. *B* died leaving a widow, a daughter and a sister *S* his heiress. According to Mahomedan law *S* was entitled to a six annas share of the mortgaged properties. On the 9th of May 1872, after the mortgage money became due, the *L* Bank brought a suit, and on the 13th of July, 1872, obtained a decree by consent. The existence or right of *S* to a share in the properties was not known to the Bank, and she was not made a party to that suit. That Bank, in execution of their decree, caused the mortgage properties to be sold, and themselves purchased some of them. The sale proceeds did not satisfy the entire claim. On the 1st of December 1875, *S* sold her share of six annas in the properties to *R*. In a suit by *R* against the purchaster **[465]** of two of the mortgaged properties at the aforesaid sale it was held that the share of *S* in the estate of *B* did not pass to the purchasers, though the Bank purported to have brought the whole sixteen annas in the properties to sale. *R* then brought this suit for the recovery of possession of the six annas share of the properties purchased at the sale by the Bank themselves, and which were now in their possession.

Held that the share of *S* not having been sold the lien imposed upon it by the mortgage deed remained intact and continued in the hands of the Bank.

Held, also, that, under the covenant in the mortgage deed above referred to, the Bank were entitled to remain in possession as mortgagees until the proportion of the debt, which might legitimately be imposed upon the six annas share of the properties in their hands, was paid.

[F., 7 C.W.N. 11 (20): R., 22 A. 307; 11 C.W.N. 1078 (1081)=6 C.L.J. 719.]

The facts out of which this appeal arose were shortly as follows:—

One Moonshi Buzloor Rohim executed a deed of mortgage in the English form in favour of the Land Mortgage Bank of India, on the 27th August, 1870, for the consideration of Rs. 3,10,000. By this deed he conveyed to the Bank 37 properties situate partly within the town of Calcutta and partly outside Calcutta, subject, however, to the usual proviso for redemption. The due date for the repayment of the loan was the 22nd February, 1871; and it was covenanted among other things that, upon default, the Bank would be entitled to sell the properties comprised in the mortgage deed for satisfaction of their claim; and also to enter into possession of the said properties, and to hold and enjoy the same, and receive the rents and profits thereof.

Buzloor Rohim died on the 24th July, 1871, leaving behind him three heirs, *viz.*, Fatamatunnessa Khatoon, his widow, Shurufunnessa, his daughter, and Sadurrunnessa, his sister.

On the 9th May, 1872, the Land Mortgage Bank of India brought a suit against Shurufunnessa, the daughter of Buzloor Rohim, and two other parties, who were wholley unconnected with the estate of Buzloor Rohim, to enforce their mortgage and to recover the money lent by them. The

* Appeal from Original Decree, No. 340 of 1885, against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of 24-Pergunnahs, dated the 29th of December, 1884.

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persons against whom the said suit was brought were those whom the Land Mortgage Bank considered at the time to be the heirs of Buzloor Rohim. Sadurrunnessa, the sister of Buzloor Rohim, who had at that time gone away to Medina, was not made a defendant. But so [466] far as Fatamatunnessa, the widow, was concerned, her interest was fully represented by the daughter Shurufunnessa, who had before the suit obtained a conveyance of that lady's share, so that all the heirs, with the exception of Sudurrunnessa, were represented in the suit. In that suit a consent decree was obtained by the Land Mortgage Bank on the 13th July 1872, and in execution of that decree the Bank caused to be sold the properties comprised in the mortgage deed, and at the sales some of the properties were purchased by the Bank, and others by third parties, and the purchasers duly took possession of the properties purchased by them respectively. The sales which were thus held did not, however, satisfy the entire claim of the Bank, and a considerable amount of money remained due to them. Subsequently to these sales Sadurrunnessa returned from Medina, and on the 1st December 1875, sold her share, which was six annas under the law of inheritance, to the present plaintiff Roy Lutchmiput Singh Bahadur, who thereupon brought a suit against the purchaser of two of these properties on the Original Side of the High Court; and the question raised in that suit was whether the whole sixteen annas or only a ten annas share of the properties passed under the sales in execution of the decree obtained by the Land Mortgage Bank on the 13th July 1872. A Full Bench of the High Court in May 1878 held that the decree obtained by the Bank and the execution founded upon it did not affect the share of Sadurrunnessa in the estate left by Buzloor Rahim; and that, consequently, her six annas share of the properties in question did not pass under the sale to the then defendants, and that the plaintiff Lutchmiput Singh was entitled to recover the same [see *Assamathemnessa Bibee* v. *Roy Lutchmiput Singh* (1)].

The result of the above case led to a suit being instituted by the Land Mortgage Bank on the 3rd August 1882, against Lutchmiput Singh and some other parties, who were his donees, as also against certain other persons who had, as already mentioned, purchased some of the properties comprised in the mortgage deed in execution of the decree obtained by the Bank, for the purpose of enforcing their mortgage security, for the balance of the money due to them, and asked that it might be [467] declared that they had a good and subsisting charge by virtue of the mortgage deed of the 22nd August 1870, against the six annas share of the properties belonging to Sadurrunnessa; and, in the event of the money still due to them not being paid within the time to be fixed by the Court, that the said six annas share of the properties might be sold and the proceeds applied towards the payment of the principal, interest and costs still due to them.

This was followed by the present suit, which was instituted on the 21st July, 1883, by Lutchmiput Singh against the Land Mortgage Bank to recover possession of a six annas share of ten of the properties, that being the share of Sadurrunnessa, which among others, had ostensibly been sold in execution of the said decree of the Land Mortgage Bank, and purchased by the Bank themselves, and which were then in their possession. The plaint proceeded upon the ground that the decree obtained by the Land Mortgage Bank, and the sales held under it, did not affect the share

(1) 4 C. 142.

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and interest of Sadurrunnessa; that the whole of the debt, if there was any left due to the Bank, had long been satisfied and realised; that the Bank were unlawfully in possession of the said six annas share of the properties, and it was therefore prayed that a decree for possession be given to the plaintiff for the said six annas share of the properties in question; and that an account be taken from the defendants of the rents and profits which had been received by them in respect of the properties in question from the time of Buzloor Rohim's death to the date of suit; and, after deducting the necessary and proper expenses, a decree be passed in favour of the plaintiff for the balance of the money.

The Bank in answer to this suit referred to the suit which they had brought against Lutchmiput Singh and other parties, and they justified their conduct with reference to the proceedings in the suit which terminated in the decree of the 13th July, 1872, and to the sales that were held in execution thereof, and they contended that, even supposing that the plaintiff was entitled to any relief, he was not entitled to recover any share of the properties subject to the mortgage in favour of the defendants without satisfying the balance due on the said mortgage. Both [**468**] these suits were tried together by the Subordinate Judge. In the suit, in which the Land Mortgage Bank were the plaintiffs, the Subordinate Judge held, among other matters, that the plaintiffs were entitled to the relief sought for; that upon an account being taken between the parties a sum of Rs. 1,63,332-2-1 was still due to the plaintiffs; that upon the principle of estoppel, the Bank was not entitled to charge any portion of those properties which had been sold at their instance and purchased by third parties, but that as regards the other properties, namely, the properties that were in the possession of the Bank and of Lutchmiput Singh and his donees, a six annas share thereof was liable to be sold for the satisfaction of the said amount of money, and that the properties in the possession of the Bank should be first sold, and the proceeds, as also the net profits received by them from those properties, should be applied towards the liquidation of the money still due to them, and that the balance, if any, of the debt should be realized by the sale of the properties in the possession of Lutchmiput Singh and his donees.

In the present suit the Subordinate Judge held that, according to the terms of the mortgage-deed executed by Buzloor Rohim, the Bank was entitled to hold the six annas share of the properties in their possession until the full satisfaction of the mortgage-debt; and that it being found that a sum of Rs. 1,63,232-2-1 was still due to the Bank upon the mortgage, the plaintiff Lutchmiput Singh would be entitled on payment of that sum to obtain possession of a six annas share of the properties claimed, or in other words that the plaintiff would be entitled to redeem his share of the properties in question upon the payment of the said sum of money.

Appeals were preferred to this Court by Lutchmiput Singh against the decrees passed in both these suits. The appeal in the suit, in which the Land Mortgage Bank were the plaintiffs, was taken up by a Division Bench of the Court consisting of Prinsep and Trevelyan, JJ., and decided on the 21st April, 1886. Those learned Judges held, following the principle laid down by the House of Lords in the case of *Kendall* v. *Hamilton* (1), that, [**469**] having brought a suit, and obtained a decree in July 1872, against some of the debtors and brought the whole of the properties to sale, the Bank had no fresh remedies under the mortgage against

(1) L. R. 4 App. Ca. 504.

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Sadurrunnessa and the share held by her, and that therefore the suit of the Bank was not maintainable. And the result was that the decree of the lower Court made in that suit was reversed and the plaintiffs' suit dismissed.

The judgment of the High Court in that case (1) will be found in a note* attached hereto.

14 C. 469 N=11 Ind. Jur. 416 N.

* Note.—*Roy Lutchmiput Singh Bahadur* v. *The Land Mortgage Bank of India, Limited.*

The earlier stages of the litigation, of which this suit is the outcome, are set out in the case of *Assamathemnessa Bibee* v. *Roy Lutchmiput Singh* (2), which came before a Full Bench of this Court.

There is no dispute about the facts of this case. The real questions raised in this appeal are qustions of law.

So far as they are material the facts are as follows:—

On the 22nd of August, 1870, one Buzloor Rohim mortgaged to the plaintiff Bank 36 parcels of property in Calcutta, and in the 24-Pergunnahs (all of which are set out in the schedule to the plaint) for Rs. 3,10,000 with interest at 10 per cent. per annum.

Buzloor Rohim died on the 3rd of July, 1871. His heirs, according to Mahomedan law, were his widow Fatamatunnessa Khatoon, his daughter Shurufunnessa, and his sister Sadurrunnessa.

On the 17th of May, 1872, the plaintiff Bank, who were, as they say, ignorant of the existence of the defendant Sadurrunnessa, brought a suit on the mortgage against the persons whom they considered to be the heirs of Buzloor Rohim, namely, against Shurufunnessa (who, in addition to her own share, had by purchase obtained Fatamatunnessa's share) and against Mahomed Ahya, Mahomed Moosa and Mahomed Zakaria, who, if Sadarrunnessa had died, would, together with Shurufunnessa and Fatamatunnessa, have been heirs of Buzloor Rohim.

On the 13th of July, 1872, a consent decree was made in that suit.

This decree, after having recited that a *razinama* had been filed, ordered "that the case be decreed in terms of the said *razinama* in this way; that there be a decree for the whole amount of the claim set out in the plaint with interest and costs, and that the defendants and all their mortgaged properties be liable for the amount of the decree with interest, and the amount of the decree is to carry interest at 1 per cent. from the date of the institution of the suit, *i.e.*, from the 9th of May, 1872, which will be [470] payable every six-months. One year's time will be given to the defendants within which they are to seek for purchasers of those properties and give notice to the Bank. Then the Bank is to take out execution of the decree and attach the properties, and cause them to be sold by the Court."

There can be no doubt that in this suit the Bank were seeking to realize the mortgage money from Buzloor Rohim's interest in the property mortgaged, *i.e.*, as is the usual expression in this country, from the whole sixteen annas of the property. The decree recites that the suit is for the recovery of the amount due on the mortgage, and for the sale and foreclosure of the property mortgaged to the plaintiffs, and the decree contemplates the sale of the whole of the property mortgaged. All the persons who, as far as the Bank could ascertain, were the heirs of Buzloor Rohim were made parties to the suit.

Default having been made in payment of the mortgage money in accordance with the decree, the Bank attached and sold all the properties mortgaged, some of which the Bank themselves purchased.

Apart from a consideration of the terms of the decree, we have no doubt that these sales purported to pass the whole interest of Buzloor Rohim in the properties, and that the purchasers believed they were purchasing the whole sixteen annas of the property, and paid the purchase money in respect of the whole of such sixteen annas. The conditions of sale describe the property to be sold as follows: "The right which the late Buzloor Rohim had in the properties given in the schedule below and which Mahomed Ahya, Shurufunnessa, Moosa, and Mahomed Jafer have as representatives of the said Buzloor Rohim shall be sold."

The bidding paper describes the property to be sold as follows:—

"The right of the late Moonshi Buzloor Rohim, at present held by Mahomed Ahya, Shurufunnessa, Moonshi Mahomed Jafer, and Moonshi Afzul Rohim, as his representatives, shall only be sold"; and the Nazir's return of the sale recites the

(1) Appeal from Original Decree, No. 389 of 1885. (2) 4 C. 142.

[470] The other appeal, namely, that in the suit brought by Lutchmiput Singh against the Bank, now came on for hearing.

order given to him which was this: "You are hereby directed that you do sell the properties mentioned in the notification on the fixed day after making mention of the right which the deceased Buzloor Rohim had therein, and which is at present enjoyed as representatives of the said Buzloor Rohim by the judgment-debtors Mahomed Ahya, Shurufunnessa, Mahomed Jafer, and Mahomed Moosa."

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[471] These sales realized a sum of Rs. 3,96,576-4-10, which was not sufficient to clear the mortgage. In 1875 Sadurrunnessa returned to Calcutta from Medina and asserted her right to a six annas share of Buzloor Rohim's property as his sister, but being apparently unprovided with funds for the purpose of carrying on the litigation, without which she could not maintain her rights, she, on the 1st of December, 1875, assigned her interest in the property of Buzloor Rohim to Roy Lutchmiput Singh Bahadur, who is a defendant in the present suit.

On the 26th of April, 1876, Lutchmiput Singh brought a suit against Ashruff Ali, the purchaser of two of the properties at the sale in execution of the mortgage, asking to have it declared that he (Lutchmiput) was entitled to a six annas share of the property purchased by Ashruff Ali. Lutchmiput succeeded in the first Court and also on appeal after there had been a reference to a Full Bench [see *Assamathemnessa Bibee* v. *Roy Lutchmiput Singh* (1)] The Bank mortgagee was no party to that suit. In consequence of the decision in that suit the Bank bring this suit to enforce their mortgage against Sadurrunnessa's six annas share of the property. The contention of the Bank is contained in the 17th paragraph of the plaint which runs as follows:—"The plaintiff Bank submit that, inasmuch as it has been decided that the six annas or 6|16 share of the defendant Sadurrunnessa, in the properties specified in the first column of schedule A hereto annexed, was not affected by the said consent decree of the 13th July, 1872, and did not pass by or under the sales in execution thereof, the said six annas or 6|16th share in all the said properties remains, and still is, liable in the hands of the holders of the same respectively as security for the repayment to the plaintiff Bank of the balance still due to them under the said instrument of mortgage, dated the 22nd August, 1870." There were 36 properties mortgaged. They are set out in the schedule to the plaint. The Bank have made as defendants in this suit—(*a*) Sadurunnessa, (*b*) Rai Lutchmiput Singh Bahadur, (*c*) the purchasers and present possessors of some of the mortgaged properties, namely, those numbered 1, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 19, 21, 23, 25, 32, 33, 36. In the schedule annexed to the plaint Lutchmiput and his son Chutterput, who is a defendant, are in possession of the properties numbered 2, 4, 12, 20, 22, in the schedule annexed to the plaint.

The Bank themselves purchased the properties numbered 15, 24, 26, 27, 29, 30, 31, 34, 35, in the schedule. No. 28 is in the possession of defendant [472] No. 20, who obtained it as a gift from Lutchmiput. Nos. 3 and 18 are in possession of Lutchmiput and of other persons who are made parties to this suit. This case first came before Mr. C. B. Garrett, the District Judge of the 24-Pergunnahs, who then decided that this suit was not barred by the decree of the 10th of July 1872 Two other issues, namely, (*a*) is the suit barred by limitation, and (*b*) is the suit defective by reason of the heirs of Moonshi Buzloor Rohim not having been made parties to it, were raised before Mr. Garrett, but were not pressed.

The other questions in the case were determined by the First Subordinate Judge. He very properly declined to allow the questions decided by Mr. Garrett to be re-opened. He then decided that the mortgage bond was a genuine document. This is not disputed before us. He then proceeded to discuss the question of estoppel which was raised by some defendants who had purchased some of the properties from the Bank and also by the defendants who had purchased at the sale in execution of the Bank's decree. The claim against the purchasers from the Bank was not pressed. The Subordinate Judge held that the Bank was estopped from denying the title of the person who has purchased under the decree of 1872. In the result the lower Court has found that the six annas share which Sadurrunnessa had in the properties numbers, 2, 3, 12, 18, 20, 22, 24, 26, 28, 15, 27, 29, 30, 31, 34, 35, and 36 is liable to be sold to satisfy the balance of the mortgage-debt (if any) remaining due to the plaintiff.

Lutchmiput, his son Chutterput, and Lutchmiput's donee, defendant No. 20, have appealed from this decision.

Mr. Woodroffe for the respondent has contended that under Mahomedan law each heir became separately liable for the debt to the extent of his separate share, and for this proposition he has relied upon the Full Bench case already mentioned, but we do not think that this question in reality arises in this case.

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Baboo *Rash Behari Ghose* and Baboo *Dwarkanath Chuckerbutty*, for the appellant.

Mr. *J. T. Woodroffe* and Baboo *Busant Coomar Bose*, for the respondents.

[471] Baboo *Rash Behari Ghose* for the appellant.—In the suit brought by the Bank against the present appellant to enforce their mortgage security, it has been held by a Divisional Bench of this Court that the Bank, having exhausted their remedy, are not entitled to bring a fresh suit. The sales of the mortgaged properties in execution of their decree, dated the 13th of [472] July 1872, have extinguished their lien—*Kendall* v. *Hamilton* (1); *King* v. *Hoare* (2); *Brinsmead* v. *Harrison* (3); *Nultoo Lall Chowdry* v. *Showkee Lall* (4); *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (5); *Guru Sami Chetti* v. *Samurti Chinna Manar Chetti* (6); *Chockalinga Mudali* v. *Subbaraya* [473] *Mudali* (7); *In re European Central Railway Company Ex parte Oriental Financial Corporation* (8). The Bank having lost their rights cannot now fall back upon the mortgage-deed. The lien has been merged in the decree. The properties in dispute must now be held free from the lien.

Mr. *Woodroffe* for the respondents.—The decision of the Division Bench of this Court referred to by the other side is [474] not correct. Even if it be held to be correct it does not affect the Bank in this appeal. The Bank do not want to make any one liable. They merely say that the property in their hands is not released from the debt. The decision

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The Bank have sold the whole of the mortgaged property and have obtained a price for the whole of it. The effect of their so doing is to release the property from their claim, and they cannot again seek to realize the mortgage money from any part of it As we have pointed out they sought to sell the whole interest, which was of Buzloor Rohim. As the purchasers [473] purported to purchase that interest it must be taken that the Bank has received the purchase money in respect of such interest. Besides Mr. Reily, the manager of the plaintiff Bank, says this: "While making the purchase the purchasers understood to have purchased entire sixteen annas of the properties. I intended to sell in execution of the decree the whole of the right, title and interest of Buzloor Rohim, but can't say whether our solicitors intended. I intended to sell this right of Buzloor Rohim as the same had passed to his representatives. My belief was that the entire properties would be sold." It seems to us that, from this view of the case, this suit is not maintainable. Even if this were not so there is another objection which we think disposes of the case.

Mr. Woodroffe's contention is that by Mahomedan law a mortgagee can bring as many suits as there are co-sharers. Without deciding whether this is or is not the law we think that at the most it would justify separate suits for separate portions of the debt, and that a mortgagee cannot even under Mahomedan law bring a suit for the whole of his claim against each of the co-sharers. In this suit he has obtained a decree for the whole amount against all the co-sharers but one. When the decree was passed the mortgage-debt disappeared, and in its place the mortgagee acquired the decree, retaining however his lien on the land. On the sale in execution of the decree the whole of the mortgagee's rights, whatever they were, passed to the purchasers, and his lien vanished. There is no real distinction between the principle in this case and the principle laid down by the House of Lords in *Kendall* v. *Hamilton* (1).

Furthermore the purchasers obtained possession under the sales to them, and the fact that Sadurrunnessa has returned from Medina and ousted some of them from a portion of the property purchased by them does not give to the mortgagee fresh remedies under his mortgage.

Besides there are other difficulties in the way of giving the plaintiff a decree. All the purchasers are not before the Court, and before any relief could be given it would be necessary to cancel all the sales in execution of the decree of 1872. We think that this suit must be dismissed with costs of both Courts as against the defendants who have appealed. [This case is referred to in 22 A. 307.]

(1) L.R. 4 App. Ca. 504. (2) 13 M. & W. 494. (3) L.R. 7 C. P. 547.
(4) 10 B.L.R. 200. (5) 3 C. 353. (6) 5 M. 37.
(7) 5 M. 133. (8) L.R. 4 Ch. D. 33.

in *Emam Momtazuddin Mahomed* v. *Raj Coomar Dass* (1) lays down that a fresh suit will lie against a mortgagor or his assignee, whose name had been omitted in the first suit. *Kendall* v. *Hamilton* (2) and the other cases of a like nature cited by the other side deal with the question of the joint debt and joint liability. They do not apply to this case. The original mortgagor was a Mahomedan, and under Mahomedan law the debt is a several debt, each heir being responsible to the extent of his own share; *Muttyjan* v. *Ahmed Ali* (3)—and as such it is recoverable by a separate suit. It has always been held that if, in the execution of a mortgage decree against the father of a Mitakshara family, the sons get their respective shares released, the mortgagee may bring a suit against the sons to bind their respective shares—*Sitanath Koer* v. *Land Mortgage Bank of India* (4) *and Nobin Chandra Roy* v. *Magantra Dassya* (5). The covenant in the mortgage-deed that the mortgagee can enter into possession on default of payment is a valid covenant, and the Bank having got into possession are entitled to retain it till the debt is paid off. There is no doubt that in England such a covenant is perfectly good. This mortgage-deed is in the English form, and the mortgaged properties were partly situate in Calcutta. It has been held in *Khelat Chunder Ghose* v. *Tara Churn Koondoo* (6), which decision was confirmed by the Privy Council on appeal—[see *Brojanath Koondoo Chowdhry* v. *Khelat Chunder Ghose* (7)] that such a covenant in a mortgage-deed is valid. *Petamber Narayen Dass* v. *Vanmali Shamji* (8) supports the same view.

The contention that the lien has been merged in the decree is not correct. It has been held by a Full Bench of this Court in *Jonmenjoy Mullick* v. *Dassmoney Dassee* (9) that the decree in [**475**] a mortgage suit does not extinguish the lien. See also the cases of *Syed Nadir Hossin* v. *Baboo Pearoo Thovildarinee* (10); *Ram Kant Roy* v. *Raj Kishore Deb* (11); *Cheit Narain Singh v. Gunga Pershad* (12) *Shaik Abdulla Saiba* v. *Haji Abdulla* (13) and *Jatha Naik* v. *Venkatapa* (14).

Baboo *Rash Behari Ghose* in reply.—The right of a mortgagee under a covenant to enter into possession must be enforced by a Civil Court. The mortgagee cannot take the law into his own hands.

It has been held in several cases that a fresh suit will lie at the instance of a mortgagee against third parties, but in those cases the third parties were not originally liable. Section 283 of the Civil Procedure Code allows a mortgagee to bring a suit against a successful claimant, but here there is no successful claimant.

JUDGMENT.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.), after stating the facts set out above, continued as follows:—

It was strongly urged upon us by the learned Vakil, who appeared for Lutchmiput Singh, the appellant before us, that the suit of the Land Mortgage Bank having been dismissed, we should hold that the plaintiff Lutchmiput Singh was entitled to an unconditional decree in this suit, and it was contended that the Land Mortgage Bank having already exhausted their cause of action in the suit brought by them in 1872, no fresh suit would lie to enforce the mortgage lien against any portion of the

(1) 23 W. R. 187 (F.B.). (2) L. R. 4 Ap. Ca. 504. (3) 8 C. 370.
(4) 9 C. 888. (5) 10 C. 924. (6) 6 W.R. 269.
(7) 14 M.I.A. 144=8 B.L.R. 104=16 W.R. (P.C.) 33. (8) 2 B. 1.
(9) 7 C. 714. (10) 19 W. R. 225. (11) 24 W.R. 94.
(12) 25 W.R. 216. (13) 5 B. 8. (14) 5 B. 14.

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properties belonging to Sadurrunessa in accordance with the principle laid down in the case of *Kendall* v. *Hamilton* (1); and that, therefore, the share of Sadurrunnessa must now be taken to be free of the mortgage lien, and that as a result of this, no portion of the debt still due to the Bank could properly be charged against the said share.

It was further contended that the lien which existed upon Sadurrunnessa's share vanished when the properties were sold; that the decree of 1872 caused a merger and extinguished the original obligation; and that, lastly, reckoning from the date upon which the money under the mortgage deed fell due, twelve years had [**476**] elapsed, and therefore the lien could not be enforced against the properties in question.

It appears to us, upon a careful consideration of the matters involved in this appeal, that notwithstanding the result of the other suit decided by the other Division Bench of this Court, it does not follow that the plaintiff in this suit is entitled to a decree for possession of Sadurrunnessa's share of the properties free of the mortgage lien. The result of that suit is, as we understand it, that the Bank having once brought a suit upon the mortgaged bond, obtained a decree, and sold the properties comprised in it, they are not entitled to maintain a fresh suit upon the same cause of action. But the Bank are the defendants in the present suit; they ask for no relief. The plaintiff is now in the place of one of the representatives of the mortgagor, and what he asks for is that he should be entitled to recover his share of the properties free of the lien imposed upon it by the mortgage-deed. It is one thing to hold that a creditor or a mortgagee is not entitled to enforce his remedy by a suit in Court, but it may be quite a different thing when the question is whether the debtor or the mortgagor is entitled to a specific relief as against the creditor or the mortgagee.

The contention on behalf of the Bank is that, notwithstanding the suit of 1872, and the sales which took place in execution of the decree, the lien which existed upon the six annas share of the properties in question has not been extinguished. If this contention be correct the result would be, were we to give effect to the argument of the appellant's vakil, that, although the whole of the money due under the mortgage-deed has not been satisfied, and although there is still a subsisting lien upon the said six annas share, the plaintiff in this case, standing in the shoes of a representative of the mortgagor, is entitled to a decree for the properties freed from that lien.

The main question, as it appears to us, upon which the case hinges is whether or no the lien which existed upon the share of the properties which devolved upon Sadurrunnessa has now been extinguished, so that the plaintiff, as the owner of the said six annas share, is entitled to recover the same discharged of the said lien.

[**477**] By the deed of mortgage executed on the 27th August, 1870, a lien was created upon the whole of the properties comprised in the said mortgage. Upon the death of Buzloor Rohim, as already mentioned, a six annas share of the properties devolved upon Sadurrunnessa. The suit that was brought for the enforcement of the mortgage was one in which Sadurrunnessa was not represented, and the decree that was passed in that suit was, as held by a Full Bench of this Court, one which did not affect the share of Sadurrunnessa. The debt contracted by Buzloor Rohim by reason of this decree passed into a judgment-debt, but the lien that

(1) L.R. 4 App. Ca. 504.

was created by the mortgage continued as an incident of the debt. The effect of the decree was not to create any right against the properties mortgaged. The lien or the security, notwithstanding the judgment, would continue, as before, as an incident of the debt itself, and it would continue to exist in the hands of the Bank for the purpose of the satisfaction of the debt. It could not possibly be extinguished by reason of the decree. [*See* the Full Bench decisions in the cases of *Syud Emam Momtazuddin Mahomed* v. *Raj Coomar Dass* (1), *Jonmenjoy Mullick* v. *Dassmoney Dassee* (2), and *Syud Nadir Hossein* v. *Pearoo Thovildarinee* (3).] Now, if the lien is not extinguished by reason of the debt having been turned into a judgment debt, can it be said that, by reason of the proceedings in the sale or sales which took place in execution of their decree, the said lien came to an end so far as the six annas share of Sadurrunnessa was concerned? No doubt, if the whole sixteen annas share of the properties in question had been validly sold, the benefit of the lien which existed in the hands of the Bank would be transferred to the purchasers, and in that way the lien would be extinguished. It is indeed true that the Bank purported to sell the whole sixteen annas share of the properties. But whatever they might have purported to have sold, the fact is, as was held by the Full Bench in *Assamathemnessa* v. *Roy Lutchmiput Singh* (4), that the whole sixteen annas did not pass under the sale. All that was really sold was the ten annas share, and a six annas share remained, notwithstanding the sales, with Sadurrunnessa. The six annas share, therefore, not having [**478**] been sold, the result must be, as we understand it, that the lien imposed upon it by the original deed of mortgage remained intact and continued in the hands of the Bank, and nothing has since happened which has the effect of removing or extinguishing the lien. We are not called upon in this case to determine the respective rights and remedies of the Bank and those parties who have, in execution of the decree obtained by the Bank, purchased some of the properties. The question in this case is one entirely between the plaintiff, as one of the representatives of the mortgagors entitled to his six annas share, and the Land Mortgage Bank, the mortgagees. What we have to determine is whether the plaintiff's six annas share has now been freed from the mortgage lien; and we are of opinion that it is not. Nor do we think it necessary to determine whether, as contended by the learned counsel for the Bank, a suit would lie at the instance of the Land Mortgage Bank to enforce their mortgage lien against the six annas share belonging to Sadurrunnessa. A Division Bench of this Court has, no doubt, held that it does not lie. But, whether that decision is correct or not, the question yet remains whether the effect of that judgment is to free the six annas share from the mortgage lien so as to entitle the plaintiff in this suit to an unconditional decree for the recovery of the six annas share of the properties now in the possession of the Bank. If the reasoning that we have adopted above be correct, then it follows that, notwithstanding the result of the other suit, the lien yet subsists upon the six annas share of Sadurrunnessa. The Land Mortgage Bank may not be in a position, by reason of the previous suit of 1872, to enforce that lien by another suit, but it does not necessarily follow from this that the lien imposed upon it has been discharged or extinguished. We then find, as already mentioned, that the deed of mortgage provided that, in case of default, the mortgagee would be entitled to enter into possession of the mortgage premises. The possession which the Land Mortgage Bank obtained in this case was, no doubt,

(1) 23 W.R. 187. (2) 7 C. 714. (3) 19 W.R. 254. (4) 4 C. 142.

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a possession under the sale which took place in execution of their own decree. But that sale was no sale so far as regards the six annas share of the properties in question, and therefore it may be taken that the Bank in one sense unlawfully [479] entered into possession; and it is possible that Sadurrunnessa might have recovered a decree for possession under s. 9 of the Specific Relief Act, if she had brought a suit within six months from the date of such unlawful possession, notwithstanding the above covenant in the mortgage deed. But no such suit was brought; and this being a suit where all questions of right between the two parties must be tried, we are bound to see whether the said covenant can now be relied upon by the Bank. It seems to us that the Bank are entitled to insist upon their right to be in possession as mortgagees until the proportion of the debt which may legitimately be imposed upon the said six annas share of the properties is paid, and the lien thus discharged.

It was pressed upon us by the learned Vakil for the appellant that such a power, as was reserved under the mortgage deed, was unknown in the mofussil, and he relied upon the decision in the case of *Bhuwani Churn Mitter* v. *Joykishen Mitter* (1).

The question before us was not identically the same that was considered in that case. There the mortgage deed gave a power of sale of the mortgaged properties in case of default in the repayment of the money. The mortgagee sold under the power without the intervention of the Court; and the purchaser brought a suit against the mortgagor to obtain possession under the sale made to him. The Court refused to recognise the validity of such power, and it was of opinion that such a power was opposed to the principles of the Regulations in regard to the transfer of immoveable properties and particularly in satisfaction of mortgage debts.

This view of the law was not, however, adopted by a Division Bench of this Court in the case of *Sonatun Bysak* v. *Kunjo Behari Bysak*. The case is unreported, but will be found in the Tagore Law Lectures for 1876, Appendix 1. And in a more recent case before another Division Bench of this Court—*Bhanoomutty Chowdhrain* v. *Premchand Neogee* (2)—the Judges said they felt considerable difficulty in deciding the question; but disposed of the case upon another ground. The same question came before the Bombay High Court for consideration on two different occasions; and they seem to have held that such a power [480] of sale, when reserved in the mortgage deed, could lawfully be exercised—*Keshavrav Krishna Joshi* v. *Bhavanjibin Babjain* (3) and *Petamber Narayan Dass* v. *Vanmali Shamji* (4). Upon the authorities as they stand at present, the question does not seem to be a settled one. The question, however, that we have to determine is somewhat different. It is whether, when a power of entry into possession in the case of default is reserved in a mortgage deed, the mortgagee can insist upon such a power. The question seems to have come up before a Division Bench of this Court for consideration in the case of *Khelat Chunder Ghose* v. *Tara Churn Koondoo* (5). The immediate question then before the Court was one of limitation—whether the suit, which was one for the recovery of possession of the mortgaged properties, after foreclosure, was barred by limitation, it not having been brought within twelve years from the

(1) S.D.A. (1847), 354. (2) 15 B.L.R. 28. (3) 8 B.H.C. 142.
(4) 2 B. 1. (5) 6 W.R. 269.

date of default, in which event the mortgagee was, under the terms of the mortgage deed, entitled to enter into possession. Sir Barnes Peacock, in delivering the judgment of the Court, observed as follows: "In this case there was a stipulation that, until default should be made in the payment of the mortgage money (which was Rs. 22,000 and interest), the mortgagee should not be at liberty to turn the mortgagor out of possession; but that, if default should be made on the 4th April 1848, the mortgagee was to be entitled to possession, and then he would be entitled to the usufruct of the estate. He would receive the usufruct subject to the first mortgagor's right to redeem the estate if he came in and paid the mortgage money and interest before the mortgagee should foreclose the estate; but he would be entitled to possession, and to receive the usufruct of the estate, the mortgagor being entitled to redeem and the mortgagee being entitled to foreclose." And later on he adds: "It is clear that, as soon as the default was made, the mortgagee might have sued the mortgagor and Guru Churn Sen, and recovered possession of the estate in dispute (assuming that it was included in the mortgage); and I am of opinion that, from that date, the statute of limitation began [**481**] to run as against the mortgagee in respect of a suit for possession." The case then went upon appeal to the Privy Council (*Brojonath Koondoo Chowdhry* v. *Khelat Chunder Ghose*) (1). Their Lordships of the Judicial Committee accepted the view of the question taken by Sir Barnes Peacock in respect of limitation, and observed as follows: "The right under the mortgage deed was to obtain possession of the land, and the cause of action accrued when default was made." And later on, after adverting to the question raised upon the judgment of this Court whether the bar of limitation applied even to the case of the original mortgagor himself if he continued in possession and paid interest to the mortgagee, and then remarking that the said question did not arise in the case, observed as follows: "But it is impossible to hold that the defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee; and when both things occur—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the law of limitation."

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It seems to us, upon the observation of Sir Barnes Peacock and their Lordships of the Judicial Committee just referred to, that, when an express right of entry is covenanted for, the mortgagee would be entitled to enter into possession, although it might be that such right of entry ought to be enforced through the intervention of the Court. The mortgagee when he enters into possession would be in possession as mortgagee, subject to the right of redemption in the mortgagor; and there is, as far as we are aware, nothing in the law of this country to prohibit such a covenant being enforced. And if we are entitled to look into the intention of the parties at the time when the covenant was entered into, there can be no doubt, considering that the mortgage deed was drawn up in the English form, was executed in the town of Calcutta, where portions of the mortgage properties were situate, and the mortgagees were an English Banking Firm, and the deed was drawn up by an European attorney, that it was the intention of the parties that the contract should be governed by the English rule of law which obtains in such matters, [**482**] under which law such a covenant as we have to deal with in the present case

(1) 14 M.I.A. 144=8 B.L.R. 104=16 W.R. (P.C.) 33.

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is a perfectly valid one—see *Bhola Nath Coondoo* v. *Unoda Pershad Roy* (1); *Petamber Narayen Dass* v. *Vanmali Shamji* (2).

We further observe that in the case of *Jatha Naik* v. *Venktapa* (3) where the mortgagee entered into possession under a sale in execution of a decree made upon the mortgage, but which decree and sale were held not to be binding as against the plaintiff, who was the heir of the original mortgagor, a Division Bench of the Bombay High Court was of opinion that the defendant, the purchaser at the sale, was at least a mortgagee in possession, and that the plaintiff could not be permitted to recover the property without redeeming the mortgage.

Upon these considerations, therefore, we hold that the defendants, the Land Mortgage Bank, as mortgagees, are now entitled, notwithstanding the decree and sale, to insist upon the covenant of entry into possession stipulated in the mortgage deeds. They might have enforced such a covenant by suit in Court. But it does not follow that because such a suit was not brought, and the Bank entered into possession under a sale which has now fallen through, the plaintiff, the mortgagor, is entitled to obtain an unconditional decree for possession without redeeming the properties.

The observations already made, we think, dispose of all the grounds raised before us by the learned Vakil for the plaintiff-appellant, with the exception, perhaps, of only one, that is, limitation. But it is obvious that the right of the Land Mortgage Bank cannot in any sense be said to be extinguished by efflux of time, although twelve years have run out from the date of default, if they are rightfully now in possession as mortgagees under the covenant. They do not seek to enforce their lien as against any portion of the properties; they have no necessity to do so. It is the plaintiff, the mortgagor, who seeks to destroy the lien upon the ground that it has come to an end.

That being our view of the questions raised in the appeal, it follows that the plaintiff is not entitled to have in this [**483**] case an unconditional decree as prayed for in the plaint, and that he can only have a decree if he pays the amount of money legitimately chargeable upon the six annas share of the properties now in the hands of the Land Mortgage Bank. And this brings us to the question, what is the amount which the plaintiff is bound to pay before he can redeem the said six annas share. We have already noticed what the decree of the lower Court was in the suit brought by the Land Mortgage Bank, which, among other matters, was that the sum of Rs. 1,63,232-2-1 *plus* other sums of money, which the Court held justly payable by the defendants in that suit, should be realised by a sale in the first instance of the six annas share of the properties which were in the possession of the Bank, and if the proceeds of such sale be insufficient, then by the sale of the six annas share of the properties in the hands of Roy Lutchmiput Singh and his donees. In this case the decree that was pronounced by the Subordinate Judge was but the result of accounts taken in the other suit, but it runs thus: "That the plaintiff do, on payment of Rs. 1,63,232-2-1 due to the defendant, or on payment of that money in any other way than the sale of the mortgaged property in suit, recover possession of a six annas share of the properties mentioned in the schedule and in possession of the defendant, and it is further ordered that each party do pay his own costs."

(1) 1 Boul. 97. (2) 2 B. 1. (3) 5 B. 14.

It is obvious that this decree as drawn up cannot be affirmed, for the sum of Rs. 1,63,232-2-1 was chargeable not only upon the six annas share now in the hands of the Land Mortgage Bank but also upon the like share of the properties in the hands of Lutchmiput Singh and his donees. In the view taken of the matter by the Subordinate Judge himself, this sum of money should have been rateably distributed amongst all the several properties in the possession of both the parties, and it should have been provided that, upon payment of that portion of it, which legitimately falls upon and is chargeable against the nine properties (one out of the ten properties in suit being not identified or traced) now in the hands of the defendants, and in respect of which the present suit is brought, the plaintiff be entitled to recover possession. The enquiry which the lower [484] Court will have to make will, therefore, be as to the respective values of the several properties now in the hands of the Bank and of the plaintiff and his donees with a view to the apportionment of the money now due to the Bank, and the Court will direct that, upon payment of the sum thus found due as chargeable against the six annas share of the properties in the possession of the Bank, the plaintiff should be entitled to redeem.

We therefore remit the case to the Court below with the direction that the Court do complete the necessary enquiries and make the final decree in the cause.

Under the circumstances, each party will bear his own costs in both this Court and the lower Court.

H. T. H *Appeal allowed and case remanded.*

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14 C. 484.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ghose.

MOOKOOND LAL PAL CHOWDHRY AND ANOTHER (*Judgment-debtors*) v. MAHOMED SAMI MEAH (*Decree-holder*).*
[15th April, 1887.]

Execution of decree—Possession under decree—Reversal of decree—Restitution of property after reversal of decree—Mesne profits—Civil Procedure Code, 1882, s. 244.

A Court, reversing a decree under which possession of property has been taken, has power to order restitution of the property taken possession of, and with it any mesne profits which may have accrued during such possession.

[F., 11 M. 261 (262); 21 C. 989 (997); 3 C.L.J. 181. (182); 15 C.L.J. 187=14 Ind. Cas. 486; 35 B. 255=13 Bom. L.R. 259=10 Ind Cas. 818; **Rel. upon,** 2 C.L.J .537 (539)=9 C.W.N. 381; **Expl.,** 6 C.W.N. 710 (712); **R.,** 22 C. 501; 28; A. 665= A.W.N. (1906) 171=3 A.L.J. 556 (559).]

IN the Court of first instance the plaintiff obtained a decree for possession, which decree was on appeal reversed. In the interval between these decrees the plaintiff took possession of the land in suit; the defendant after obtaining his decree in the Appellate Court applied in the execution proceedings for restitution of the property and for *wasilat* for the period during which the plaintiff had been in possession.

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* Appeal from Order No. 37 of 1887, against the order of F. Rees, Esq., Judge of Tipperah, dated the 20th of September 1886, affirming the order of Baboo Dwarka Nath Bhuttacharji, Subordinate Judge of that district, dated the 1st of July 1886.

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The plaintiff (judgment-debtor) contended that, there being in the decree no order for *wasilat*, the decree-holder could not [**485**] apply in execution, but should bring a fresh suit for any *wasilat* there may have become due.

The Subordinate Judge overruled this contention, deciding on the authority of the cases of *Lati Kooer* v. *Sobadra Kooer* (1) and *Rachapa* v. *Amingovda* (2) that the decree-holder was entitled to have the lands in suit restored to him and mesne profits refunded.

On appeal to the District Judge the judgment of the lower Court was affirmed.

The judgment-debtor appealed to the High Court.

Baboo *Akhai Coomar Banerji*, for the appellant contended that a fresh suit must be brought for mesne profits, citing *Ram Roop Singh* v. *Sheo Golam Singh* (3); *Ram Ghulam* v. *Dwarka Rai* (4).

Baboo *Durga Mohun Das* and Munshi *Serajal Islam*, for the respondent.

JUDGMENT.

Judgment of the Court (Petheram, C. J., and Ghose, J.) was delivered by

Petheram, C. J. (Ghose, J. concurring).—I think that this appeal must be dismissed.

The question which arises here is whether a Court, which has given a wrong decree, which has been afterwards reversed, for the possession of land, has power to order the restitution of the thing which had been improperly taken under its decree with the mesne profits which have been derived from that thing whilst it was in the possession of the party who was not entitled to it.

A decision of the Allahabad Court in which I took part has been cited, in which it was held that the section of the Code does not prevent the person who has been wrongfully deprived of his property by this proceeding from bringing an action to recover the profits during the time he has been wrongfully kept out of possession; and speaking for myself I still adhere to the opinion which I then expressed that such an action may be maintained; but, if such an action can be maintained, it by no means follows that the Court which has given possession under the wrong decree, [**486**] which has afterwards been cancelled, cannot order restitution of the property which has been wrongfully taken and any mesne profits which may have been derived from it in the meantime.

Speaking for myself, I do not think that this restitution is a proceeding which comes within the meaning of s. 244 of the Code of Civil Procedure, but I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to any one, and therefore it seems to me that that inherent right does exist, and that the Court has a power under that inherent right to order restitution of the thing which has been improperly taken, and as a part of that power it must have the right and the power to order restitution of everything which has been improperly taken. If they have that power, they have the power not only to order restitution of the property itself, but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received are the mesne profits of the property; and, therefore, it seems to me, it being admitted that there is

(1) 3 C. 720. (2) 5 B. 283. (3) 25 W.R. 327. (4) 7 A. 170.

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a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits, and therefore the order of the Court below, directing the restitution of the property and the return of the mesne profits, was perfectly correct. The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

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14 C. 486 (P.C.)=14 I. A. 71=11 Ind. Jur. 313=5 Sar. P.C.J. 13.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Fitzgerald, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

KRISHNA KISHORI CHAODHRANI AND ANOTHER (*Defendants*) v. KISHORI LAL ROY (*Plaintiff*). [15th and 16th February, 1887.]

Evidence Act (I of 1872), ss. 56 and 74—Secondary evidence of contents of document.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in **[487]** such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act, I of 1872 (1).

An *anumatipatra* is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76.

[**R.**, 31 C. 155; **D.**, 4 Ind. Cas. 400.]

APPEAL from a decree (16th April, 1884) of the High Court, reversing a decree (20th June, 1881) of the Subordinate Judge of Rajshahye.

The suit out of which this appeal arose related to the estate of Anand Sunder Mozumdar, deceased, on 11th February, 1876.

Chandramoni, wife of Goluck Nath Roy, who died in 1840, survived her husband 28 years. She had two daughters, one of whom, Ujalmoni, was alleged by the plaintiff to have adopted him in 1851 under power from her husband, then deceased. The other daughter was married to Sham Sunder Mozumdar, and was the mother of Anand Sunder Mazumdar, deceased, who was, in his lifetime, married to Krishna Kishori, the defendant.

The plaintiff sued (5th March, 1880) as adopted son of Ujalmoni to obtain possession, with mesne profits, of one moiety of all the estates, which on Goluck Nath's death had come to his sonless widow Chandramoni, to which moiety he, the plaintiff, claimed to have become entitled on the death of Chandramoni on 4th April, 1868, at which time Anand Sunder had taken wrongful possession.

The questions now raised related to the genuineness and effect of an alleged *anumatipatra*, said to have been executed by Goluck Nath on 17th Magh 1246 (January, 1840), containing a power to Chandramoni to adopt. As to this the High Court (MCDONELL and FIELD, JJ.) reversing the decision of the first Court, thus stated their opinion:—

"The conclusions, therefore, at which we arrive may briefly be summed up as follows: We think that there was undoubtedly an *anumatipatra* executed by Goluck Nath Roy; but we are of opinion that the

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(1) See *Bhubaneswari Debi* v. *Harisaran Surma Moitra*, 6 C. 721.

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non-production of this original document has not been sufficiently accounted for so as to render secondary evidence of its contents admissible. We are of opinion that the [488] copy produced to prove the original has not been shown to be a true copy, and we think that grave suspicion must attach to its genuineness. It must be borne in mind that Sham Sunder is shown to have had a large share in the effectual management of the property during Chandramoni's lifetime, and the testamentary provisions in the copy of the *anumatipatra* now set up are calculated exclusively to benefit his son. Even if we assume the copy to have been rightly admitted and to be good evidence of the original, we think, for reasons already given, that Anand Sunder Mozumdar can take no interest under this *anumatipatra* either by descent or by purchase.

"The result is that the decree of the Subordinate Judge must be reversed, and that the plaintiff must have a decree for a moiety of the property left by Goluck Nath Roy."

For the appellant Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne* contended that the Court of first instance had rightly found that the original *anumatipatra* had been accounted for so as to let in secondary evidence of its contents.

Counsel having also been heard on the whole case, Mr. *J. D. Mayne* (with whom was Mr. *J. Rigby*, Q.C.) was not called upon.

SIR B. PEACOCK delivered their Lordships' judgment:—

JUDGMENT.

The question upon which this case must be determined is whether there was proof of the document alleged to have been executed by Goluck Nath Roy in the year 1840.

The plaintiff claims to be entitled to half of the estate which belonged to Goluck Nath. Goluck Nath died, leaving only a widow and two daughters. The plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the defendant in the action sets up that, in a power to adopt which Goluck Nath executed in the year 1840, he devised, in the event of no adoption being made, the half share, which would otherwise go to the plaintiff, to the other daughter and her son. After giving his widow power to adopt, he says: "God forbid if, without any son being begotten of my loins, I should die, and you also should suddenly die without having made "—the literal translation is "having delayed to make "—" an adoption, then my younger daughter [489] Roopmunjari, and her son, that is my grandson by my daughter's side, shall become entitled to, and shall exclusively possess, all my above-mentioned zemindaries," &c. The question is, has it been proved that those words are contained in a document executed by Goluck Nath.

It is said that the original document was filed in the Collector's office when the widow, after the death of Goluck Nath, applied for mutation of names. It was unnecessary for the Collector, in deciding whether the name was to be changed from that of the deceased husband to that of the widow, to enquire into any subject except whether the widow was entitled to have her name substituted for that of her deceased husband. It was no part of his duty to inquire who, on the death of the widow, would be the reversionary heirs; and it is to be remarked that when she put in her petition to the Collector for the mutation of names, although she said that her husband had given her power to adopt, she did not go on to say that in that document he had devised over the estate to the

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second daughter and her son in the event of her not adopting. The Collector, also, in adjudicating that the widow's name was to be substituted for that of her husband, does not allude to that portion of the document. He merely declared that it has been shown to him; that the widow represents her husband; and that her name should be entered in the Collectorate in place of that of her husband.

It is stated that Goluck Nath, after he had executed the document, notified to the Judge that he had given his widow power to adopt. Those proceedings are before the Court; but there is nothing in them to show that, when he spoke of having given his widow power to adopt, he ever mentioned the fact of his having devised over the estate to his second daughter and her son in the event of the widow's not adopting.

The original document is not produced, but the parties have endeavoured to give secondary evidence of it, and in order to let in secondary evidence they endeavoured to show that the document was burnt in a fire. The learned Judge of the first Court, in dealing with this subject, does not go so minutely into the question as the High Court have done. He says: "The [490] *anumatipatra* will relied upon by the defendants is dated" so and so, "but the original deed was burnt up by setting fire in the cutcha cutchery bungalow of the deceased Chandramoni, and its loss was satisfactorily accounted for by the depositions of the defendant's witnesses." That is all he says upon the subject. The High Court in dealing with that question go more minutely into it. They say: "We have considered the evidence as to the loss of this document and it by no means satisfies us. When the copy was filed in 1868 this account was not given of the loss of the original, and we think that, if this were a true account, the fact of the loss by burning would have been stated at that time. At page 15 of the Paper Book, in Appeal No. 260, there is a judgment in a suit, No. 31 of 1870, which contains a statement as to the loss of the document and this was relied upon to show that a different account was given on this occasion. We think we cannot accept the recital of facts in the judgment as evidence of a different account having been given on a previous occasion; but we are of opinion that we may properly make the observation that the account of the loss by burning, now given, was not given in 1860." But further there is a very important remark which may be made in addition to that of the High Court. In the record to which they refer it is said:—"The plaintiff has failed to produce the original will or *anumatipatra;* he has only produced a copy of an *anumatipatra* of 17th Magh 1246, as executed by Goluck Nath Roy, in favour of Chandramoni, and the plaintiff's witnesses Nos. 2 and 3 have stated that the plaintiff searched for, but could not find, the original *anumatipatra.*" Now, if he knew that it was burnt, how could he produce witnesses to say that he had searched for it? He not only does not give the same account, but he gives an entirely different account. He says now that it was burnt. He said in a proceeding subsequent to the alleged date of the burning that he searched for the document but he has not been able to find it.

The High Court then go on: "Upon the evidence we think that the account now given is not entitled to credit, and we feel bound to say that the defendant has not proved the loss [491] of the original so as to entitle him to give secondary evidence of its contents."

Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under cl. (c) s. 65, of the Indian Evidence Act. There are

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however cases under that Act in which secondary evidence is admissible even though the original is in existence. One of the cases is under s. 65, letter (e): "When the original is a public document within the meaning of s. 74." And another under letter (f): "When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence." But in either of those cases "a certified copy of the document, but no other kind of secondary evidence, is admissible." If then the *anumatipatra* was a public document within the meaning of s. 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out at page 118 of the Record is not a certified copy. There is no certificate of any public officer that it is a true copy of a document contained in the office. *See* s. 76.

Then, again, it is said that the Judge, on the trial, sent for the proceedings before the Collector's Court, and that they were sent up to him; and at page 218 of his Record we find that there is what is said to be an authenticated copy of the document in the proceedings. But that document was not a certified copy, and there is no evidence whatever to show that it had ever been examined by any witness with the original document, which was said to have been at one time in the Collector's office.

Their Lordships, therefore, are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence, within the meaning of the Evidence Act.

Even if parol evidence were admissible as secondary evidence, their Lordships cannot rely upon such evidence as was given in 1881 with reference to the contents of a document which had [**492**] been executed forty years previously. The only witness who was an attesting witness says that he recollects a document being executed, but he cannot say whether it contained the words which amount to a devise over to the daughter and her son. There is no evidence on the part of the attesting witness that the document did contain a devise, and there is only the evidence of witnesses who can hardly be supposed to have known at the time, or even if they did know at the time, to have recollected the contents of a document by which it is contended that the estate of this gentleman was alienated from him by the will of his grandfather.

Then, again, it was stated that, at the time of the making of the will, the second daughter's son was born, and that the child was in the lap of the mother when her father gave the power to his widow to adopt, and also devised his estate to the daughter and her son in case the widow should not adopt. From the contents of the document it appears that the testator was not speaking of a son to be born, but of a son who was then actually in existence. From the evidence which was given it appears to be clear that at the time Goluck Nath executed this document, giving his widow power to adopt the child, Anand Sunder was not in existence. The High Court have very carefully gone into the evidence upon that subject, and they have shown conclusively that the child was not in existence at the time when the document is alleged to have been executed.

Looking, then, to all the evidence in the case, their Lordships are of opinion that the High Court, who gave very carefully considered judgment and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by Goluck Nath, and consequently that the plaintiff is entitled to recover his half share, and that the judgment of the High Court ought to be affirmed.

Their Lordships will, therefore, humbly recommended Her Majesty to affirm the Judgment of the High Court, and the appellant must pay the costs of the appeal.

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Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messsrs. *Sanderson & Holland.*

C. B.

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[493] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Herschell, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

PIRTHI PAL AND UMAN PARSHAD (*Plaintiffs*) *v.* JOWAHIR SINGH AND OTHERS (*Defendants*). [8th, 9th and 10th December, 1886 and 19th February, 1887.]

TWO APPEALS AND A CROSS APPEAL CONSOLIDATED.

Hindu law, Joint family—Rights of members of a joint Hindu family in a talukdari estate—The Oudh Estate Act (I of 1869)—Partition and account against the talukdar—The Oudh Rent Act (XIX of 1868), s. 83. cl. 15, and s. 106—Limitation Act (XV of 1877), sch. II, arts. 127 and 120

A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate, as he has no definite share until partition. He may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account.

A talukdari estate, though entered in the name of one member of a joint family in the lists prepared in conformity with Oudh Estates Act, I of 1869, may be subject to a trust, implied from the acts and declarations of the talukdar, for the joint family as a joint estate. *Hardeo Baksh* v. *Jowhir Singh* (1).

In that suit, commenced in 1865 by a member of a joint family for the declaration of his rights, partition not being claimed, the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the members of the family.

The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits.

Held, that, in regard to the order of Her Majesty above-mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari estate could not be declared to be impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under-proprietor under the talukdar, could not be allowed to stand.

[494] *Held,* also (*a*) that the first suit, as one for partition and an account, was not barred by limitation under Act XV of 1877, s. 120, and must be decreed; (*b*) that the provisions of the Oudh Rent Act, XIX of 1868, s. 8, cl. 15, and s. 106, precluding proceedings in the Civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been

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(1) 3 C. 522=4 I.A. 178.

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recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate; and (*c*) that the sections of the Code of Civil Procedure relating to the mesne profits were not applicable to a suit for partition or for an account of the proceeds of family estate in which a plaintiff has no specific interest until decree.

[**F.**, 3 C.P.L.R. 41 (44); 16 C. 397 (**P.C.**); **R.**, 16 B. 29 (37) (**F.B.**); 15 B. 247 (256); 7 Bom. L.R. 659 (662)=30 B. 101; 14 C.W.N. 221=3 Ind. Cas. 9; 8 Ind. Cas. 512 (515)=21 M.L.J. 21 (26)=9 M.L.T. 3 (7).]

The first of these appeals was from a decree (12th September 1882) of the Judicial Commissioner, affirming a decree (3rd January 1882) of the District Judge of Sitapur. The second appeal and the cross appeal were from a decree (16th July 1883) of the Judicial Commissioner in another suit, amending a decree (15th February 1883) of the same Judge.

The suit (1880) and cross suit (1881) out of which these appeals arose originated in proceedings taken to execute an order (11th March 1879) of Her Majesty in Council in *Thakur Hardeo Baksh and another* v. *Thakur Jowahir Singh* (1), instituted in 1865. Hardeo Baksh, who with his cousin Parbat Singh brought the first of the present suits, died in January 1884, leaving two sons, now the appellants. The parties were thus related:—

NEWAZ SINGH.

Hawanchal Singh.	Bhawani Singh.	Fatteh Singh.
Hardeo Baksh	Jowahir Singh.	Parbat Singh and Guneshi Singh.
Pirthi Pal Singh and Uman Parsad.		

The suit of 1865 was to obtain a declaration of the plaintiffs' rights as members of a joint family, under the Mitakshara, in the family estate, then consisting of 113 villages, in the Sitapur district, forming the taluk of Basa Dih and in the possession of Jowahir Singh, with whom the summary settlement was made in 1859 and who received a sanad, the taluk being afterwards entered in the lists prepared in conformity with the Oudh Estates Act, I of 1869.

[**495**] It was held in the judgment that, as Jowahir Singh might although his name was so entered, have nevertheless rendered himself a trustee of the beneficial interest belonging to others in the taluk (on which point reference was made to *Thakurain Sookraj Koonwar* v. *The Government* (2); and to *Shunkar Sahai* v. *Raja Kashi Pershad* (3), the question was whether the talukdar had agreed or had become in any way bound to hold the villages forming the talukdari estate, or the rents and profits thereof, in trust for the plaintiff and Parbat Singh.

An issue on this point having been sent to the Commissioner of Sitapur, and returned by him (9th June, 1877), the final judgment of the Judicial Committee—see *Hardeo Baksh* v. *Jowahir Singh* (1)—dealt with the case as it stood at the commencement of the suit in 1865. Their Lordships were of opinion that it was to be presumed from the acts and transactions of the defendant that there was a declaration of trust on his part in favour of the joint family; and that all the villages in suit, *viz.*, 78 villages, included in the summary settlement, with 20 villages,

(1) 3 C. 522=4 I.A. 178. (2) 14 M.I.A. 112. (3) 4 I.A. 198.

afterwards settled for as. 12, were granted by sanad to Jowahir Singh for services in the Mutiny; also 15 villages, acquired out of the rents and profits of the estate (after the summary settlement but before the institution of the suit), formd the joint family estate, and were held by the talukdar in trust for the family and subject to the rules of the Mitakshara. It was pointed out in the judgment that the plaint did not allege that the plaintiffs had been dispossessed of their rights, but that the defendant Jowahir Singh intended to dispossess them and to put a stop to their receipt of the profits, asking no other relief than that after enquiry proper orders might be passed, and not praying for separate possession or partition.

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The conclusion of that judgment was as follows:—

"Upon the whole, then, their Lordships are of opinion that it is to be presumed from the acts and transactions of the defendant that there was a declaration of trust by him in favour of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit were held by the defendant in trust for the family, as a joint family estate, governed by the rules of [496] the Mitakshara; and they rejoice to find that a loyal subject of the Crown, who rendered good-service to the Government in the time of the rebellion, has not been deprived of all his property by the Act of Confiscation and through the want of knowledge or the absence of remembrance on the part of the officers of Government of the moral claim which he had upon the Government for the restoration of his property.

"The plaint does not allege that the plaintiffs have been dispossessed of their rights, but merely that the defendant intends to dispossess them and to put a stop to the profits enjoyed by them, and they simply pray that, after enquiry, proper orders may be passed that they be not deprived of their right.

"Their Lordships must deal with the case as it stood at the time of the commencement of the suit.

"At that time there does not appear to have been any complete separation or division of the family, and the plaintiffs do not pray for a partition of the estate. Hardeo Baksh was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindu family. Their Lordships cannot, therefore, do more than humbly advise Her Majesty, which they will do, to allow the appeal and reverse the judgments and decrees of both the lower Courts, and to declare that the defendant holds the villages in suit in trust for the joint family, and as a joint family estate, governed by the rules of the Mitakshara, and to order and decree that the defendant do cause and allow the said villages, and the proceeds thereof to be managed, used, dealt with and applied accordingly; and that he do pay the costs of the plaintiff Hardeo Baksh in both the lower Courts out of the estate.

"Further, their Lordships do order that the costs of the plaintiff, Hardeo Baksh, in this appeal be paid by the respondent out of the estate.

"A question has been raised on the argument of this appeal whether, by reason of an arrangement alleged to have been entered into by Hardeo Baksh and Parbat Singh, pending the suit, the latter is entitled to the benefit of this appeal or the former to recover Parbat Singh's share as well as his own.

"It was also suggested that Parbat Singh had, after the [497] arrangement with Hardeo Baksh, entered into an arrangement with the defendant.

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"Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement (if any) which may have been made or entered into by or between any of the parties to the suit subsequent to the commencement thereof."

In execution of the order (22nd March, 1879) which followed upon the above judgment, Hardeo Baksh obtained an order from the Sitapur Courts, maintained on appeal to the Judicial Commissioner (11th September, 1879), that proclamation be made, by beat of drum, in each of the 113 villages forming the subject of the suit, that these are the estate of a joint undivided Hindu family, in which Thakur Hardeo Baksh has a member's rights; and which is held by Thakur Jowahir Singh in trust for the joint family; and that Thakur Jowahir Singh be enjoined, in the words of the decree, that he do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly, failing which he will be liable to be proceeded against under s. 260 of Act X of 1877.

Upon an application (2nd June, 1880) made by Hardeo Baksh under the Oudh Land Revenue Act, XVII of 1876, ss. 57 and 58, for the entry of his name as a co-sharer in the Collectorate register kept in pursuance of s. 56 of that Act, an order to that effect was made in reference to the villages as set forth in their Lordships' judgment. Afterwards, in further proceedings in execution against the estate in possession of Jowahir Singh, the Judicial Commissioner, while maintaining the order of June, 1880, stated his opinion as follows in regard to an account of the profits pending suit; "It is quite true, as urged by decree-holder's counsel, that a managing member of a joint Hindu family is bound to render an account of his management to his co-shares; but the first question for me to determine is whether, under the decree of the Privy Council and the order above [**498**] referred to, the decree-holder can enforce his rights to share from the commencement of this litigation to date of decision, in execution of his decree, or must bring a separate suit; and, under all the circumstances, it seems to me clear that he must proceed by suit."

This led to the first of the present suits, commenced 14th December 1880, in which Hardeo Baksh claimed—

(*a*) To recover one-third share of Parbat Singh and Guneshi Singh in the 113 villages, the subject of the former suit, on the basis of an agreement of the 23rd of March 1870, and that it be declared that the withdrawl petition of the 5th of February 1874 was invalid and of no effect.

(*b*) To recover two-thirds of all property (other than the said 113 villages) acquired from the profits of the joint estate in the hands of Jowahir Singh.

(*c*) To be placed in separate possession by partition of such shares.

(*d*) That, to the extent of the above-mentioned shares, the defendant be ordered to render accounts of the "mesne profits" during his management, and also from 28th August 1865 up to the present date and to the date of partition in future; and to pay all the money that may be found due, after deduction of all proper charges and costs of purchasing estates, etc., with the exception of so much profits of the third share of the 113 villages for which plaintiff's name had been entered in the Revenue

Records, and for which he could seek his remedy in the Rent Court since 1288 F.

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The agreements referred to in the plaint were the following: Whilst the suit of 1865 was pending, an agreement, dated 23rd March 1870, was executed between Hardeo Baksh, Parbat Singh, and Guneshi Singh described as co-sharers in Basa Dih; and, referring to the suit, they agreed that, if any one of them withheld payment of money for the expenses of the suit in proportion to his share, he should be held to have parted with his share to the other or others. Again, on the 5th February 1874.Parbat Singh and Guneshi Singh filed a petition, termed a *baz dawa* or withdrawal of claim, expressing their satisfaction with what had been awarded to them by way of maintenance by the Talukdars' [499] Committee of the British Indian Association upon a reference to arbitration. The Courts in India having held these agreements to be of no effect, and no question having been raised as to them on the present appeal, they are not material to this report.

Jowahir Singh having answered, alleging, among other things, that the estate was impartible, issues were fixed, raising questions, of which, for the purposes of this report, the following only are those that require mention, *viz.*, whether the suit was barred by limitation; whether the family had ceased to be joint on the occurrence of the litigation of 1865; whether a share could be claimed in the profits and the additions to the estate since that date; and whether the claim to an account was cognisable in a Civil Court and, if so, back to what date.

Meantime, Jowahir Singh, having previously sued to have the order of the 2nd June, 1880, which gave *dakhil kharij* to Hardeo Baksh, set aside (a suit which ended in being declared non-cognisable by the Civil Courts) brought the second or cross suit on 4th August, 1881. By this Jowahir Singh sought to establish that the order of Her Majesty of 22nd March, 1879, did not declare Hardeo Baksh to be entitled to any definite portion of the family estate, but merely to the rights of a member of a joint Hindu family, entitled, therefore, to share in the profits only, as distinguished from the estate itself, and to an account of his share in them, but not to a partition of the estate, it being impartible.

The first of these two suits was dismissed (3rd January, 1882) by the District Judge, who held that the suit was not barred by limitation, but, on other grounds, could not be maintained. Although Hardeo Baksh was entitled to a share in the rents and profits as he had been declared to be, he was not entitled to partition of the talukdari estate, nor, in regard to the provisions of Act XIX of 1868, could he claim an account of the rents and profits of the villages in the Civil Court, the jurisdiction in such cases being confined to the Revenue Courts. The District Judge also held that the plaintiff had not, by the agreement referred to in the plaint, acquired the rights of Parbat Singh and Guneshi Singh.

[500] An appeal against this decision was dismissed by the Judicial Commissioner (12th September 1882), who was of opinion that the claim for the share of the profits and for the share of the property purchased with the profits, was barred by time. Without its coming under art. 127 of the sch. II of Act XV of 1877, there was enough to bring it within art. 120:

In the second suit the District Judge's decree (15th February 1883) was that Hardeo Baksh was only entitled to one-third of the profits of the villages, as they stood at the time of the suit of 1865. In effect this

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was in favour of Jowahir Singh. As to the impartibility of the estate, which the Judge held established, he expressed his opinion that his judgment on this point in the other suit had not been overruled by the Judicial Commissioner, who had disposed of the case on another point.

On appeal, the Judicial Commissioner sought to reconcile the impartibility of the talukdari estate with the declaration of their Lordships in 1879, which in his opinion had only declared the rights of Hardeo Baksh as a member of the family in a manner consistent with his not having the right to divide the estate itself, though he had a right to share the profits. In modification of the decree of the District Judge, he ordered that Hardeo Baksh should have one-third of the estate separately apportioned to him, but that this should be held by him as an under-proprietor, paying the Government revenue, with the addition of 10 per cent. to the talukdar.

Hardeo Baksh having died in 1884, his sons, the abovenamed appellants, appealed from the decrees in the first and second suits, and Jowahir Singh filed his cross appeal in the second. The appeals were consolidated by an order of 5th June 1886.

Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon*, appeared for the appellants.

Mr. *R. V. Doyne* and Mr. *Theodore Thomas*, for the respondents.

For the appellants it was argued that the decisions of the Courts below, though differing on the point of limitation, as to which the opinion of the District Judge was correct, were both wrong in dismissing the first suit. This should have been considered [501] as a sequel to the suit of 1865, it having been rightly held in the execution proceedings of 1818 that to obtain an account of the rents and profits, pending the suit of 1865, this suit was necessary, as it also was to obtain the share of Hardeo Baksh in the villages purchased out of the profits. The Judicial Commissioner had erred in applying the law of limitation to the first suit; and both the Courts below were wrong in concluding that the Revenue Courts alone had jurisdiction to deal with the claim for the rents and profits of the villages other than those as to which Hardeo Baksh had obtained entry of his name on 4th June, 1880. To all, except the latter, Act XIX of 1868, ss. 83 and 106, were inapplicable. The decree in the first suit should, therefore, be reversed.

The decrees of the Courts below in the second suit, which in effect declared the impartibility of the estate, were also erroneous. They were in contravention of the decision of their Lordships in 1879, which regarded the estate as subject to the law of the Mitakshara. The Judicial Commissioner, in ordering that the one-third share decreed should be held by the heirs of Hardeo Baksh as under-proprietors paying their quota of revenue to the talukdar, with the addition of ten per cent., had make a decree which could not be supported.

For the respondent Mr. *R. V. Doyne* and Mr. *Theodore Thomas* contended that the decision of the Judicial Commissioner in the first suit was correct on the point of limitation. The claim of Hardeo Baksh to have a separate allotment of his share as a member of the family, not put forward when the suit was commenced in 1865, in the end had resolved itself into a mere claim for partition. This had not been made in due time. Again, without reference to limitation as a suit for the partition of the estate, the claim had been rightly dismissed, whatever might be the right to share in the rent and profits. And lastly, as to the latter, the provisions of Act XIX of 1868 were applicable to deprive the Civil Courts of

jurisdiction. The collection of rent, for such at most was the right of Hardeo Baksh, could be made only according to the law which gave jurisdiction to the Revenue, and not to the Civil, Courts.

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[502] In the second suit the talukdari estate had rightly been held to be impartible, there being nothing in the nature of such an estate inconsistent with its being held by a joint family; and consequently there was no contravention of the order of 22nd March 1879.

Mr. *J. F. Leith*, Q. C., replied.

On a subsequent day, 19th February 1887, their Lordships' judgment was delivered by:—

JUDGMENT.

SIR R. COUCH:—The parties to the suits, which are the subject of these consolidated appeals, are members of a Hindu family in Oudh, being the sons and grandson of three brothers, Hewanchal Singh, Bhawani Singh, and Fateh Singh. One of them, Hardeo Baksh, died pending the appeal to Her Majesty in Council and the appellants are his sons and representatives. Prior to the annexation of the kingdom of Oudh the family was joint, the respondent Jowahir Singh being the head of it and the manager of the family property. The lands which belonged to the family were confiscated to the British Government by Lord Canning's Proclamation of March 1858, and on the 28th of April 1858 a summary settlement of them was made with Jowahir Singh. He was consequently included in the list of talukdars in accordance with the Government letter of the 10th of October 1859, and a sanad was granted to him. After the passing of Act I of 1869 he was also registered in List No. 1 under s. 8 of that Act, and in List No. 5. On the 28th of August 1865, Hardeo Baksh and Parbat Singh brought a suit in the Settlement Court which then had jurisdiction in the matter, against Jowahir Singh by a petition of plaint, in which they stated that since the death of their fathers, they had been, according to the old order of things, living together, their expenses being paid out of the profits of the estate, the plaintiffs continuing in possession of the taluka, and the kabuliat standing in the name of the defendant; that he intended to dispossess them and keep them out of their permanent right to the profits; and they prayed that after inquiry proper orders be passed so that they be not deprived of their rights. In a written statement, dated the 6th of October 1865, they stated that they had been compelled by an order [503] of the Criminal Court, dated the 15th of September 1865, to give up possession, but that previously to that time they had held continuous possession. The defendant in his written statement alleged that he had held possession of the land without any co-sharer, and that a summary settlement had been made with and a sanad granted to him alone. The Courts in Oudh decided in favour of Jowahir Singh, and Hardeo Baksh appealed to Her Majesty in Council. It is unnecessary to refer to the judgments of the Oudh Courts, as the rights of the parties were determined by the final order of Her Majesty in the appeal. The case was twice before this Committee, and is reported in L. R. 4 I. A., 178 and 6 I. A., 161.

On the first occasion their Lordships, after referring to two previous cases—*Thakurain Sookraj Koowar* v. *The Government* (1); *Sunkar Sahai* v. *Rajah Kashi Pershad* not then reported but since reported, L. R. 4 I. A., 198—say:—

"Their Lordships are of opinion that, up to the time of Lord Canning's Proclamation, the whole of the villages mentioned in the summary settle-

(1) 14 M. I. A. 112.

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ment were the joint family property of the petitioner and Parbat Singh and the defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case, on the 8th of July, 1859, that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Parbat Singh, who were his partners, should claim, they would get their shares divided. He said: "They at present live with me, and receive food and clothing.' It does not appear clearly from the latter words whether the estate was held as joint family property or whether the defendant merely made an allowance to the plaintiff."

Their Lordships then, after saying that the lower Courts appeared to have decided the case merely upon the ground that the defendant was protected by the sanad, advised Her Majesty that the Commissioner should be directed to try, or to refer to the Settlement Officer for trial, the issue whether the respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sanad, or the rents and profits thereof, in trust for the appellant and Parbat Singh, or either of them. Her Majesty's Order in Council was made accordingly.

[504] On the 13th of December 1877 the Commissioner found that "there is no proof of any fresh act or agreement on the part of the respondent by which he became bound to hold the villages alluded to in the issue set in trust for the appellant and Parbat Singh, but that they were an undivided Hindu family up to 1865 and that the joint interest extended to the whole estate then in possession, ancestral and acquired."

The appeal came before this Committee again in January 1879, and judgment was delivered on the 1st of March. It is sufficient to quote the following passages from it. Having stated the finding of the Commissioner and that it was fully warranted by the evidence, it says:—

"Their Lordships are of opinion that the facts so found, coupled with the statement of the defendant in his application for a summary settlement, to the effect that Hardeo Baksh was his partner, and with his deposition of the 8th of July 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Parbat Singh, who were his partners, should claim, they would get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the defendant that the villages included in the summary settlement and sanad should be held by him in trust for the joint family, and as a joint family estate, subject to the law of the Mitakshara."

Their Lordships then state the reasons for their opinion, that the Act I of 1869 did not operate so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previously held the estate, and conclude by saying:—

"The plaint does not allege that the plaintiffs have been dispossessed of their rights, but merely that the defendant intends to dispossess them and to put a stop to the profits enjoyed by them, and they simply pray that they be not deprived of their right.

"Their Lordships must deal in the case as it stood at the commencement of the suit. At that time there does not appear to have been any complete separation or division of the family, and the plaintiffs do not pray for a partition of the estate. Hardeo Baksh was not entitled to any definite portion of the estate, but merely to the rights of a member of a

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joint Hindu family. Their Lordships cannot therefore do more than humbly advise Her Majesty, which they will do, to allow the appeal, and to reverse the judgments and decrees of both the lower Courts, and to declare that the defendant holds the villages in suit in trust for the joint family, and as a joint family estate governed by the rules of the Mitakshara [**505**] and to order and decree that the defendant do cause and allow the said villages, and the proceeds thereof, to be managed and dealt with and applied accordingly. . . . . Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit, subsequent to the commencement thereof."

Any member of a joint Hindu family may sue for a partition of the family estate, unless there is a family usage or a special law which makes it impartible. Jowahir Singh had himself said in 1859 that the estate was partible, and this is one of the grounds upon which it is said that up to the time of the quarrel in 1865 it was his intention that the villages included in the summary settlement and sanad should be held by him in trust for the joint family, and as a joint family estate. Their Lordships notice that the plaintiffs did not pray for a partition of the estate, and therefore say they cannot do more than advise Her Majesty to declare that the villages were held in trust for the joint family, and as a joint family estate. The order which followed this was applicable to a joint family property. There does not appear to be any reason for thinking that it was considered that the estate was impartible, and was to be held as such in trust for the family.

The order of Her Majesty in Council is dated the 22nd of March 1879. In or about May, 1879, Hardeo Baksh applied to the Court of the Deputy Commissioner of Sitapur for execution of it. The Deputy Commissioner made an order, from which there was an appeal to the District Judge, and from him to the Judicial Commissioner, who, on the 11th of November, 1879, ordered proclamation to be made by beat of drum in each of the 113 villages forming the subject of the suit of what had been declared by the order in Council. On the 2nd of June, 1880, Hardeo Baksh applied, under Act XVII of 1876, the Oudh Land Revenue Act, ss. 57 and 58, to have his name entered as a co-sharer in the taluka in the register which the Deputy Commissioner of each district is by the 56th section of the Act [**506**] directed to keep. And on the 4th of June 1880 the Deputy Commissioner ordered that—

"The name of Thakur Hardeo Baksh will therefore be entered in the register of co-sharers (the extent of his interest being one-third) in the joint family estate, consisting of the villages mentioned in the judgment of the Privy Council.

"Thakur Jowahir Singh will remain manager and lambardar.

"This order refers to the following villages:—

"1. Villages comprised in the Summary Settlement	78
"2. Villages granted in reward for services during the Mutiny (afterwards demarcated as 12)	20
"3. Villages acquired from the profits of the estate after Summary Settlement	15
	113
"Afterwards demarcated as	105

"Thakur Jowahir Singh will pay applicant's costs."

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This order was affirmed on appeal on the 13th of July 1880, but the Judicial Commissioner, on an appeal from another order relating to the execution, held that, in execution of the order in Council, Hardeo Baksh could not obtain an account from Jowahir Singh of the rents and profits of the taluk from the commencement of the litigation, but for that purpose must proceed by suit. This was on the 2nd of August 1880, and on the 14th of December 1880, Hardeo Baksh instituted the first of the suits which are the subject of these appeals.

The plaint, after stating the facts, and that on the 30th of May 1879, the defendant refused to determine the amount of wasilat (amount collected), and to adjust accounts of the profits which had accrued during the pendency of the suit, and with which considerable additions had been made to the family estate, and to fix the exact extent of the share to which the plaintiff was entitled, prayed that a *baz dawa* (petition of withdrawal of suit), dated 5th February 1874, executed by Parbat Singh and Guneshi Singh in Jowahir Singh's favour, was invalid and of no effect as against a previous agreement of 23rd March 1870, executed in the plaintiff's favour, and that the plaintiff was entitled, as against Jowahir Singh, to recover Parbat Singh and Guneshi Singh's share in addition to his own; that the plaintiff [507] should be put in separate possession by partition to the extent of the aforesaid shares of the 113 villages, and all the property which had been acquired by Jowahir Singh, with the profits of the joint estate and the joint property not included in the former suit, a list of which was attached to the plaint. It also prayed that, to the extent of the above-mentioned shares, the defendant should be ordered to render accounts of the profits during his management, and to pay all the money that might be found due after deducting all proper charges and costs of purchasing estates, with the exception of so much profits of the third share of the 113 villages for which the plaintiff's name had been entered in the Revenue Records, and for which he could seek his remedy from the Rent Court, since 1288 F., the time when his name was entered. The lists attached to the plaint contained the names of 144 villages, in addition to the 113, also a number of debts due to the estate on mortgages, a large number of bond debts, and moveable property of various kinds of considerable value.

Jowahir Singh in his written statement said that, by the *baz dawa* of the 5th of February, 1874, and by way of family compromise, Parbat Singh and Guneshi Singh relinquished all rights and claim to a share in the taluka in his favour, and declared themselves satisfied with and accepted from him certain property as and by way of maintenance which had been awarded to them on the 11th of July, 1869, under an arbitration of the British Indian Association; that the claim to property in his possession at the date of institution of the suit in 1865 was barred by the law of limitation as well as by s. 43 of Act X of 1877; that the plaintiff was not entitled to any accounts from 1865 or any other date, and was in the position of an ordinary sharer suing a co-sharer who would have his remedy in the Rent Courts and in respect of three years' profits only; that the plaintiff was not entitled to the partition prayed for; and that he, Jowahir Singh, held the taluka as an integral impartible estate according to the rule of primogeniture without any trust in respect of such talukdari rights and status, though, as ruled by Her Majesty in Council, subject to a trust in respect of a portion of the profits in favour of the plaintiff. The plaint was then amended by making Parbat and Guneshi Singh defendants, and praying

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that [508] if the plaintiff was held to be not entitled to their full share, it might be decreed that as a joint property it was divisible in equal shares between him and Jowahir Singh.

The District Judge in his judgment, dated the 3rd January 1882, held that the suit was not barred by the law of limitation. This, in their Lordships' opinion, was right. The plaintiff had in 1879 been declared by the order in Council entitled to share in the 113 villages and the proceeds thereof as a joint family estate. It was preposterous to allege, as the written statement did, that his claim to that was barred by the law of limitation. It clearly was not. It was equally preposterous to allege that he had his remedy in the Rent Court for the profits of the estate received by Jowahir Singh whilst the suit of 1865 was pending, and that he could only recover three years' profits. The provision in the Oudh Rent Act (XIX of 1868) supposed to be applicable is cl. 15 of the 83rd section, which gives exclusive jurisdiction to the Courts of Revenue in Oudh over suits by a " sharer against a lumberdar or co-sharer for a share of the profits of an estate or any part thereof, or for the rendering and settlement of accounts in respect of such profits.'' And by the 106th section, suits for the recovery of a share of profits are to be instituted within three years from the date on which the share of profits claimed shall have become due. A member of a joint Hindu family cannot sue for a share of profits, as he has no definite share until partition. These provisions might apply to the profits of the 113 villages after Hardeo Baksh had been entered in the register as a co-sharer under the order of the 4th of June 1880, but they are applicable only to co-sharers, and it seems only where the co-sharers and lumberdars are entered in the register, and therefore they could not apply to the 144 villages, and certainly not to the moveable property of the family. Moreover, this defence is inconsistent with the defence that the taluka is impartible, for by the entry in the register Hardeo Baksh was made a co-sharer to the extent of one-third. That entry still remains, and Hardeo Baksh may fairly contend that there has been a partition of the 113 villages. This is the reason for his excepting from his prayer for an account the profits of those villages since the entry in the register.

[509] The District Judge, in considering the question of the partibility of the estate, took this veiw of the entry in the register, and said the Revenue authorities had acted upon an interpretation which they had placed upon the order in Council. He then proceeded to dispute that interpretation, and quoting only the passage in the judgment of this Committee, " and the plaintiffs do not pray for partition of the estate. Hardeo Baksh was not entitled to any definite portion of the estate, but merely to the right of a member of a joint "Hindu family," he says: "The plaintiff could not, therefore, upon the strength of the Privy Council's decision, claim a partition- of the estate to the extent of his share in the profits, for the Privy Council has distinctly recorded that the plaintiff is not entitled to any definite portion of the estate.'' This seems to their Lordships a rather strange misapprehension, for until partition no member of a joint Hindu family is entitled to a definite portion of the family estate, and if that be a reason for his not being able to claim a partition of the estate, a partition could never be claimed. Independently of the construction which the District Judge thus put upon the judgment of this Committee, he pronounced his own opinion that under the Act I of 1869, or the sanad, the estate was not partible. The District Judge then proceeded, erroneously in their Lordships' opinion, to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the

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Code of Procedure as to mesne profits. These provisions are intended for and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree. He then said that, as there was no doubt the principal parties in the case stand in the position of co-sharer and lumberdar respectively, the claim to any share in the profits of the estate must be preferred in the Revenue Court. So far as regards the 113 villages after the entry of the names this might be true, but the Rent Court had no jurisdiction to take an account of the family property, consisting of the proceeds of those villages and of other property, and to make a partition of the whole. The most it could do would be to make a partition of the 144 villages, or any others that might have been purchased [510] and become family property. Finally, after deciding that the agreement of the 23rd March 1870 did not give Hardeo Baksh a title to Parbat Singh's share, he dismissed the suit with costs.

Hardeo Baksh appealed to the Judicial Commissioner, who, on the 12th of September 1882, gave his judgment. He agreed with the District Judge that Hardeo Baksh had not acquired a right to the shares of Parbat Singh and Guneshi Singh, and he held that Hardeo Baksh, having had his name entered in the revenue registers as a co-shārer, showed that he had ceased to be a member of the joint Hindu family, and that his claim to an account for a share of the profits and for a share of the property purchased with the profits was barred by the law of limitation because he had failed to sue to enforce his right to share or for partition in 1865. It is difficult to see how it could be thought that he failed to sue to enforce his right. In their petition, to the Settlement Court in 1866, by which the suit was begun, he and Parbat Singh prayed that, after enquiry, proper orders might be passed so that they should not be deprived of their rights, and the order in Council declared that Jowahir Singh held the 113 villages as a joint family estate, and that they and their proceeds should be applied accordingly. After that there could be no application in the present suit of the law of limitation to those proceeds.

The Judicial Commissioner then held that Hardeo Baksh was not entitled to any benefit from the resignation by Parbat Singh and Guneshi Singh, because he had ceased to be a member of the joint family. The *baz dawa* was executed on the 5th of February 1874, and their Lordships are unable to understand what ground there was for saying that Hardeo Baksh had then ceased to be a member of the joint family as regards the estate, though in other respects there might have been a separation. Finally the Judicial Commissioner held that it was not necessary to go into the question of the partibility of the estate, and dismissed the appeal.

Their Lordships have indicated their opinion that the conclusions of the lower Courts in the first suit, except that of the District Judge on the question of limitation, are erroneous, and it [511] is now necessary to refer to the second suit. This was brought by Jowahir Singh against Hardeo Baksh on the 4th of August, 1881, and the plaint prayed for a declaration of the share the defendant was entitled to in the villages named in the schedules, which were said by the District Judge to be identical with the property in suit in 1865, and that it might be further declared that the plaintiff was entitled to hold the property mentioned in the schedules as an integral impartible and indivisible estate or taluka, subject to the beneficial interest of the defendant in respect of the profits thereof to the extent of his share as declared by the Court. The district Judge adhered to

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the opinion he had declared in the first suit, that the estate was impartible, and said that Hardeo Baksh was only entitled to one-third of the profits of the property. The Judicial Commissioner, on an appeal to him, had to decide the question of partibility, in the first suit, he had left undecided. In his judgment on the 16th of July, 1883, he decided that Hardeo Baksh should "be declared entitled to have one-third of the estate separately apportioned to him, the one-third share so allotted to him to be held by him as a sub-proprietor, and subject to the payment of the Government revenue, plus 10 per cent."

The decree which was passed upon this judgment cannot be allowed to stand. It does not give to Hardeo Baksh the right which by Her Majesty's order in Council he was declared entitled to. The villages and the proceeds thereof were by that order declared to be a joint family estate, governed by the rules of the Mitakshara, and one member of the family could not rightly be made a sub-proprietor to another member of his share of the family property. Also the contention of Jowahir Singh in this and in the first suit, that he held the taluka as an integral impartible estate to himself and his heirs according to the rule of primogeniture, subject to a trust in respect of the profits, is inconsistent with the estate being governed by the rules of the Mitakshara. The direction that he should cause and allow the villages and the proceeds thereof to be managed and dealt with and applied "accordingly," that is, as a joint family estate, shows that the declaration that he held the villages in trust for the joint family was not intended to give him an impartible [512] estate. He did hold them in trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made. Notwithstanding Hardeo Baksh's clear right to a share of the profits of the villages, Jowahir Singh has pertinaciously refused to give any account of what he has been receiving since 1865, and their Lordships regret to see he has succeeded up to this time in not doing so. The suit for partition and an account stands dismissed by both the lower Courts, and Hardeo Baksh has only been declared in the second suit to be a sub-proprietor of a one-third share, against which declaration he appealed to Her Majesty in Council. It is unnecessary to consider whether he became entitled, as he claimed, to part of the shares of Parbat Singh and Guneshi Singh, because, in their Lordships' opinion, he was concluded from claiming more than a one-third share in the family property, by obtaining the order for the entry of his name as a co-sharer of one-third in the 113 villages, which order was affirmed on appeal, and is treated in the plaint in the first suit as a subsisting order. The second suit was unnecessary, as the questions raised in it might have been decided upon the issues framed in the first suit. Their Lordships think that the second suit should be finally disposed of by reversing the decrees of both the lower Courts, and ordering the suit to be dismissed with costs in those Courts and that the cross appeal should be dismissed with costs. The first suit should be remanded to inquire what the joint property of the family consists of, including therein the villages held by Parbat Singh and Guneshi Singh, and for that purpose to take the usual accounts, and when that has been done to allot to Hardeo Baksh a third part thereof, and to order that he recover the third part of the moveable property, with the costs of the suit, up to the making of but not including the costs of the inquiry, from Jowahir Singh; and to order that the costs of the inquiry, and taking the accounts, and of the partition, be paid out of the estates, and

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also to order that Hardeo Baksh be at liberty to apply under s. 57, Act XVII of 1876, the Oudh Land Revenue Act, to have his name entered as a co-sharer with Jowahir Singh in the immoveable property, to the extent of one third. The Judicial Commissioner may remand the suit to the [513] District Judge to do what is above directed, and their Lordships, under the circumstances, are of opinion that if any application should be made under the provisions of the Code of Civil Procedure for the appointment of a manager or receiver of the estate during the inquiry and taking the accounts, and until the partition, it would be a proper case for granting it. Their Lordships will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to make a decree remanding the suit to the effect and containing the directions before stated. The costs of these appeals and of the cross appeal are to be paid by Jowahir Singh.

Appeals allowed.

Cross appeal dismissed.

Solicitors for Pirthi Pal Singh and Uman Pershad Sing: Messrs. *T. L. Wilson & Co.*

Solicitors for Thakur Jowahir Singh: Messrs. *Barrow & Rogers.*

C. B.

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14 C. 513 (F.B.).

FULL BENCH.

Before sir W. Comer Petheram, Kt., Chief Justice Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris and Mr. Justice Ghose.

HARADHAN MAITI (*Appellant*) *v.* QUEEN-EMPRESS (*Respondent*).*
[4th June, 1887.]

Forgery—Intention—Penal Code, s. 466.

Where a document is made for the purpose of being used to deceive a Court of Justice it is made *with the intention* of being used for that purpose.

A person, therefore, who at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document.

[D., U.B.R. (1892-1896), 279 (284) Cr.]

ONE Haradhan Maiti was charged and tried before a Court of Sessions, sitting with Assessors, under s. 466 of the Penal [514] Code with having committed forgery of a document purporting to have been made by a public servant in his official capacity, and under ss. 109 and 466 of the Penal Code with having abetted by conspiracy the offence of forgery.

The facts were that, in accordance with a preconcerted plan, a sub-inspector of police sent a constable in disguise, named Maslauddeen, to the house of Haradhan, instructing him to persuade Haradhan

* Full Bench on Criminal Appeal No. 192 of 1887, against the order passed by F. Cowley, Esq., Officiating Sessions Judge of Midnapore, dated the 23rd or March, 1887.

(who was alleged to be a professional forger) to forge a certain notice purporting to issue from the office of a Deputy Collector; and that, in obedience to these instructions, Maslauddeen, taking with him an original notice addressed to one Mannu, issuing from the office of a Deputy Collector, went to the house of Haradhan, and after telling him that he required the notice for the purpose of a suit then pending between himself and a ryot (there being in reality no such suit in existence), and that he wished it to run in his name and not, as in the original in the name of Mannu, arranged that the forged notice should be prepared and ready for delivery on the next day, and that Rs. 25 should be paid for the work. On the next day payment was made in rupees, some of which had been previously marked, and the sum paid was made over by Haradhan to his father. After this payment had been made, and before the original and forged notices were made over by Haradhan to Maslauddeen, a sub-inspector and his constable, at a signal arranged and given by Maslauddeen, appeared on the scene and arrested Haradhan, finding both the original and forged notice on his person and the marked rupees on the person of his father; and on a search being made in the house of Haradhan, papers, on which rough copies of the original notice appeared, were found. At the trial the prisoner produced no evidence. The Judge, concurring with the assessors, found Haradhan guilty of an offence under s. 466 of the Penal Code, and sentenced him to seven years' rigorous imprisonment.

The prisoner appealed to the High Court. The case came on before Sir Comer Petheram, C.J., and Mr. Justice Ghose, who found the facts to be as stated above, but, doubting whether [**515**] the prisoner could be convicted of forgery on those facts, referred the question to a Full Bench.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.—The receipt of money by the accused to imitate a document bearing a Munsif's seal and signature, and the fact that he made the document in order that it might be used to obtain a decree for the person who had paid him to make it, show that the document was a false one within the definition of s. 464 of the Penal Code, and that the making of such a document was forgery within the meaning of s. 463, inasmuch as it was made with the intent that fraud might be committed. The offence is made up of the act of making the document and the fraudulent intent. The fact that the person who paid the accused to make the document had no intention of using it fraudulently does not affect the accused; his intention was undoubtedly fraudulent, and it is only his intention that the law refers to. I submit that the law does not require that it shall be possible that a fraud can be committed where the intention is clear. In *Reg* v. *Tytley* (1), where drugs were sold to a woman in order that she might procure abortion, it was held that; although the woman was not in the condition necessary and had no intention to use the drugs, but had only been employed by the police to trap the accused, the accused, having sold the drugs with the intent they should be so used, was guilty—*R.* v. *Nash* (2), Maule, J., says that it is not necessary to show an intent to defraud any particular person; and in *R.* v. *Holden* (3) and *R.* v. *Marcus* (4) there was no person who could have been defrauded.

No one appeared for the prisoner.

(1) 14 Cox. C. C. 502.
(2) 2 Den. C. C. 492 (499).
(3) Russ. & R. 154.
(4) 2 C. & K. 356.

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JUDGMENT.

The judgment of the Court (PETHERAM, C. J. WILSON, J., TOTTENHAM, J., NORRIS, J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This case of Haradhan Maiti is a case in which Mr. Justice Ghose and myself had doubts as to the legality of the conviction, because we felt that a question might arise whether, upon the facts which were found, the offence of forgery had been committed. I do not think we had any doubt that the facts [516] were correctly found by the assessors and the Judge, and that the conclusion of facts at which they arrived was correct; the only doubt we felt was whether those facts amounted to a crime.

The facts of the case are that in some town a person resided who was suspected of being a professional forger, and upon that suspicion the Sheristadar of the Judge's Court and the police set a trap to catch him, and the trap which they set for him was that they took him a notice which had been used in some suit and asked him to prepare a notice like it, that is, to make an exact imitation of it in that form, only changing one or two names, and they told him that their object in having the imitation of the notice made was that it should be used in the proceedings in a certain case for the purpose of deceiving the Court; so that they employed him to forge, or rather to make, a document for the purpose, as he understood them, of its being used to deceive the Court.

It is perfectly clear that, if the persons who employed the prisoner to make this imitation had been persons who were parties to a real suit and they had gone to him to prepare this document in order that they might be able to deceive the Court in that suit, and he had made the document for the purpose of its being so used, he would have been guilty of forgery. But the doubt we had was whether a person could be guilty of forging a document when the document was never intended to be used at all and represented absolutely nothing; in other words, whether the person who was the agent of the other for the purpose of making the document could have a wicked intention when the person who employed him, the principal, had no such intention. Feeling that doubt we decided that the case had better be argued before five Judges, in order that the matter might be considered and laid at rest once for all, and upon a consideration of the question we have all come to the conclusion that the facts are sufficient to sustain a conviction and we rely upon the case of *Reg* v. *Hillman* (1). In that case the offence with which the prisoner was charged was that of supplying a noxious drug to enable a woman to procure abortion. The facts proved were that he had supplied a drug, [517] the effect of which, if it had been taken by a woman, with child, would have been to cause abortion; but that the drug was purchased by a person whose object in purchasing it was to entrap the prisoner, and there being in fact no woman with child to whom it was intended to give the drug for the purpose of procuring abortion. In that case the same question arose, namely, whether the offence of supplying a drug to obtain abortion was committed when there was, in effect, no intention to obtain abortion. In that case the judgment of the Court was given by Sir William Erle, who was then Chief Justice of the Common Pleas, and than whom no greater authority ever sat on the English Bench, and what he says is: " The question asked of us is whether the intention of any other person than the defendant is necessary to the commission of the

(1) 1 Leigh & Cav. C. C. 343.

offence made punishable under this Statute (24 and 25 Vic., c. 100, s. 59). We are all of opinion that that question should be answered in the negative. The Statute is directed against the supplying of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and is, therefore, within the words of the Statute, as we construed them. He is also, in our opinion, within the mischief of the Statute, and ought to be convicted."

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It seems to us that that case is absolutely on all fours with the present because Sir William Erle there says, in effect, that where the drug was supplied for the purpose of its being used to procure abortion that is equivalent to supplying it with the intention to procure abortion. In the case before us this particular document was made for the purpose of being used to deceive the Court, and, being made for that purpose, we may, for the same reason as that on which it was held that an offence had been committed in the other case, say that it was made with the intention of being used for that purpose, and therefore we think that the offence was committed and that the prisoner comes within the *mischief* of the Statute; and as we feel no doubt that the facts found were correctly found by the Judge and the assessors, we confirm the conviction and dismiss the appeal.

T. A. P. *Appeal dismissed.*

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14 C. 518.

[518] ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

KALLY DOSS SEAL (*Plaintiff*) *v.* NOBIN CHUNDER DOSS (*Defendant*).* [7th March, 1887.]

Sale by Registrar—Title to property purchased at Registrar's Sale—Doubtful title, Enforcement of—Endowment—Rent charge.

The Court will not enforce a doubtful title on a purchaser where (*a*) there is a reasonable probability of litigation resulting; or (*b*) where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.

Case in which the title sought to be enforced did not fall within these rules.

THIS was an application on notice made by one Kally Doss Seal, the plaintiff in the suit of *Kally Doss Seal* v. *Nobin Chunder Doss* to vary or discharge a certain report of the Registrar, dated the 29th November 1886, made in pursuance of an order made in the above-mentioned suit.

The reference on which the said report was founded was one to enquire and report whether a good title could be made to certain property purchased by one Kristo Mohun Sen.

The evidence taken before the Registrar disclosed that certain properties, being No. 19, Baboram Seal's Lane, and No. 10, Carra Doss's Gully (the latter being now No. 5, Muddun Dutt's Lane), were formerly purchased by one Jogul Kishore Doss, the ancestor of Ram Chunder Doss and Nobin Chunder Doss, that these properties were alleged to have been dedicated by him to the sole purpose of the worship of a certain idol; the

* Original Civil Suit No. 512 of 1884.

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only documentary evidence of this dedication produced previous to 1858 was an extract from the Collector's register, showing that on the 22nd May 1802 a pottah was granted to the idol, and that the alleged dedicator was the shebait; that after the death of Jogul Kishore Doss his sons Ram Chunder Doss and Nobin Chunder Doss agreed to partition the said properties, and that for this purpose, they entered into a deed of partition, dated the 11th March 1858, under [519] which, as the deed witnessed, Ram Chunder Doss, his family and descendants, took No. 19, Baboram Seal's Lane "to live and reside in for ever as permanent tenants to the ancestral idol, paying for the same the rent at the due rate of Company's Rs. 5 per month;" and Nobin Chunder, his family and descendants, took No. 10, Carra Doss' Lane (No. 5, Muddun Dutt's Lane) "to reside in for ever as perpetual tenants of the said ancestral idol, paying for the same the rent of Rs. 5 per month;" that the deed further witnessed that the two brothers should take turns in performing the worship of the said idol, the idol being removed from one brother's house to the other in rotation; and that in the event of the party or representatives of the party whose turn it should be to perform the said worship not performing it, it should be optional to the other party to perform the same at the expense of the defaulter. The evidence further disclosed that the worship of the idol was still continued and the Rs. 5 a month paid; that the grandfather of defendant performed the sheva; that the Collector had refused to grant a pottah with regard to the property to Nobin Chunder Doss.

Subsequently Nobin Chunder Doss mortgaged the house No. 5, Muddun Dutt's Lane to Kally Doss Seal, Nobin Chunder alleging in his evidence that he had informed Kally Doss Seal that the property was *debutter;* this, however, was denied by Kally Doss Seal.

Kally Doss eventually brought a suit on the mortgage, and the house No. 5, Muddun Dutt's Lane, was sold by the Registrar and purchased by one Kristo Mohun Sen. Kristo Mohun then employed an attorney of the High Court to investigate the title to the house, and on such investigation it was discovered that there were no title deeds to the house, save and except the mortgage and the deed of partition of 1858. The purchaser on, as he said, discovering from this deed that the property purported to be *debutter* property, refused to carry out his purchase, and the matter was by an order of Court referred as above-mentioned to the Registrar to report on the title.

On the 29th November, 1886, the Registrar reported that after considering the evidence adduced before him in the presence of the attorneys for the purchaser and for the plaintiff, the defendant not appearing, he found that a good title could not be made.

[520] Kally Doss Seal thereupon took exception to this report, submitting that the report ought not to be accepted or acted on, the Registrar being wrong in directing upon the evidence adduced before him that a good title could not be made.

At the hearing of the application to vary the report—

Mr. *Bonnerjee* and Mr. *O'Kinealy*, for the plaintiff.

Mr. *Bonnerjee*.—There is no proof of any actual dedication which distinguishes the case from *Nollit Mohun Doss* v. *Khetter Mohun Doss* (1). Consent of the parties might put an end to the endowment. See *Konwur Doorganath Roy* v. *Ram Chunder Sen* (2).

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(1) Unreported. (2) 4 I.A. 52 (58).

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As to what is or is not sufficient to constitute an endowment, see *Brojo Soonduree Debia* v. *Ranee Luchmee Koonwaree* (1); *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (2).

There could have been no partition if the dediction was good. As to the question that it was the duty of the Court to find out whether the objection taken was good or bad, I refer to *Hamilton* v. *Buckmaster* (3); *Alexander* v. *Mills* (4); and an unreported case, Suit No. 567 of 1874, *Radhanath Mookerjee* v. *Taraknath Mookerjee*, decided by Phear, J., on 12th March 1875; and sumbit that the other side can at most show that there was a charge on the property of Rs. 5 per month, but to whom that charge was payable is not clear.

Mr. *Kennedy*, for the purchaser.—The title is so doubtful, if not actually bad, that the Court ought not to enforce it on a purchaser—*Blosse* v. *Clanmorris* (5).

Unless the title is a reasonable one the Court ought not to enforce it; the Collector's receipts show that the original grant was made as if there had been a dedication; it is impossible to obtain the deed of dedication which took place some time in 1802: [Trevelyan, J.—Suppose the property had been purchased in the name of the idol, the Collector would have given a pottah in his name.] The presumption must be that the title is in agreement with the documents produced; the recitals in the deed of 1858 are **[521]** evidence against the mortgagee. We have the persons having full power to deal with the property, dealing with it as *debutter;* we have the creation of a rent payable out of the property. [Trevelyan, J.—Can the descendants of either of those persons be sued for the rent?] There is a sufficient covenant for the payment of rent during the entire terms; and even if there were a difficulty in law equity would give assistance. The word "paying" has been held sufficient to create a rent charge. See *Cupit* v. *Jackson* (6). Coke, 47*a*, shows the words necessary to create a rent charge. [Trevelyan. J.—The question I have to consider is whether there is a rent charge, and whether the family cannot do away with the endowment.] There is no allegation that the endowment was put an end to by the family. With regard to the case of *Brojo Soonduree Debia* v. *Ranee Luchmee Koonwaree* (1), there the property was dealt with from the commencement as the Maharajah's own property; and in *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (2), the plaintiff failed to prove his case. In *Konwur Doorganath Roy* v. *Ram Chunder Sen* (7), the Court found that there was no evidence of endowment.

In the case of *Rajender Dutt* v. *Sham Chund Mitter* (8), there was a similar deed to ours; see also *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (9). As to the old rule of forcing a title on a purchaser, see *Rogers* v. *Waterhouse* (10); *Simmons* v. *Hezeltine* (11); *Pyrke* v. *Waddingham* (12).

Mr. *Bonnerjee*, in reply.

ORDER.

Trevelyan, J.—In this case I have to consider whether a good title can be made to a certain house which has been sold in pursuance of a mortgage decree.

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(1) 2 B. L. R. A. C. 155=11 W.R. 13=on appeal 15 B.L.R. 176 note=20 W.R. 95.
(2) 18 W.R. 399. (3) L. R. 3 Eq. 323. (4) L. R. 6 Ch. 124.
(5) 3 Bligh. 63. (6) 13 Price 729 (7) 4 I.A. 52 (58)=2 C. 641.
(8) 6 C. 106. (9) 5 C. 438=6 I.A. 182. (10) 4 Drewry. 332.
(11) 5 C. B. N. S. 554 (571). (12) 10 Hare 1.

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The matter was in accordance with the rules of the Court referred in the first instance to the Registrar, who has reported that a good title cannot be made out to the property.

Counsel on both sides have cited cases to me as to what sort of title the Court can force on an unwilling purchaser.

[522] The result of recent cases on this subject is laid down with precision in the last edition of Fry on Specific Performance, p. 388. On examining the title I will refer afterwards to what is there laid down.

The abstract of title started with the mortgage, which recited that the mortgagor was possessed of, or otherwise well and sufficiently entitled to, the house and premises.

On investigation the purchaser discovered a deed of the 11th of March 1858, made between the mortgagor and his brother Ram Chunder Doss and referring to this and other properties. This deed recites that one Jogul Kishore Doss, who was the paternal grandfather of these brothers, purchased in his lifetime (in the name of and appropriated for the sole purpose of the worship of a deity called "Muddun Mohunjee" established by him) two houses, one of which is the house in question.

The first question I have to decide is whether there was any endowment prior to the deed of 1858; the second question is whether the deed of 1858 created an endowment; and the third question is whether, if on the materials before me I come to the conclusion that there has been no endowment, there are circumstances in the title such as to prevent me forcing this title upon an unwilling purchaser. I think the case of *Alexander* v. *Mills* (1) shows that I must come to a conclusion on the first two questions. There Lord Justice James says:—"As a general and almost universal rule the Court is bound as much between vendor and purchaser as in every other case to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined."

As to the first question I have come to the conclusion that there is no evidence from which I can be satisfied that there was an endowment prior to the deed of 1858. Much reliance is placed upon an extract from the Collector's register, showing that on the 22nd of May 1802 a pottah was granted to the idol; that Jogul Kishore, the alleged dedicator, was described as shebait of the idol; and that in 1853 Ram Chunder and Nobin Chunder, the parties to the deed of 1858 and grandsons of Jogul Kishore, [523] were described as shebaits. There is no evidence of the terms of the alleged dedication, and except the recital in the deed of 1858 which is in vague terms, there is nothing to show that the profits of the houses were appropriated to the use of the idol. The fact that the house was purchased in the name of the idol, and that the purchaser was described in the Collector's books as the shebait, proves nothing. I cannot be satisfied that there was an endowment until I know what the terms of the endowment were. In the case of *Brojo Soondurec Debia* v. *Rance Luchmee Koonwaree* (2) there was a conveyance to the idol and the shebait, but there was no evidence of the objects of the alleged endowment.

It is true that it is difficult to prove the terms of an old endowment, but there is no definite evidence as to what took place before 1858, from which I could infer the terms of the endowment. There is no doubt that the deed of 1858 is inconsistent with the alleged anterior endowment, and that since 1858 the parties have acted on the deed of that year.

(1) L. R. 6 Ch. 131.

(2) 15 B. L. R. 176 note=20 W. R. 95.

I think I must hold that prior to the deed of 1858 there was no endowment. In this conclusion I agree with the Registrar. Does the deed of 1858 create an endowment? The first paragraph of the deed recites the partition of the moveable property of the two brothers. The second and third paras. are as follows: "That the said Ram Chunder Doss, his family and descendants, shall alone occupy and live and reside in the said house and premises No. 19, Baboram Seal's Lane in Mullungah aforesaid, and shall continue to do so for ever as permanent tenants to the said ancestral idol called 'Muddun Mohunjee,' paying for the same as hereinafter mentioned the rent at the rate of Company's Rupees Five per month, commencing from the first day of the present month of Magh in the Bengalee year One thousand two hundred and sixty-four, and the ground-rent and house-tax, including the expenses for the repairs of the said last-mentioned house and premises, shall be paid and borne by him the said Ram Chunder Doss and his descendants.

"That the said Nobin Chunder Doss, his family and descendants, shall in like manner occupy and live and reside in the house [524] and premises No. 10, Carra Doss's Lane in Mullungah aforesaid, and shall continue to do so for ever as perpetual tenants of the said ancestral deity called 'Muddun Mohunjee,' paying for the same as hereinafter mentioned the rent at the rate of Company's Rs. 5 per month, commencing from the said first day of the present month of Magh One thousand two hundred and sixty-four, and the ground-rent and house-tax, including the expenses for the repairs of the said last-mentioned house and premises, shall be paid and borne by the said Nobin Chunder Doss and his descendants."

These are the two houses said to be endowed.

The 4th paragraph recites the payment of Rs. 1,000 for the purpose of adding buildings to the house No. 10, Carra Doss's Lane, that sum being the difference in value between the two houses.

The 5th and 6th paragraphs are as follows: "That the said Ram Chunder Doss and Nobin Chunder Doss respectively, and each of their heirs and representatives, will and shall perform the said worship of their said ancestral deity called "Muddun Mohunjee," each doing so turn by turn for the space of one year, the said Ram Chunder Doss doing so first, commencing from the first day of the present month of Magh One thousand two hundred and sixty-four, and the said Nobin Chunder Doss doing so in the following year, and the said Ram Chunder Doss doing so the next following year, the said Nobin Chunder Doss the then next following year and so on year by year, and for the purpose of such worship the party or the heirs and representatives of the party, whose turn it shall be to perform the same, shall be at liberty to take and keep with him and them the said idol, together with all jewels and other furniture belonging to the said idol to his usual place of abode as aforesaid during the year of his own turn, and in the event of the party, or the representatives of the party whose year or turn it shall be for him to perform the said worship, not performing the same, it shall be optional to the other party or his representatives to perform the same during that year at the expense of the defaulter.

"That each of them, the said Ram Chunder Doss and Nobin Chunder Doss respectively, and their and each of their heirs [525] and representatives, shall, during his and their own turn of worship, apply himself and themselves towards the charges and expenses of such worship as aforesaid, the said monthly rents of the above-mentioned two several houses and premises payable by each of them and his heirs and

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representatives as aforesaid, together with the additional sum of Company's Rupees Five per mensem to be paid during his and their own turn of worship out of his and their own pocket, and in case any surplus shall remain in the hands of the said parties of the first and second parts, or their heirs or representatives after defraying charges and expenses attendant on the daily worship of the said idol, or for the periodical religious ceremonies thereof throughout the year during his and their turn of worship, the same shall be applied towards the making of some property or other of the said idol."

There then come mutual releases.

I think this deed does not create an endowment or a charge of any kind. It is only an attempt to tie up the property for the benefit of the heirs of the brothers. The Rs. 5 a month is called rent, but this is merely a name. It is not a rent charge. The deed itself (para. 5) provides the remedy in case of non-payment of this so-called rent. The ordinary remedies for the recovery of a rent charge are therefore excluded.

The house is not given to the idol. There is no valid gift of the house to any one. The Rs. 5 a month is not payable by the occupier of the house. It is only payable by the mortgagor and his descendants.

The cases of *Rajendar Dutt* v. *Sham Chund Mitter* (1), and *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2), relied upon by Mr. Kennedy are distinguishable from the present case. In the former of those cases there was an express gift to the idol, and in the latter there was an express charge in favour of the idol.

The next question is whether, having come to the above conclusions, I must still refuse to force the title on the purchaser.

At page 388 of the last edition of Fry on Specific Performance, the cases in which a Court would consider a title [526] doubtful are summarized. The only two which can have any application here are numbers 1 and 4. These are:—

(1) That there is a reasonable decent probability of litigation; and

(4) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court.

I do not see that there is any reasonable probability of ligation. No one seems to have disputed the mortgage or to have asserted any claim on behalf of the idol. I do not think that any Court could have a reasonable doubt as to the construction of this document. There is in it no trace of a gift or charge in favour of the idol.

In the result I must hold the title to be a good one. As the state of the title has only been disclosed by the enquiry, the purchaser must have his costs up to and including the Registrar's report.

These will be paid by the plaintiff and added to his claim. The purchaser must pay the plaintiff's costs of the exceptions and of the hearing before me. The rest of the plaintiff's costs must be added to his claim.

Application dismissed.

Attorneys for plaintiff: Messrs. *Ghose & Ghose.*

Attorney for purchaser: Mr. *Carruthers.*

T. A. P.

(1) 6 C. 106. (2) 6 I.A. 182=5 C. 438.

14 C. 526=11 Ind. Jur. 456.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

1887 June 2.

Original Civil.

14 C. 526=11 Ind. Jur. 456.

IN THE MATTER OF THE PROPOSED SUIT OF COLLETT AND ANOTHER *v.* ARMSTRONG. [2nd June, 1887.]

Leave to sue—Small Cause Court (Presidency Towns) Act (XV of 1882), s. 18—Discretion, Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction.

A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs. 23 for goods sold in Calcutta and forwarded by the East Indian Railway Company for delivery at Lucknow.

The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living [527] at a long distance from Calcutta and that the suit was one for a small amount.

Held, that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s. 18, and that the case was one in which the leave applied for should have been granted.

[R., 18 C. 144 (146).]

IN this case the Chief Judge of the Small Cause Court was directed to send up the records of a certain proposed suit, in which leave to sue under s. 18 of the Small Cause Court Act had been refused.

On the 6th May, 1887, an application was made on behalf of Messrs. Collett and Bridge, partners in the firm of Kellner & Co., for leave to sue one C. M. Armstrong, a Sub-Deputy Opium Agent residing at Lucknow, for goods sold and delivered, amounting in value to Rs. 23-7. The goods were ordered by Armstrong in Calcutta by a letter addressed to Messrs. Kellner & Co. in Calcutta, and the same were forwarded at his request by rail to Lucknow. The application, as usual, set out the fact that the defendant was then residing at Lucknow, that the plaintiffs were in Calcutta, and that it would be difficult and expensive for the plaintiffs to procure the attendance of their witnesses in the Court, within the jurisdiction of which the defendant was then residing. The learned Judge of the Small Cause Court refused the application without recording his reasons in writing, but orally made the following statement: "That, since the case of *Wallis* v. *Taylor* (1), and having regard to the great caution enjoined on this Court by the High Court in the case of granting leave (not refusing it), I have thought it proper not to give leave to sue defendants long distances off for comparatively small sums of money."

The plaintiff thereupon moved the High Court and obtained an order that the records be sent for.

Mr. *Woodroffe*, in support of the rule, contended that the Judge of the Small Cause Court had in reality exercised no discretion at all, or, if he had, he had exercised it wrongfully; that the points that he had considered were those of distance and the smallness of the amount in suit, both of which were considerations foreign to the Small Cause Court Act; that he had misconstrued the case of [528] *Wallis* v. *Taylor* (1) in considering that he was to take great caution in granting leave to sue, but not so in refusing leave; that in s. 18 of the Act the words "and leave of the Court has for reasons to be recorded in writing" ought to be

(1) 13 C. 37.

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construed as a statement whether or no the cause of action arose either wholly or in part within the jurisdiction; that it was never intended to give the Court power to refuse leave, if the cause of action has arisen either wholly or in part within the jurisdiction; that the words "giving jurisdiction" in the Charter were similar, omitting the words "for reasons to be recorded by him in writing." [TREVELYAN, J.—Is there any doubt that the High Court has discretionary powers in granting leave under the Charter?]—The only cases on the subject are *Radha Bibee* v. *Mucksoodun Doss* (1) and *Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub* (2); that, if there was a discretion, it was clear that it had not been exercised; and when discretion has not been exercised at all, that this Court would have power under s. 622 to supervise the order refusing leave—see *Shiva Nathaji* v. *Joma Kashinath* (3) as to the revisional powers of the High Court; that under the Specific Relief Act it was discretionary to grant relief, and that such discretion had under s. 22 of that Act to be exercised on legal principles; that as to the kind of discretion which ought to be used, the case of *Kalikissen Tagore* v. *Golam Ali* (4) was an example; that as a further example of the meaning of the word "discretion" as applied to a question whether an appeal lay as to costs—see *Jones* v. *Curling* (5), in which case *Cooper* v. *Whittingham* (6) is cited, which lays down that in such cases, where there is no omission or neglect, the Court has no discretion in disallowing costs; that, therefore, if a Judge finds that the cause of action has arisen either wholly or in part within the jurisdiction, he is bound to grant leave to sue, unless there are other reasons to the contrary, and, if so, such reasons must be recorded; that under the old Small Cause Court Act of 1864 a suitor had a right to have his case tried if the cause of action arose [**529**] within the jurisdiction; that, although the wording of the present Act was slightly different and somewhat against me if read according to the punctuation placed in the section, yet there is no good reason for supposing that the Legislature intended to deprive suitors of a right they had under the old Act; that, however, the case of *Burdwan, Maharani of* v. *Krishna Kamini Dasi* (7) lays down that Courts are not to rely on punctuation in construing Statutes. [TREVELYAN, J.—Where a Judge refuses on account of the smallness of amount you could file your suit in the High Court, but that could never have been intended, as the Small Cause Court was established for the purpose of the recovery of small debts; that, I think, shows that the amount in suit has nothing to do with the question; what do you consider is the meaning of the word "cognizable" in s. 18?] Mr. Woodroffe contended that it meant any suit other than a suit mentioned in s. 19, and that the word had been discussed in *Wallis* v. *Taylor* (8) although with reference to another Act, and further submitted that the form in which the order passed under the rule should run would be to direct that the order refusing leave be rescinded and for the Court to pass an order admitting the suit.

No one appeared on the other side.

ORDER.

TREVELYAN, J.—In this case I am asked to exercise the power given to this Court by s. 622 of the Civil Procedure Code and to set aside an order made by Mr. *Millett*, the Chief Judge of the Calcutta Small Cause

(1) 21 W. R. 204. (2) 13 B. L. R. 91 (101). (3) 7 B. 341.
(4) 3 C. 13. (5) L. R. 13 Q. B. D. 262. (6) L.R. 15 Ch. D. 501.
(7) 14 C. 372=14 I.A. 35. (8) 13 C. 37.

1887 June 2.

Original Civil.

14 C. 526=11 Ind. Jur. 456.

Court, refusing to permit the plaintiffs to institute this suit in the Calcutta Small Cause Court.

The suit which the plaintiffs sought to institute was for the purpose of recovering the sum of Rs. 23-7, the price of goods sold and delivered to the defendant in Calcutta. The defendant is residing at Lucknow. The goods were sold to the defendant in Calcutta, and were delivered to the East Indian Railway in Calcutta for transport to the defendant.

The 18th section of the Presidency Small Cause Court Act of 1882 provides that, subject to certain exceptions (which do not apply to this case), "the Small Cause Court shall have jurisdiction to try all suits of a civil nature, when the amount [**530**] or value of the subject-matter does not exceed two thousand rupees; and the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of this suit."

Mr. *Woodroffe*, who appears for the plaintiffs, contends that this section gives no discretion to the Judge of the Small Cause Court, but I do not agree with this contention. The provision in this Act is similar to the provision in s. 12 of the High Court Charter, and the word "leave" in that section of the Charter has always been construed as giving a discretion to the Court. It is true that in very rare instances has the High Court, when leave to sue has been applied for, refused such leave; but although I know of no instances in my own experience, I believe that occasionally leave has been refused, and it has always been assumed that the High Court has this discretion. In the case of *Wallis* v. *Taylor* (1) Mr. Justice *Pigot* refers to the Small Cause Court having a discretion under s. 18. This case is, I think, an authority on this point.

The question here is, has Mr. *Millett* exercised his discretion or has he not? In consequence of statements made by Mr. *Adkin* in the affidavit, which formed the grounds of this application, Mr. *Millett* has very properly sent up an explanation of what occurred. In that explanation he does not say expressly why in this particular case he refused leave to sue, but he denies the suggestion that he always refuses leave in cases under Rs. 100, and furthermore says that what he told Mr. *Adkin* was that, "since the case of *Wallis* v. *Taylor* (1), and having regard to the great caution enjoined on the Small Cause Court by the High Court in the case of granting leave (not of refusing it) he had thought it proper not to give leave to sue defendants long distances off for comparatively small sums of money." As I understand it, Mr. *Millett* applied to this case a rule which he seems to have framed from *Wallis* v. *Taylor*, *viz.*, that leave should not be given to sue defendants long distances off for [**531**] comparatively small sums of money. It appears that Mr. *Millett* has not acted upon the rule suggested by Mr. *Adkin*, namely, never to give leave in cases under Rs. 100; but Mr. *Millett* himself shows that he has made a rule never to give leave to sue defendants long distances off for small sums of money.

I do not think that there is anything in the judgment in the case of *Wallis* v. *Taylor* to justify Mr. *Millett* in framing such a rule. All that Mr. Justice *Pigot* said was: "We think it desirable to add that the discretion of the Small Cause Courts in giving leave to sue under s. 18 of Act XV of 1882 is one that ought to be only very cautiously exercised in cases such as the one before us." These expressions suggest no such rule

(1) 13 C. 37.

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as that which Mr. *Millett* has framed for himself. All that Mr. Justice *Pigot* seems to have meant by those observations is to repeat what was said by Mr. Justice *Wilson* in his judgment in the same case, where he says: "I wish to add that, in my judgment, when an application is made for leave to sue a military officer or other person compelled by his duty to be in a distant place, the discretion entrusted to the Court ought to be exercised with great care and discrimination" (1). In the case of *Wallis* v. *Taylor* the defendant was an officer doing duty with his regiment at Quetta. I was one of the Judges who sat with Mr. Justice *Pigot* in the trial of that case, and I certainly understood his judgment to be simply repeating the warning which was given by Mr. Justice *Wilson*. If Mr. *Millett* had had the opportunity of seeing Mr. Justice *Wilson's* judgment he would probably have taken a different view of Mr. Justice *Pigot's* observations.

I think that where, in a case of this kind, discretion is given to a Court, it is necessary that the Court should look into the circumstances of each case and should not frame for itself any rules. If a hard rule is to be made, it is for the Legislature to make it and not for the Court. The fact that the Legislature has not [**532**] made any rule shows that no general rule is to be made. The Court should look into each case by itself, take the circumstances of such case into consideration, and see that the section is not made a means of oppression.

The inappropriateness of the rule which Mr. *Millett* seems to have framed for himself is, I think, apparent. One of the objects of the existence of the Small Cause Court is to collect small debts for Calcutta tradesmen; yet according to Mr. *Millett's* rule the smallness of the debt is a reason for excluding the jurisdiction where the defendant lives afar off. Apart from the inconvenience which a tradesman must undergo in having to follow his debtor to a distant place, the costs which he must necessarily incur in doing so, and which are irrecoverable even in case of success, will frequently far exceed the amount of the debt. Thus there would be a denial of justice even in cases where the whole cause of action arose in Calcutta, and the defendant was, at the time he purchased the goods, residing in Calcutta.

I should have thought—I do not put it as a proposition of law, but as a principle of fairness and as a circumstance to be taken inot consideration by a Judge in exercising his discretion—that where goods are ordered of a Calcutta tradesman it is more reasonable that he should be allowed the use of a Calcutta tribunal than that he should be sent at great expense and inconvenience in pursuit of his debtor. Comparatively speaking the inconvenience to the debtor is small, and though there may be some inconvenience to a few alleged debtors who dispute the claims against them, this inconvenience is of trifling importance when compared with the evil of closing the doors of the Small Cause Court to Calcutta tradesman.

Before the passing of the present Act a tradesman who sought to recover a debt under Rs. 500, and whose debtor did not reside in Calcutta, could not proceed in the Small Cause Court, but, if the cause of action or a part thereof arose in Calcutta, he might sue in the High Court. Between the passing of the Act of 1864 and the passing of the present Act,

(1) The case of *Wallis* v. *Taylor* originally came before GARTH, C.J., and WILSON, J., who disagreed and no final opinion was given, the case being then referred to a Bench of three Judges by whom the case was eventually decided. The above quotation is from the recorded opinion of WILSON, J., when the case came before himself and the late Chief Justice.—ED.

if the cause of action were in Calcutta, a creditor for over Rs. 500 and less than Rs. 1,000 could sue in the Small Cause Court; thus the [533] creditor for the lesser debt was compelled to come to the higher and more expensive tribunal (compare s. 28 of Act IX of 1850 and s. 2 of Act XXVI of 1864). For, amongst other purposes, that of remedying this hardship the new Act was passed; yet Mr. *Millett's* rule entirely negatives this remedial effect of the new Act.

I do not think that in this case Mr. *Millett* has exercised any discretion at all. He has simply applied to this case the rule that I have referred to, and has not considered the circumstances of this case.

I must set aside his order refusing leave to sue.

Under the circumstances I think it better that I should also, under the powers given to me by s. 622 of the Civil Procedure Code, give leave to sue in the Small Cause Court. I accordingly give such leave.

T. A. P. *Order reversed.*

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14 C. 533.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

KHAJAH ASSENOOLLAJOO *v.* SOLOMON AND ANOTHER.*
[9th May, 1887.]

Security for Costs—Poverty—Speculative Suit.

The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him; it is otherwise where he is not the real litigant, but a mere puppet in the hands of others.

[R., U.B.R. (1892—1896), Vol. II, 279 (280); 18 C.W.N. 119 (121)=20 Ind. Cas. 703 (704).]

THIS was an application on notice made on behalf, of Bibee Solomon for an order that the plaintiff be directed to give security for the payment of all costs incurred and to be incurred in the suit of *Khajah Assenoollajoo* v. *Bibee Solomon*, and that all proceedings should be stayed until such security be given.

The affidavit supporting the application alleged (*a*) that the plaintiff was a permanent resident of Cashmere, and was merely a temporary resident in Calcutta for the purpose of bringing this suit; (*b*) that the plaintiff did not carry on any business in British India nor was he possessed of any property, moveable or immoveable, in British India; (*c*) that the suit was a speculative one carried on for the benefit, amongst others, of Rohim Bux, Aga Hossein Ally, Aga Ekram Ally and Gobind [534] Chunder Doss; that the plaintiff had in 1882 assigned over to Abdoor Rohim a moiety; of all his claim in the said suit and of all property that he might recover under the decree in the said suit in consideration of being advanced funds for the purpose of carrying on the said suit; that on the failure in business of the said Abdoor Rohim the plaintiff had on 11th December 1883 entered into a fresh agreement of a similar nature with Aga Hossein Ally, Aga Ekram Ally and Gobind Chunder Doss, and that monies had been advanced to the plaintiff under this agreement; that the plaintiff had on the 21st of April 1884 executed a mortgage in

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* Original Civil Suit No. 107 of 1886.

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favour of the persons last mentioned in pursuance of the agreement of the 11th December 1883; that at the present time there were several decrees out against the plaintiff remaining unsatisfied.

In reply the plaintiff alleged that he had been a permanent resident in Calcutta since 1880, and was still residing there; that he carried on business in shawls in Calcutta, and was possessed of certain household furniture and stock-in-trade in his residence at Calcutta in addition to certain property, moveable and immoveable, to which he was entitled under a decree of the 27th August 1883. He admitted the agreement with Abdoor Rahim, and that he had received from him Rs. 1,700 but alleged that he had repaid to him Rs. 1,000 out of such sum; further admitting the second agreement of the 11th December 1883, and the mortgage of 21st April 1884, and a further assignment of a 1-anna share to one Petumber Chowdhuri, but alleged that he still has a 7-anna interest in the estate, the subject of the suit, and denied that the suit was a speculative one.

Mr. *Bonnerjee* and Mr. *O'Kinealy* in support of the application, cited *Ram Coomar Koondoo* v. *Chunder Canto Mookerjee* (1) as showing that when a plaintiff sues for another person, security should be taken.

Mr. *Hill* and Mr. *Amir Ali* contra, cited *Morgan* v. *Evans* (2) *Wray* v. *Brown* (3); *Parker* v. *G. W. Ry. Co.* (4); *Armitage* v. *Grafton* (5); *Woorrall* v. *White* (6).

ORDER.

[535] TREVELYAN, J.—In this application the defendant seeks to compel the plaintiff to give security for the costs of this suit.

The first ground is that he does not reside in British India.

Although he is a native of Cashmere, he seems to have been for some time resident in British India, and it does not appear that he has been out of British India for a long time. This ground, I think, clearly fails.

The other ground is that he has disposed of a portion of his interest in the suit, that he is a pauper, and that the suit is a specultive one brought at the instance of and for the benefit of others.

There are a good many matters alleged which go to the merits of the suit, and to which I need not refer in dealing with this application.

In the 43rd paragraph of his affidavit Mahomed Ghouse states that in the year 1882 the plaintiff entered into an agreement with one Abdoor Rohim and others for the purpose of obtaining from them advances from time to time in order to carry on a suit referred to in that affidavit, and to meet his personal expenses during the pendency of the said suit and as remuneration for such advances he assigned over to Abdoor Rohim and others a moiety of all his claims in such suit, and of all property that he might recover under the decree in that suit. The plaintiff admits this agreement, and states that he owes Rs. 700 under it.

It is then alleged that on the 11th of December, 1883, the plaintiff entered into a fresh agreement of a similar nature with Aga Hossein Ali, Aga Ekram Ali, and Gobind Chunder Das, and that on the 21st of April, 1884, a mortgage was executed in favour of those persons.

The plaintiff admits this agreement and mortgage, but points out that he has still got a seven-anna interest in the estate, the subject-matter of this suit.

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(1) 2 C. 233. (2) 7 M. P.C. 344. (3) 8 Scott. 557.
(4) 9 C.B. 766. (5) 10 Jur. 377. (6) 3 Jo. & Lat. 513.

The 46th paragraph of Mahomed Gouse's affidavit contains an allegation which is denied and is unsupported. I do not think I can act upon it.

The 47th paragraph states that the plaintiff's landlord had to institute against him three suits, for small sums of rent.

The plaintiff states that he has satisfied these decrees, but [536] he does not state when he satisfied them. As he satisfied another suit for rent, which is referred to in the 48th paragraph of Mahomed Gouse's affidavit, after notice of this application had been given, in all probability he satisfied the three decrees also after notice had been given.

It appears from the affidavit of Mahomed Gouse that the defendant has been unable to realize from the plaintiff the costs of an interlocutory application which he was directed to pay.

There is no doubt, I think, that the plaintiff is a poor man, probably without any means at all, and that he is being assisted by others in obtaining funds for the purpose of carrying on this litigation, and that he has parted with a portion of his interest. I do not think that the case goes further than this. Mr. Bonnerjee for the defendant relied on some observations made by the learned Judge who delivered the judgment of the Privy Council in the well-known case of *Ram Coomar Koondoo* v. *Chunder Canto Mookerjee*. There Sir Montague Smith says (I. L. R., 2 Calc., 259):—

"It is the ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay proceedings until it is given. The new plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the McQueens and the defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-plaintiff under s. 73 of Act VIII." And later on in the judgment he says:—"It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit."

These observations were not necessary for the purpose of the decision, but I take it that there can be no doubt, apart from that decision, that this Court has power to require security for costs, if it finds that the plaintiff is not the real litigant, but that he is only a puppet in the hands of others. Sir Montague Smith did not, as I understand him, intend to apply to this country any principle in this matter different from that adopted by the Courts in England. As I understand the English decisions the Courts do not require security, because the plaintiff is a pauper or because he is a mere trustee, but they do require security when they find that he is not the real litigant. As Sir Montague [537] Smith puts it, if the plaintiff is suing for another, security is required.

The real question is whether the plaintiff is suing for himself or for another. In this case the plaintiff has a substantial interest in the suit, and, as far as I can see, the suit has been instituted by him on his own behalf. I must on the affidavits find this as a fact, and I must hold that this suit is really the plaintiff's suit, and that his name is not used by others for their own purposes. He is, I think, suing for himself and not for any one else.

The application must be dismissed with costs.

T. A. P. *Application dismissed.*

Attorney for plaintiff: Mr. *Temple.*

Attorneys for defendant: Messrs. *Watkins & Co.*

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CIVIL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Norris.

JAGADAMBA DEVI (*Plaintiff*) *v.* PROTAP GHOSE AND OTHERS (*Defendants*).* [21st May, 1887.]

Bengal Tenancy Act (Act VIII of 1885), *s.* 149—*Suit by third party claiming rent paid into Court in rent suit, Nature of—Title Suit—Institution Stamp.*

A suit by a third person under cl. (3) of s. 149 of the Bengal Tenancy Act is not a title suit and need not be stamped as such.

Per TOTTENHAM, J.—Such suit is in the nature of a suit for an injunction under the Specific Relief Act or else a declaratory suit.

[**Expl.**, 17 C. 829 (831); **R.**, 11 C.W.N. 380 (382).]

THIS case was referred by the District Judge of Birbhum under the provisions of s. 617 of the Civil Procedure Code for the decision of the High Court.

The facts were as follows: In a suit for rent by one Rash Bihari Mitra against Protap Ghose, and Bishum Laha before the Munsiff of Dubrajpore the defendants alleging that the rent claimed, namely Rs. 2-11-6, was due to one Jagadamba Devi, paid it into Court under the first clause of s. 149 of the Bengal Tenancy Act (Act VIII of 1885).

Notice under the second clause of that section having been served on Jagadamba Devi she filed a suit within three months [**538**] against all the parties to the rent suit, in which she claimed the amount deposited and a further amount of As. 8, which she alleged to have fallen due subsequent to the period covered by the rent suit.

The Munsiff, considering that the " suit " referred to in the third para. of s. 147 of the Act was a " title suit," ordered Jagadamba Devi's plaint to be returned in order that it might be so amended as to render it a plaint in a title suit, and the court-fee increased accordingly.

Jagadamba Devi did not comply with that order, but filed a petition contesting the Munsiff's view of the law. The Munsiff then directed that, in accordance with his previous order, the plaint should be returned to the petitioner in order that it might be filed within four days, with a stamp calculated on the valuation of the suit regarded as a " title suit." This order was dated 12th January, 1887.

Instead, however, of complying with such order, Jagadamba Devi filed an appeal against it. The District Judge in referring the case stated that, in so far as the court-fee was concerned, he did not think that any right of appeal existed as there was no " order of rejection," but that, so far as the order was to be regarded as an order returning the plaint for amendment an appeal would lie to him under cl. (*b*) of s. 588 of the Civil Procedure Code and in his letter of reference he stated his reason for referring the case as follows:—

" In order to decide it I must determine of what nature the suit contemplated by s. 149 (3), Bengal Tenancy Act, is, whether, *e.g.*, it is (*a*) a suit to declare the plaintiff's right to receive the particular sum deposited, or (*b*) a suit to declare the plaintiff's title as landlord as against the plaintiff in the rent suit in respect of the lands comprising the holding, the rent of which was sued for therein.

* Civil Reference No. 5 A of 1887, made by J. Whitmore, Esq., Judge of Birbhoom, dated the 31st of March, 1887.

"There is, I believe, no express authority on the subject, but I should be disposed to think that, as the question to be tried is one of title, the consequential relief should be calculated rather on the value of the land than upon a year or two's rent. 1887 MAY 21. CIVIL REFERENCE. 14 C. 537.

"But the point is new, not free from doubt, and likely to [539] recur very frequently. I would, therefore, solicit the opinion of the Honourable Court on the following question: 'Of what nature is the suit contemplated by s. 149 (3), Bengal Tenancy Act, and how should it be valued?'

"I should add that, although exception might perhaps be taken to Jagadamba Devi's plaint on the ground of misjoinder, I have refrained from considering the point, as it is not directly before me."

Baboo *Hari Mohun Chuckrabati* appeared on behalf of Jagadamba Devi.

No one appeared for the defendants.

The opinions of the High Court (TOTTENHAM and NORRIS, JJ.) were as follows:—

OPINIONS.

TOTTENHAM, J.—The suit in question under s. 149 (3) Bengal Tenancy Act, is not a title suit, and need not be stamped as such. It is in the nature of a suit for an injunction under the Specific Relief Act, or else of a declaratory suit.

NORRIS, J.—I agree that the suit in question is not a title suit. I do not think it is necessary to express any opinion as to what sort of suit it is.

H. T. H.

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14 C. 539.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

FEKOO MAHATO v. THE EMPRESS.* [21st April, 1887.]

Confession—Confession of an accused person—Evidence, Admissibility of confession in—Question and answer—Memorandum in English by Magistrate—Criminal Procedure Code (Act X of 1882), *ss.* 164, 364 *and* 533.

It is not necessary that the English memorandum referred to in para. 3 of s. 364 of the Criminal Procedure Code should be made in respect of confessions recorded under s. 164, as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364.

A confession of an accused person was recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal [540] Procedure Code while the case was under investigation by the police. No English memorandum of the nature referred to in s. 364 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence and no evidence was given under the provisions of s. 533 of the Criminal Procedure Code, that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions.

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* Criminal Reference No. 8 of 1887, made by, and Appeal No. 163 of 1887 against the order passed by J. Whitmore, Esq., Sessions Judge of Birbhum, dated the 17th of March, 1887.

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Held, upon the authority of the decision in *Titu Maya* v. *The Queen* (1), that as the accused was not prejudiced by the questions and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld.

[F., 9 C.L.J. 55=3 Ind. Cas. 625; R., 21 B. 495 (500); U.B.R. (1897—1901) 47 (50) (Cr.); 4 Bom. L.R. 785.]

IN this case the accused was charged with the murder of his sister and her child. The evidence against him consisted mainly of two confessions made by him—the first on the 22nd of November before the Sub-Divisional Magistrate, and the second on the 15th December before the Magistrate during the enquiry into the case. The first confession was recorded in Kaithi by a clerk in the presence of the Deputy Magistrate, in the form of a narrative and without the questions being recorded, and moreover no memorandum in English was written or signed by the Magistrate and appended to it as required by s. 364 of the Criminal Procedure Code. The second confession was recorded in the narrative form, but had the requisite memorandum. The other evidence and facts of the case are not material for the purpose of this report, the sole question being as to whether the two confessions were rightly admitted in evidence by the Sessions Judge. The accused was convicted and sentenced to death in respect of the murder of his sister, and to transportation for life for the murder of her child, and consequently the Sessions Judge referred the case to the High Court under the provisions of s. 374 of the Criminal Procedure Code. The accused also appealed.

The grounds upon which it was suggested that the two confessions were not admissible in evidence are sufficiently stated in the judgment of the High Court.

[**541**] No one appeared for the appellant.

Mr. *Kilby*, for the Crown.

The judgment of the High Court (TOTTENHAM and Ghose, JJ.) was as follows:—

JUDGMENT.

This case has been referred to this Court by the Sessions Judge of Birbhum under s. 374 of the Criminal Procedure Code for confirmation of the sentence of death passed by him on the prisoner. The prisoner has also appealed against the conviction and sentence. He has been convicted of two murders—that of his sister named Basseja, and of her child. The sentence of death has been passed in respect of the murder of Basseja, and in respect of the other murder the prisoner has been sentenced to transportation for life. He appeals against both convictions.

The case depends, we may say, mainly upon the confessions put in evidence in the Sessions Court. There were two confessions made by the prisoner before the Magistrate. The first was apparently under s. 164 of the Criminal Procedure Code while the case was still under investigation by the police. This confession was made on the 22nd of November last. The other confession was made in prisoner's examination before the Magistrate during the inquiry after the case had been sent up by the police. This examination was under s. 364. The examination and the confession under s. 164 have the defect that the questions put to the prisoner were not recorded. The answers were given in narrative form. As regards the examination under s. 364

(1) 8 C. 618 (note).

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there is no other defect. In that case the Magistrate made a memorandum in English at the time the examination was recorded, and the proper certificate was signed by him. As regards the confession recorded under s. 164 we find that there was no English memorandum made by the Magistrate, but the certificate required by that section was duly recorded. Both the confessions were admitted in evidence in the Sessions Court, and the conviction is based mainly upon them. Now s. 533 provides that "if any Court before which a confession or other statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate [542] recording the statement, it shall take evidence that such person duly made the statement recorded." We have had some little doubt as to whether the confession recorded under s. 164 was admissible without the evidence referred to under s. 533, because there was no English memorandum made at the time that it was recorded. But upon examination of the section we think that it was not necessary that any such English memorandum should be made in respect of that confession. Section 164 provides that such confession shall be recorded and signed in the manner provided by s. 364. Section 364 sets out the manner in which examinations of accused persons should be recorded. It appears to us that the manner in which such examinations should be recorded is fully set out in the first two paragraphs of that section. The provision for an English memorandum is contained in the 3rd paragraph. That paragraph provides that the Magistrate or Judge shall be bound "to make a memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record." This shows that the memorandum is not itself the record of the examination. What is tendered in evidence is the examination or confession recorded in the manner provided by the first two paragraphs of s. 364. The confession of the 22nd November was recorded in the manner prescribed excepting, as we have said, that the questions, put were not committed to writing. But that this omission is not fatal where the accused is not prejudiced by it is shown by a Full Bench decision in *Titu Maya* v. *The Queen*, reported in a note to the case of *In the matter of the petition of Munshi Sheikh* (1). The case itself was decided by a Division Bench of this Court, but the note to it contains the Full Bench decision referred to by us. That being so, we do not think that it was necessary for the Judge in the present case to take evidence under s. 533 in respect of either the confession under s. 164 or the examination under s. 364. And that these confessions were substantially true we think there is no [543] reasonable cause to doubt. The interval between the two was more than three weeks, during which time the prisoner was in custody. But on the 25th December when examined during the inquiry he fully confirmed the statement made by him on the previous 22nd November, and stated that it was all true. The circumstances under which the murder was discovered and suspicion fell upon the prisoner are set out in the judgment of the Sessions Court, and were such that we think it highly probable that the prisoner, a simple peasant, would suppose it to be useless to deny his guilt and would make a full confession. There seems to us no reason to discredit the other evidence

(1) 8. C. 616.

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in the case, which evidence shows that the prisoner followed up his confession by pointing out the precise scene of the murder, and by pointing out and giving up various articles which had been in the possession of the deceased, and some of which the prisoner had concealed after her death.

In the Sessions Court the prisoner retracted his confession, and told two stories in connection with it. One was that the confession recorded was not made by him at all, and the other that it was extorted from him by torture, the torture alleged being branding with a hot iron on the arm. Neither of these stories we think can be believed. The first story that he did not make the confession is absolutely negatived by the Magistrate's certificate. As to the other story it is simply incredible that the police sending in a prisoner to have his confession recorded should have branded him with a hot iron in such a manner that the fresh marks would be conspicuous. Besides that this story of the torture was never told by the prisoner till he was on his trial in the Sessions Court. We find therefore no reason to doubt the truth in the main of the confessions made by the prisoner upon which his conviction is chiefly based. In addition to the confession there is evidence to show that the prisoner was the last person with whom the deceased was seen alive, and upon his trial in the Sessions Court when examined he admitted what he had at one time denied, that the deceased came to his house, and that he had seen her out of the village, the motive of her removal being [544] the threat on the part of his caste fellows to excommunicate him if he allowed her to continue in his house.

Finding no reason for differing from the Sessions Judge, we must confirm the sentence of death, and dismiss the appeal.

H. T. H. *Appeal dismissed and conviction upheld.*

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14 C. 544.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

HORENDRA CHUNDRA GUPTA ROY AND OTHERS, MINORS, BY THEIR MOTHER AND NEXT FRIEND BUSUNTO KAMARI GUPTA (*Plaintiffs*) *v.* AUNOARDI MUNDAL AND ANOTHER (*Defendants*).*

[4th April, 1887.]

Limitation Act (XV of 1877), sch. II, art. 127—Suit for possession by purchaser from sharer in joint family.

Article 127 of sch. II of Act XV of 1877 does not apply to a suit where the plaintiff is a stranger who has purchased a share in joint family property from one of the members thereof.

[**Rel. upon**, 18 C. 642 (646).]

THIS was a suit to recover possession of a share in a taluk after establishing the right of the plaintiffs thereto. The share in question was alleged to have been purchased by the plaintiff's father from one Chikani by a deed of sale, dated the 1st Cheyt 1280 (13th March, 1874), and to have formed portion of the property of Chikani's husband Baru, and to have

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* Appeal from Appellate Decree No. 1565 of 1886, against the decree of H. T. Mathews, Esq., Judge of Mymensingh, dated the 28th of April 1886, affirming the decree of Baboo Mohendro Nath Ghose, Munsif of that district, dated the 25th of January 1886.

been inherited by her on his death. The principle defendant, Aunoardi Mundul, the son of Baru, and step-son of Chikani, contested the suit, claiming the property to be his and in his possession, and impugning the deed of sale as a fraudulent document. He further contended that the suit was barred by limitation.

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The plaint was filed on the 23rd January 1885, and in the deed of sale there was an admission that Chikani, the vendor, was not then in possession. The first Court found as a fact and this was not questioned in the lower Appellate Court, that Baru, from whom Chikani was alleged to have inherited, died not later than 1277 B. S., and both the lower Courts found that the plaintiffs [**545**] had failed to prove that either Chikani had been in possession within 12 years of the date of suit or that they or their father had, at any time, since the date of the deed of sale, acquired possession.

Both Courts, therefore, agreed in dismissing the suit on the ground of limitation, and the first Court went further and found that the deed of sale was not a genuine document and dismissed the suit on the merits.

The plaintiffs preferred this second appeal to the High Court, and it was contended on their behalf that art. 127 of sch. II of the Limitation Act (XV of 1877) applied to the case, as the defendant Aunoardi Mundul and Chikani formed members of a joint family, and that consequently the suit was not barred by limitation.

Baboo *Jogesh Chunder Roy*, for the appellants.

Baboo *Mokund Nath Roy*, for the respondents.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We are of opinion that this appeal must be dismissed. The only point urged before us is that the lower Courts are in error in holding that the plaintiffs' suit is barred by limitation, and the learned pleader for the appellants relies upon art. 127 of sch. II of the Limitation Act in support of his contention. We find, however, that in the case of *Ram Lakhi* v. *Durga Charan Sen* (1) it has been decided that that article will not apply to a case like the present, where a stranger has purchased the share of a member of a joint family, so that even supposing that the presumption which applies to a Hindu joint family would be applicable to the present case in which the parties are Mahomedans, we think that the contention relied upon by the pleader for the appellants must fail.

The appeal is therefore dismissed with costs.

H. T. H. *Appeal dismissed.*

(1) 11 C. 680.

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[546] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

GANEE MAHOMED SARKAR (*Judgment-Debtor*) v. TARINI CHARAN CHUCKERBATI (*Decree-holder*).* [5th April, 1887.]

Execution of decree—Foreign decree—Execution in British India of decrees of Courts of Native States—Evidence—Certified copies of foreign judicial records—Cooch Behar, Execution in British India of decree passed by Courts of—Civil Procedure Code (Act XIV of 1882), s. 434—Evidence Act (I of 1872), s. 86.

A decree of the Court of the Civil Judge of Cooch Behar was sent for execution to the Court of the District Judge of Rungpore. The copy of the record was signed by the Sheristadar instead of by the Judge himself. Upon receipt of the decree by the Subordinate Judge, a notice, under s. 248 of the Civil Procedure Code, was served on the judgment-debtor, calling on him to show cause why the decree should not be executed, and an order was forthwith issued for the attachment of his property. The judgment-debtor appeared and objected that the copy of the record was not properly certified, and, therefore, that the whole of the execution proceedings were bad. The Subordinate Judge ordered that the record be sent back to the Cooch Behar Court through the District judge, in order that a certificate might be given in proper form, and directed that the other points raised should be decided after the return of the papers. On appeal it was urged that the order of the Subordinate Judge was made without jurisdiction, but the District Judge rejected the appeal. The judgment-debtor appealed to the High Court.

Held, that the Subordinate Judge acted properly in sending the record back to the Cooch Behar Court to be properly certified, and also that he should have set aside the execution proceedings as being altogether void, but as that, formed no portion of the grounds of appeal urged in the lower Appellate Court, the appeal should be dismissed.

Per NORRIS, J.—*Quære.*—Whether the notification published in the *Calcutta Gazette* of the 8th April 1879, signed by the then Deputy Commissioner of Cooch Behar, and stating the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies, and which notification was published after a notification had been published by the Governor-General of India in Council under the provisions of s. 434 of the Civil Procedure Code to the effect that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British India as if they had been made [547] by the Courts of British India, was a compliance with the provision of s. 86 of the Indian Evidence Act at a time when there was a representative of the Government of India resident in Cooch Behar.

Per NORRIS, J.—The notification of the 8th of April, 1879, is now of no use as there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and consequently certified copies of judicial records of that State cannot now be received in evidence in the Courts of British India under the provisions of s. 86 of the Evidence Act.

THIS was an appeal from an order of the District Judge of Rungpore, refusing to set aside an order of the Subordinate Judge, relating to the execution of a decree passed by the Civil Judge of Cooch Behar which had been sent to the Rungpore Court for execution.

The facts of the case are fully stated in the judgment of Mr. Justice Norris.

Baboo *Ishwar Chunder Chuckerbutty,* for the appellant.

Baboo *Kuloda Kinkur Roy,* for the respondent.

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* Appeal from Order No. 224 of 1886, against the order of J. Whitmore, Esq., Judge of Rungpore, dated the 5th of April 1886, affirming the order of Baboo Dwarka Nath Mitter, Subordinate Judge of that district, dated the 2nd of April 1886.

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The judgment of the High Court (Norris and Beverley, JJ.) was as follows:—

JUDGMENT.

Norris, J.—The facts of this case appear to be as follows:—

The decree-holder, respondent, obtained a decree against the judgment-debtor, appellant, in one of the Courts of the Maharajah of Cooch Behar on the 12th of September, 1874. Subsequently the decree-holder applied that the decree might be sent for execution to the District Court of Rungpore. This application was granted, and a copy of the judicial record of the suit was sent to the Rungpore Court, and reached there on the 6th of February, 1886.

It is now admitted in argument at the Bar that the copy of the judicial record in the suit was defective, inasmuch as it did not "purport to be certified in the manner certified by the representative of the Government of India resident in Cooch Behar to be the manner commonly in use in that country for the certification of the copies of judicial records." The decree was made in the Court of the Civil Judge of Cooch Behar, and the copy of the record should have been signed by the Judge, his official designation being added below his signature [**548**] and the seal of the Court affixed; instead of this it was signed by the Sheristadar.

On the 8th February 1886, a notice, under s. 248 of the Code of Civil Procedure, was issued, calling upon the judgment-debtor to show cause on the 20th of February why the decree should not be executed, and on the same day, before he had had any opportunity of appearing to show cause, an order was issued for the attachment of his property. On the 20th of February he appeared and raised several objections to the execution of the decree. The only one of these objections which it is necessary to notice is the following. "The decree contains order for realization of the money from the mortgaged property only, and it contains no order for realization of the money in any other manner, hence the decree-holder is not competent to sell by auction any other property of your petitioner than the mortgaged one covered by the decree."

On the 1st of March to which day the case had been adjourned, the judgment-debtor appeared and raised further objections. In the first place he said that the copy record was not properly certified, and therefore the whole of the execution proceedings which had been taken against him were invalid, and in the second place he said that the plaintiff had no right to have his property attached on the 8th of February until he had had an opportunity on the 20th of February of appearing and showing cause why the decree against him should not be executed. The case was then postponed to the 2nd of April, on which day it came on before the Subordinate Judge. In the course of his judgment the Subordinate Judge says. "The judgment debtor takes several objections against the execution. His first point is that the decree is incapable of execution, because the Governor-General in Council has not by notification made the declaration specified in s. 434 of the Code of Civil Procedure. The plea fails, because such a declaration was made by the Governor-General in Council (High Court Circular Order Book of 1881, page 269). Then it is contended that the certificate of the copy of judicial records of the Cooch Behar Court being a true copy is not in correct form. I am bound to say that the objection, though technical, has weight, and as it is a question of form [**549**] which may again come up before the Court, it would be better that the attention of the Cooch Behar authorities be drawn to it. The

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Government of India, in pursuance of the provisions of s. 86 of the Indian Evidence Act and s. 434 of the Code of Civil Procedure, have prescribed that a copy of the judicial record being prepared, and the words 'true copy' written at the top of the Copy, it shall be signed by the presiding officer (or in the case of the Deputy Commissioner's Court, by the Head Clerk and Sheristadar), of the Court in which the original document is recorded, his official designation being added below his signature, and the seal of the Court affixed. The decree in the present case was made by the Court of the Civil Judge of Cooch Behar and not by the Deputy Commissioner. The certificate is signed not by the presiding officer of the Court but by a gentleman who, from the official designation, appears to be the Sheristadar. Hence this Court cannot consider the copy of the decree to be a true copy, and it must be sent back to the Civil Judge of Cooch Behar through the District Judge, in order that a certificate in proper form may be given. The other points will be decided after the papers come back."

I am of opinion that the Subordinate Judge acted quite properly in sending the record back to Cooch Behar to be properly certified, and I am also of opinion that he ought to have set aside the execution proceedings as being altogether void. Against the order of the Subordinate Judge the judgment-debtor appealed to the District Judge, and at the hearing of the appeal, whatever he may have urged in his grounds of appeal, he only took one point, *viz.*, that the Subordinate Judge had no power to send the record back for correction. He does not appear to have argued before the District Judge that the execution proceedings were void *ab initio*, and ought to have been set aside, nor did he complain of the Subordinate Judge for not deciding upon the abovementioned ground of objection of the 20th February. The District Judge dismissed the appeal. His judgment is as follows: "I do not see how a Court, which receives from another Court a legal proceeding in which there is an inadvertent mistake (which is purely one of form) upon the part of the latter Court, and sends it back with the suggestion that the error should be corrected, [**550**] acts without jurisdiction. The appeal is rejected." Now it is plain that the only point urged before the District Judge was that the Subordinate Judge had acted without jurisdiction in sending the record back to Cooch Behar. That judgment, which was delivered on the 5th April 1886, appears to be perfectly right, although I do not agree with the District Judge when he says that the error upon the record was "one purely of form." It is against the order of the 5th of April 1886, and only against that order, that this appeal is brought, and I am, therefore, constrained to say that the appeal fails.

But there is still a matter of very considerable importance which remains to be noticed. Section 434 of the Civil Procedure Code says: "The Governor-General in Council may, from time to time, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty and not established by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India." In pursuance of the powers thus conferred upon the Governor-General in Council the following notification was published in the *Gazette of India* on 7th March 1879: "Under s. 434 of the Civil Procedure Code the Governor-General in Council is pleased to declare that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British

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India as if they had been made by the Courts of British India." There was thus a legislative power given to Courts in India to execute the decrees of the Civil and Revenue Courts of Cooch Behar. Then came the question what machinery was to be employed for the purpose of executing these decrees, and what things were necessary to be proved before a Court in British India could execute those decrees. It was clearly necessary to prove the genuineness of the decree which came to the Court in British India from the Court of Cooch Behar. Upon that point it was necessary to refer to the provisions of s. 86 of the Evidence Act, which says: "The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine [**551**] and accurate if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records." Before the notification of 7th March 1879, appeared in the *Gazette of India*, the attention of the Legislature had been drawn to the difficulty which might be experienced if under s. 86 of the Evidence Act a certificate was to be required in each case of the manner in which documents are certified in Cooch Behar, and in order to get over this difficulty the then Deputy Commissioner of Cooch Behar, being the then "representative of the Government of India resident in such country," was directed to notify to the Government of Bengal "the mode in which copies of judicial records of the Cooch Behar Courts are certified as correct copies." On 8th April 1879, the following notification was published in the *Calcutta Gazette*:—

"With reference to the above notification (*i.e.*, the notification of 7th March, 1879) of the Government of India in the Foreign Department, the following certificate of the mode in which copies of judicial records are certified in the State of Cooch Behar is published for general information. I hereby certify that the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies is as follows: A copy of the judicial record being made, the words 'true copy,' are written at the top of the copy and it is signed by the presiding officer (or, in the case of the Deputy Commissioner's Court, by the Head Clerk and Sheristadar) of the Court in which the original document is recorded, his official designation being added below his signature and the seal of the Court affixed thus—

(True copy.)
A. B.
Dewany Ahilkar of Cooch Behar.

Seal of the Court.

G. J. Dalton,
Deputy Commissioner.

I express no opinion as to whether such a certificate so published [**552**] was a compliance with the provisions of s. 86 of the Evidence Act, when there was a representative of the Government of India resident in Cooch Behar. It is clearly of no use now the Maharajah of Cooch Behar has come of age, and there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and I do not see how certified copies of judicial records of that State can now be received in evidence in the Courts of British India under the provisions of s. 86 of the Evidence Act, and until some steps are taken by the Legislature

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there will be great difficulty in executing any decrees of the Courts of Cooch Behar in the Courts of British India.

BEVERELEY, J.—I concur with my learned colleague in holding that this appeal must be dismissed. The points pressed upon us are, first, that by the terms of the decree the decree-holder was restricted to execute the decree against the mortgaged property alone; and, secondly, that the attachment was bad, because it was made before the judgment-debtor had had an opportunity of showing cause why the decree should not be executed. The first point was decided by an order of the Subordinate Judge, dated 15th of May 1886, and no appeal was preferred against that order. It is contended now that we can take that order into consideration in the present appeal, which is an appeal against the order of the District Judge of the 5th of April. That is clearly not so, because no appeal lies to this Court direct from an order passed by the Subordinate Judge. The second point appears never to have been pressed in either of the lower Courts, and in the order of the 15th May the Subordinate Judge distinctly says that no other point has been pressed. For these reasons we consider that at this stage we cannot interfere, however much we may regret the irregularity that has occurred.

H. T. H. *Appeal dismissed.*

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[553] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

JOGESSUR DAS AND OTHERS (*Plaintiffs*) *v.* AISANI KOYBURTO AND ANOTHER (*Defendants*).* [22nd April, 1887.]

Bengal Tenancy Act (VIII of 1885), ss. 20, 21—Suits pending at time Act came into force—Suit for ejectment—Acquisition of right of occupancy.

Section 21 of the Bengal Tenancy Act applies to suits pending at the time the Act came into force, *viz.,* 1st November, 1885, which had not then resulted in a decree. In a suit instituted on 8th October 1885, to eject the defendants after notice to quit, it was held that, although the defendant had held the land from which it was sought to eject him for less than 12 years, and therefore would not, if the Bengal Rent Act VIII of 1869 had been applicable, have acquired a right of occupancy, yet the effect of ss. 20 and 21 of the Bengal Tenancy Act was to give him a right of occupancy, and therefore he could not be ejected.

[F., 15 C. 376 (F.B.).]

THE litigation out of which this appeal arose was commenced by the plaintiffs who were the holders of a divided share of a certain village bringing two suits against the defendants, the tenants of separate portions of the plaintiffs' estate to eject them after giving them notice to quit. The defence (among others not now material) was that the defendants had acquired a right of occupancy in the land, and therefore were not liable to ejectment. The suits were heard together by consent. As to the defendant in one of the suits, Ramdyal, both the lower Courts found on the facts that he had held the land for more than twelve years; that he had acquired a right of occupancy in the land held by him, and, therefore,

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* Appeal from Appellate Decree No. 2127 of 1886, against the decree of Baboo Nil Madhab Bandyopadhya, Subordinate Judge of Tipperah, dated the 22nd of July 1886, affirming the decree of Baboo Monmotho Nath Mukerjee, Munsif of Gouripore, dated the 22nd of March 1886.

in any case that suit must be dismissed. As regards the defendants in the other suit it was found that two plots of the land had been held by them for less than twelve years, but that they had been holding as tenants other lands on the plaintiff's share of the estate for more than twelve years. As to these defendants, therefore, the question arose whether sub-s. 2 of s. 21 of the Bengal Tenancy Act applied to them, so as to give them a right of occupancy in their entire holdings. That Act came into [**554**] force on the 1st November 1885, the suits having been instituted on the 8th October 1885. Both the lower Courts held that the sub-section 2 of s. 21 governed the cases as being cases pending when the Act came into force. The suits were therefore dismissed, and that decision was confirmed on appeal.

The plaintiffs appealed to the High Court.

Moulvi *Serajul Islam*, for the appellants.

Baboo *Kuloda Kinkur Roy*, for the respondents.

The judgment of the Court (MITTER and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This appeal relates to a part of the subject-matter of the original suit which was brought by the appellant as landlord to recover possession of certain plots of land which are in the possession of the defendant, as tenant under the plaintiff, on the ground that the tenancy has terminated by a notice to quit served upon the defendant, the tenant, some time after the 2nd of March 1883. As regards the plots involved in this appeal the finding of the lower Appellate Court is that they have been in the possession of the defendant for less than 12 years, and that he is a "settled raiyat" within the meaning of those words in s. 20 of the Bengal Tenancy Act. The suit was brought on the 6th October 1885, that is to say, before the new Tenancy Act came into operation. The lower Appellate Court has held that, under s. 21 of the Bengal Tenancy Act, the defendant-respondent before us has acquired a right of occupancy. This suit was a pending suit when the Bengal Tenancy Act came into force. The written statement of the defendant was filed after the 1st November 1885, *i.e.*, after the Act came into operation, and also the notice of the suit was served upon him after that date. It is clear that if s. 21 does not apply to this suit the lower Appellate Court is in error in holding that, as regards the plots involved in this appeal, the defendant has acquired a right of occupancy, because under Bengal Act VIII of 1869 the defendant was not entitled to rely upon his right of occupancy unless he had established that he had been in possession of the land in dispute in this appeal for 12 years. The lower Appellate Court thinks that s. 21 has a retrospective effect and applies to [**555**] all suits pending on the day on which the Act came into operation.

We think that the view taken by the lower Appellate Court is correct. We decide the question raised before us with reference to the express language of s. 21. It is true that on general principles an Act affecting the rights of parties would not apply to a suit commenced before the Act came into operation; but in this instance we find that the Legislature intended that s. 21 should apply to suits pending on the date on which the Bengal Tenancy Act came into force. The decision of this question therefore turns upon the language of sub-section 2 of s. 21 of the Tenancy Act. The sub-section is to the following effect: "Every person who, being a settled raiyat of a village within the meaning of the last foregoing section, held

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land as a raiyat in that village at any time between the 2nd day of March 1883, and the commencement of this Act, shall be deemed to have acquired a right of occupancy in that land under the law then in force." It is clear from this part of the sub-section that the Legislature provided that a settled raiyat as defined in the Act should be deemed to have acquired a right of occupancy in the land occupied by him as a raiyat in the village of which he is a settled raiyat between the 2nd of March 1883, and the commencement of the Act, that is to say, the 1st November 1885, not under the new Act but under the Act then in force, that is to say, Bengal Act VIII of 1869. It is clear, therefore, that this part of the section was intended to modify the provisions of Bengal Act VIII of 1869 as regards the class of suits specified therein during the period mentioned above. Then follow words which, in our opinion, indicate that the provisions already referred to were to apply to all suits instituted before the Act came into operation, and which had not resulted in a decree. These words are: "but nothing in this sub-section shall affect any decree or order passed by a Court before the commencement of this Act." That is to say, that the retrospective operation provided in the first part of the sub-section should have this exception only, *viz.*, that where a decree or order has been passed by a Court before the commencement of this Act relating to the rights of parties, such decree or order should [**556**] not be affected by the provisions regarding the retrospective operation of the section. It follows, therefore, that if a suit commenced before the Act came into operation has not resulted in a decree, it would be governed by the provisions of the section. Therefore, although on general principles a change in the law affecting the rights of parties does not ordinarily govern pending suits, yet, in this particular instance, the Legislature having made a provision to the contrary, we are bound to carry out the law.

The decision of the lower Court is therefore correct and this appeal must be dismissed with costs (1).

Appeal dismissed.

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14 C. 556 (F.B.)=12 Ind. Jur. 22.

FULL BENCH REFERENCE.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF GIRHAR NARAIN
TUSSUDUQ HOSAIN AND OTHERS *v.* GIRHAR NARAIN AND OTHERS.*
[23rd May, 1887.]

Legal Practitioners Act (XVIII of 1879), s. 32, Constructions of—Outsider practising as mukhtear, his liability to punishment—Mukhtears, their functions—Civil Procedure Code, s. 37.

Act XVIII of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers and duties of the mukhtears practising in the Subordinate Courts."

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* Full Bench Reference in Rule No. 69 of 1886, on the hearing of a petition from or order passed by J. M. Kirkwood, Esq., District Judge of Patna, dated 6th of October 1885.

(1) This case was followed in *Parbutty Churn Dass* v. *Komoruddin.* Appeal from Appellate Decree No. 2148 of 1886, decided by the same Judges (MITTER and BEVERLEY, JJ.) on 25th April 1887.

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When a person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32 of the Act.

The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtears who have failed to take out their certificates.

[557] *G.N.*, though not a certificated mukhtear, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act, *G.N.*, made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village."

Held that *G.N.* was neither a private servant nor a recognised agent of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners Act for having practised as a mukhtear.

Held also that, having regard to the Court in which *G.N.*, practised, the words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court." were equivalent to the words "to a fine not exceeding Rs. 250."

[R., 26 A. 380 (381).]

ON the 2nd of October, 1885, certain certificated mukhtears of Patna presented a petition to the District Judge complaining that certain persons, Girhar Narain, Bansilal, and a number of other persons, were practising as mukhtears in the Civil Courts contrary to the provisions of Act XVIII of 1879, and the rule and direction of the High Court, contained in the *Calcutta Gazette*, Part I. page 152, February 15th, 1882, describing the functions, powers and duties of mukhtears. Upon that petition notices were issued against the parties complained against to show cause why they should not be punished under s. 32 of Act XVIII of 1879. The Judge confined his enquiries to the case of Girhar Narain and Bansilal as sample cases. In his answer to the Court, Girhar Narain made the following statement: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chamari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Singh of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Mahto of Jaipur, Gunpat Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter form the mofussil from a person and act for him, he sending the *vakalatnama* with his [558] letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village. I sometimes get paid by the year and sometimes by the month. * * * * I cannot remember the names of the other ten or so who employ me in the Civil Courts." * * * * Bansilal also made a similar statement. It was admitted by his pleaders that Girhar Narain was in the habit of appointing pleaders and instructing them in the Civil Courts on account of his several masters. The Judge held that, although neither of the men was a qualified mukhtear, they were in the habit of practising and earning the greater part of their livelihood as mukhtears, and their duties far exceeded those of a private servant. He accordingly inflicted a fine of Rs. 5 as a nominal punishment on

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each of the persons under the provisions of s. 32 of the Legal Practitioners Act. Girhar Narain and Bansilal thereupon applied to the High Court (MITTER and AGNEW, JJ.), and obtained separate rules on the certificated mukhtears to show cause why the orders of the Judge should not be set aside. Bansilal having died in the meantime, Girhar Narain's matter alone came up for argument before MITTER and MACPHERSON, JJ., who referred the case to a Full Bench with the following observation: " Having regard to the general importance of the question raised in the rule we refer it to a Full Bench. The question for decision is whether upon the facts admitted by the petitioner he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

At the hearing before the Full Bench,—

Baboo *Saligram Singh*, in support of the rule:—The District Judge had no jurisdiction. Such a case as this does not come under the Legal Practitioners Act. Section 32 affects only such persons as are eligible to practise as mukhtears. The words " authorizing him to so practise in such Court or office " in s. 32 support the position. Even if the petitioner's case came under the Legal Practitioners Act, the man has done nothing which is rendered punishable by the Act. The High Court rule simply enumerates the functions of a mukhtear. It nowhere said that by performing any of those functions a man [**559**] will be considered to be practising as a mukhtear. There is no definition of " practising as a mukhtear." The petitioner is a private servant, and a private servant or a recognized agent is not within the provisions of the Legal Practitioners Act. The Act contemplates none but legal practitioners as such—See the decision of Mitter, J., in *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (1) also *Gujraj Singh, In re* (2) *In re Kali Churn Chand* (3); *In re Fuzzle Ali* (4).

Mr. *Woodroffe* (with him Mr. *O'Kinealy*) opposed the rule.—The petitioner is not a certificated mukhtear. He acts as a mukhtear and shows he is no private servant. The old cases do not apply here. Those cases were under the old Act (XX of 1865), which did not confer on the High Court the power to make rules as has now been conferred by s. 11 of the present Act. For the Statutory definition of " practising as a mukhtear " one must now refer to s. 11 and the rule framed by the High Court under it. Under s. 13 a pleader becomes guilty of unprofessional conduct by receiving instruction from such a man as the petitioner. It cannot, therefore, be said that a man in the position of the petitioner may lawfully give such instructions as he has been found to have done. Section 32 of the Act is not confined to men who are eligible to practise as mukhtears. Any one who does any of the acts provided by s. 11 of the Act is within s. 32—See the marginal note. On the value of a marginal note see *Attorney General* v. *The Great Eastern Railway Company* (5); *Venour* v. *Sellon* (6), *Claydon* v. *Green* (7) does not apply here. *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (1), discussed.

JUDGMENT.

The judgment of the Full Bench was delivered by

NORRIS, J., (MITTER, PRINSEP, WILSON & TOTTENHAM, JJ., concurring).—On 2nd October, 1885, certain certificated mukhtears presented a petition to the District Judge of Patna, complaining that many unauthorised persons were, contrary to law, acting in Court as certificated

(1) 6 C. 585. (2) 10 W.R. 355. (3) 9 B.L.R. Ap. 18. (4) 19 W.R.C. R. 8.
(5) 11 Ch. Div. 465. (6) 2 Ch. Div. 522. (7) L.R. 3 C.P. 511.

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mukhtears. The District Judge caused the persons complained against to be served with notice [**560**] to show cause why they should not be punished under s. 32, Act XVIII of 1879. On the 6th October 1885, Girhar Narain, one of the persons complained against, appeared by pleaders to show cause. The District Judge first heard what Girhar Narain's pleaders had to say on his behalf, and then, apparently without any objection on his part, put some questions to him.

The statement of the pleaders and the examination of Girhar Narain are thus recorded by the District Judge. "It is admitted by his pleaders that Girhar Narain, a certificated revenue agent, appoints pleaders and that he instructs them in the Civil Courts; but they say that he only does so on account of certain persons who are his masters, and who pay him a regular monthly salary for so doing." In answer to the Court Girhar Narain states: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chumari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Singh of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Collector Mahto of Jaipur, Gunpat Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village. I sometimes get paid by the year and sometimes by the month. Collector Mahto pays me Rs. 10 a year; he pays me that every Assin, and has done so every year for 12 years. The business I have referred to, and the names I have given as those of my employers, refer only to those who employ me in Civil Courts. I cannot remember the names of the other ten or so who employ me in the Civil Courts, but they pay me a yearly retainer. Mussummat Gujibun gives me, for what I do for her in connection with the Civil Courts, Rs. 25 per mensem. She pays me more than any one else. Tundon Singh gives me Rs. 80 a year." Upon this admission and statement the District Judge passed judgment as follows:—

"I am of opinion that the action admitted by Girhar Narain [**561**] far exceeds action as a private servant. In India pleaders and mukhtears seldom get cases out of the circle of their own recognised clients; they each have clients who habitually employ them. That is precisely the nature of the employment admitted by Girhar Narain, but he says he receives remuneration by the month or year instead of for the act. He may do this in some cases, but I doubt his doing so in all; if he does, his memory is marvellously short in not being able to mention their names, and I do not think the method of remuneration makes any real difference. When a man is so little of a private servant that he admittedly acts for at least twenty different families in different parts of this and other districts, he seems to me to be practising generally and professionally, earing a greater part of his livelihood thus as a mukhtear. This is a sample case, and I inflict the nominal fine of Rs. 5 under s. 32 of Act XVIII of 1879, my object being not so much to punish what has already been done as to prevent similar conduct for the future."

On the 5th January, 1886, Girhar Narain moved before Mitter and Agnew, JJ., for a rule calling upon the certificated mukhtears to show cause why the order of the District Judge should not be set aside on the following grounds, *viz.*: First, that it was made without jurisdiction;

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second, that ss. 10 and 32 of the Legal Practitioners Act, 1879, did not apply to the case; third, that the District Judge ought, upon the materials before him, to have held that the nature of the petitioner's work was not in contravention of any law or of any rule of the High Court, and as such he was guilty of no offence against the provisions of the Legal Practitioners Act; fourth, that the District Judge had misunderstood and misconceived the law in determining the case. The learned Judges granted a rule, which, on 8th December 1886, came on for hearing before Mitter and Macpherson, JJ., who made the following order, *viz.*: "Having regard to the general importance of the question raised in this rule we refer it to a Full Bench; the question for decision which we refer is whether, upon the facts admitted by the petitioner, he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

[**562**] The case was argued before us on the 15th April, when Baboo *Saligram Singh* was heard in support of the rule, and Mr. *Woodroffe* and Mr. *O'Kinealy* appeared to show cause. At the conclusion of the arguments we took time to consider our judgment. The first argument urged by the learned vakeel for the petitioner was that, assuming that Girhar Narain had practised as a mukhtear without being duly authorized so to do, yet he was not liable to punishment under the provisions of s. 32 of Act XVIII of 1879, as that Act applied only to mukhtears who had passed the required examination, received a certificate and had practised, after neglecting to renew the certificate, or during suspension, or after dismissal. In support of his first argument the learned vakeel referred to the preamble of the Act, and pointed out that it was an Act "to consolidate and amend the law relating to *Legal Practitioners*," to the definition of "Legal Practitioners" as given in s. 3 of the Act; to the power conferred upon the High Court by s. 6 "to make rules as to the qualifications, admission and certificates of proper persons to be mukhtears;" to the provisions of s. 7 as to the granting and renewing of certificates; and to the provisions of ss. 10 and 11 and from the language used in these sections, he argued that the Act was not applicable to a person in the position of his client, but only to "Legal Practitioners" as defined by the Act. The learned vakeel also laid much stress on the words of s. 32. That section enacts "that any person who practises in any Court in contravention of s. 10 shall be liable, by the order of such Court, to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorizing him to practise in such Court." The words "the amount of the stamp required by this Act for a certificate authorizing him so to practise," it was urged, pointed clearly to the case of a person who had passed the necessary examination for a mukhtear and was practising without a certificate, and not to an entirely unauthorized person such as the petitioner.

In the case of *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (1) which was a case under Act XX of 1865, which is repealed by Act XVIII of 1879, it seems to have occurred to Mitter J., [**563**] that s. 13 of Act XX of 1865, which corresponds to s. 32 of Act XVIII of 1879, "applied only to such persons as were qualified and enrolled as mukhtears, but who had practised as mukhtears without obtaining their certificates." This view does not seem to have been shared by White, J., for he makes no reference to it in his judgment; and Garth C. J., says: "The language of s. 13 does certainly seem to afford some ground for this view;

(1) 6 C. 585.

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and yet it would seem an absurdity that a man who is duly qualified and enrolled as a mukhtear, and who has only neglected to take out his certificate, should be subject to penalties and disabled under that section from suing for his fees, whilst a man who is neither qualified nor enrolled as a mukhtear, nor certificated, should be enabled to recover his fees, and be subject to no penalties; it is difficult to conceive that this could have been the intention of the Legislature." Whatever may be the proper construction to be put upon s. 13 of Act XX of 1865, upon which I express no opinion, I feel no difficulty in holding that the construction sought to be put on s. 32 of Act XVIII of 1879 is not the true one. Section 32 in distinct terms imposes a penalty on "any person" who practises in any Court in contravention of the provisions of s. 10, "which enacts that no person shall practise as a mukhtear in any Court not established by Royal Charter, unless he holds a certificate issued under s. 7 and has been enrolled in such Court, or in some Court to which it is subordinate." I am altogether unable to give the words "any person" in s. 32 the narrow construction sought to be placed upon them. They seem to me to embrace pure outsiders like the petitioner, as well as duly qualified and enrolled mukhtears who have failed to take out their certificates. The words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court" are, I think, equivalent (in this particular case, having regard to the Court in which the petitioner practised) to the words "to a fine not exceeding Rs. 250." It is to be observed that, where the Legislature wishes to deal with the duly qualified and enrolled mukhtear, it does so in precise terms—see ss. 33 and 34 and cl. (*c*) of s. 36. The second argument of the learned vakeel was that the petitioner had not practised [**564**] as a mukhtear. In support of the argument reliance was placed on the case of *In re Gujraj Singh* (1) decided by L. S. Jackson, J., on *In re Kali Churn Chand* (2); on *In re Fuzzle Ali* (3); and on the before-mentioned case of *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (4). All these cases were cases under the old Act of 1865, which conferred no power on the High Court "to make rules declaring what shall be deemed to be the functions, powers and duties of mukhtears,"—such powers were first given by s. 11 of Act XXIII of 1879. In the case of *In re Gujraj Singh*, L. S. Jackson, J., says: "The Court has had frequent difficulties in answering enquiries as to what the Legislature appeared to contemplate as the functions or privileges of mukhtears under the Pleaders and Mukhtears Act," and then goes on to decide that "there is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge and supplying information to the vakeels." In *In re Kali Churn Chand* (2) Kemp and Glover, JJ., held that the mere writing out of a petition for a party who himself presented it in Court was not an "acting" as a mukhtear within the meaning of s. 11 of Act XX of 1865. In *In re Fuzzle Ali* (3) Phear and Ainsley, JJ., held that "acting as a mukhtear" within the meaning of s. 5 of Act XX of 1865 meant "the doing something as the agent of the principal party which shall be recognized or taken notice of by the Court as the act of that principal, such, for instance, as filing a document." In *Kali Kumar Roy* v. *Nobin Chunder Chuckerbutty* (4) White, J., speaking for himself and Mitter, J., said: "The

(1) 10 W.R. 355. (2) 9 B.L.R. Ap. 18. (3) 19 W.R. Cr. 8. (4) 6. C. 585.

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question then resolves itself into this, whether the looking after a regular appeal and the giving instructions to pleaders in connection with it are practising as a mukhtear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a mukhtear, but I think the meaning may be gathered from s. 11 of the Act, which enacts that 'mukhtears duly admitted and enrolled may be subject to the conditions of their certificates as to the class of Courts in which they are authorised to practise, appear and act' (in the [565] report the word 'plead' is evidently by mistake used for 'act') in any Civil Court, and may appear, plead and act in any Criminal Court within the same limits. It may fairly be concluded from this that by practising as a mukhtear in a Court, the Legislature meant, in the case of a Civil Court, appearing or acting in that Court, in the case of a Criminal Court, appearing, pleading or acting in that Court. Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning. To appear for a client in Court is to be present and to represent him in various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. What the plaintiff is found to have done in the present case was not appearing or acting for the defendant in the sense in which, I think, the words must be understood, nor involved any such appearance or acting."

The Act of 1879 is, as was pointed out by Prinsep, J., in the course of the argument, an "amending" as well as a "consolidating" Act: and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers and duties of the mukhtears practising in the Subordinate Courts," thus obviating the difficulty which had been felt by the learned Judges in the cases above cited. The High Court has accordingly framed a rule prescribing the functions, powers and duties of mukhtears practising in the Subordinate Courts, and I am clearly of opinion that, if any person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule says are the functions or powers of a mukhtear, he practises as a mukhtear and is liable to a penalty under s. 32. One of the functions or powers of a mukhtear practising in the Subordinate Courts is that of "appointing and instructing pleaders." This the petitioner admits he does, and that not for [566] one person only, but for twenty; he has therefore practised as a mukhtear.

It was also argued that the petitioner was the private servant or recognized agent of his various employers, and therefore outside the provisions of the Act. No doubt under s. 13 a pleader may take instructions from the private servant of a party or the recognized agent of such party within the meaning of the Civil Procedure Code, but there is no provision authorizing a mukhtear to take such instructions, and if there were, I do not think the petitioner is the private servant of any of his employers or the recognized agent of any of them within the meaning of s. 37 of the Civil Procedure Code.

I would answer the question referred to us in the affirmative.

The result will be that the rule will be discharged with costs.

K. M. C. *Rule discharged.*

1887 April 30.

Appel-late Crimi-nal.

14 C. 566.

14 C. 566.

APPELLATE CRIMINAL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

SUKAROO KOBIRAJ (*Appellant*) v. THE EMPRESS (*Respondent.*)*
[30th April, 1887.]

Causing death by a rash and negligent act—Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk"—Penal Code (Act XLV of 1860), *ss.* 304A, 88, and 52.

A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged under s. 304A of the Penal Code, with causing death by doing a rash and negligent act.

It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of s. 88 of the Penal Code, as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk.

Held, that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88.

[567] *Held,* further, that s. 88 did not apply to the case, as it was not shown by the accused, on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk.

Held, also, that under the circumstances the conviction under s. 304A, was a proper one.

[R., Rat. Unrep. Cr. Cases. 603.]

IN this case the prisoner was charged with an offence under s. 304A, of the Penal Code. There was no dispute about the facts. The prisoner was a kobiraj and he operated on one Manai, a peasant, for internal piles. The operation consisted in cutting out the piles with a common clasp knife after pulling them down with an iron hook. The result of the operation was that Manai, who was an old and feeble man, bled to death. The Civil Surgeon was called and examined and stated that the operation was a most dangerous one. In his defence the prisoner called four witnesses, two of whom stated that he had cured them of piles and two of other diseases by the use of the knife. The District Judge disagreeing with the assessors convicted the accused and sentenced him to one year's rigorous imprisonment.

The prisoner appealed.

Baboo *Ishar Chunder Chuckerbutty*, for the appellant.

Mr. *Kilby*, for the Crown.

The grounds upon which it was sought to show that the conviction should be set aside are sufficiently stated in the judgment of the High Court (TOTTENHAM and GHOSE, JJ.) which was as follows:—

JUDGMENT.

The appellant is a kobiraj who has been convicted by the Sessions Judge of Rungpore of an offence under s. 304 A, of the Penal Code, and has been sentenced to suffer rigorous imprisonment for one year. He caused the death of a patient by performing what is shown to be a very

* Criminal Appeal, No. 173 of 1887, against the order passed by J.R. Hallett, Esq., Sessions Judge of Rungpore, dated the 14th of March 1887.

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14 C. 566.

dangerous operation, namely, the cutting out of internal piles. He was unable to stop the consequent bleeding, and the patient died the following day. This has been held by the Sessions Judge to be a rash act within the meaning of s. 304 A.

Baboo Ishar Chunder Chuckerbutty for the appellant contended before us that it was not a rash act within the meaning of [568] that section, inasmuch as the prisoner was a kobiraj and had previously performed surgical operations in one or two cases of the same nature and in other cases of a different character; and that it has not been shown that he ever before caused the death of a patient. The vakeel also contended that if, notwithstanding these considerations, the Court should still be of opinion that the act was a rash one within the meaning of s. 304 A, the prisoner would nevertheless be entitled to the benefit of s. 88 of the Penal Code, because he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk.

We are of opinion that the prisoner is not entitled to the benefit of s. 88. It is quite true that he had no intention to cause the death of the patient. Nobody accuses him of such intention. It is also true that he acted, as he thought, for the benefit of the patient. But it is very doubtful whether he can be said to have acted in good faith, regard being had to the definition of good faith in s. 52 of the Penal Code, namely, nothing is said to be done in good faith which is done without due care and attention. The prisoner is admittedly uneducated in matters of surgery. He has had no regular education in matters of medicine.

It has been contended on his behalf that he had no idea that the operation that he undertook to perform, and did perform, would be attended with danger to the patient. But it was proved by expert medical evidence adduced by the prosecution that the operation which he performed was one so imminently dangerous that educated surgeons scarcely ever attempt it. They treat the complaint of internal piles, in a totally different way. It seems almost impossible therefore to say that the prisoner, in experimenting in the way he did without any knowledge of the subject, was acting in good faith within the meaning of the definition already referred to. But apart from that, we think that s. 88 will not apply to the case, because it is not shown that the patient did indeed accept the risk which turned out to be fatal to him. A patient can hardly be said to accept a risk of which he is not aware. We think it was for the defence pleading the exception to show that the patient in the present case did accept the [569] risk, and that consequently he was aware of it. But no attempt was made to show that the patient did know what risk he was undertaking. The evidence is only to the extent that he consented to the operation with great unwillingness, and that the only information communicated to him by the prisoner on the subject was that if he submitted to the operation he would be cured. Upon that understanding he did submit; and died. It seems, therefore, quite impossible to say that he accepted the risk of the prisoner's act.

The question then remains whether the prisoner is guilty under s. 304 A. There is no doubt that by his act he caused the death of the deceased. In England he would have been indicted for manslaughter. In this country the provisions of s. 304 A seem to apply to cases where there is no intention to cause death, and no knowledge that the act done in all probabilities would cause death. It was pleaded for the prisoner that, inasmuch as he had successfully performed similar operations on

other persons, he could have no knowledge that he was likely to cause death in this case. 1887 April 30.

We are willing to accept this view of the matter; but, as I have already observed, the prisoner's ignorance only made his act the more rash. We think it is impossible to acquite him of the offence of which he has been convicted. We have no wish by this decision to deter kobirajes from legitimately exercising their profession. In many cases, no doubt, they do very successfully treat certain disorders; but we think it very important that the public, especially the poorer part of the public, who mostly have to rely upon such practitioners as kobirajes, should be protected from ignorant experiments in surgery. Appellate Criminal. 14 C. 566.

We think, therefore, that the conviction must be affirmed. But we do not think it necessary for the ends of justice to sustain the severe sentence passed upon the prisoner. Similar acts by really professional men have been visited in this country with much less punishment. We think that, as this is the first case from the Mofussil with which we have had to deal, it would be sufficient to inflict the penalty of a fine instead of imprisonment.

The sentence of one year's rigorous imprisonment will, therefore, be set aside, and a fine of a hundred rupees imposed upon the [**570**] prisoner. In default of payment he must suffer three months' rigorous imprisonment.

H. T. H *Conviction upheld.*

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14 C. 570.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

In the matter of the petition of Hukum Chand Aswal (*Decree-holder*), Hukum Chand Aswal *v.* Gyanender Chunder Lahiri, Minor, by his guardian Abhoy Chunder Bagchi (*Judgment-debtor.*)* [16th March, 1887.]

Bengal Act VIII of 1869, *s.* 58—*Execution of decree—Suit for rent not brought under Bengal Act VIII of* 1869—*Decree of Court of foreign State—Civil Procedure Code,* 1882, *s.* 434.

The law of limitation applicable to the execution of a decree of the Civil Court of Cooch Behar, for rent for a sum under Rs. 500 in a suit not brought under the Rent Act, is by s. 434 of the Civil Procedure Code, which gives the Courts in British India power to execute decrees passed by the Courts of a foreign State, s. 58 of Beng. Act VIII of 1869. That section is not confined to suits brought under that Act.

In this case the plaintiff obtained a decree for rent in the Civil Court of Cooch Behar on 23rd May, 1881. The decree was for rent and costs and amounted to Rs. 432-8-9. After execution had been applied for in Cooch Behar and partly obtained, the decree was transferred to the Rungpore district, and sent to the Munsiff of Gaibanda for execution after more than three years from the date of the decree. The Munsiff in August 1885 held, on an objection made to the decree on that ground, that it was barred by limitation under s. 58 of Beng. Act VIII of 1869, inasmuch as it was a decree for rent for less than Rs. 500, and more than three years had elapsed since the date of the decree.

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* Application for Review in Miscellaneous Appeal, No. 442 of 1885, against the judgment of Mitter, J., and Grant, J., of this Court, dated the 1st of April 1886.

1887 March 16. — Appellate Civil. — 14 C. 570.

On appeal the Officiating Subordinate Judge of Rungpore affirmed the decision of the Munsiff and dismissed the appeal.

The decree-holder appealed to the High Court on the ground that the Courts had erred in holding the execution of the [**571**] decree to be barred. The High Court (Mitter and Grant, JJ.) dismissed the appeal, on the ground that there was no jurisdiction in the matter of the execution, and that the application for execution should have been dismissed on the ground that the Courts in British India have no power to execute a decree passed by the Court of a foreign State like Cooch Behar (1).

An application for review of this decision was made by the decree-holder, on the ground that s. 434 of the Civil Procedure Code gave the Courts in British India power to execute it, and that, the suit not having been brought under the Rent Act, s. 58 of that Act was not applicable.

Baboo *Durga Mohan Dass*, for the petitioners.

Baboo *Girja Sunkar Mazumdar*, *contra*.

The Judgment of the Court (Mitter and Beverley, JJ.) was as follows:—

JUDGMENT.

This is an application to execute a decree under a certificate granted by a Civil Court in Cooch Behar with reference to a decree for arrears of rent. Section 434 of the Procedure Code is the section which gives the Courts in British India authority to execute such decrees. That section says: "The Governor-General in Council may, from time to time, by notification in the *Gazette of India*, declare that the decrees of any Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India." Therefore the decree must be executed as if it had been made by a Court in British India. The law of limitation which would be applicable to such execution proceedings would be the law which would be applicable to the decree if it had been passed in a Court in British India. The decree having been passed in a suit for arrears of rent, and the amount being under Rs. 500, we think that the lower Court was right in holding that the law of limitation applicable in this case is the law contained in s. 58 of the Rent Act. That section says: "No process of execution [**572**] of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment." It was contended before us that s. 58, Beng. Act VIII of 1869, only applies to suits instituted under Act VIII of 1869. The language of the section does not support this contention. The section says it shall apply to any "judgment in any suit *for any of the causes of action mentioned* in ss. 27, 28, 29 and 30 of the Act." That is not tantamount to saying that the suit itself must be under Act VIII of 1869. If it is a suit on any of the causes of action mentioned in the sections of the Act enumerated, it would come within the purview of s. 58; and there is no doubt that the present suit comes within the causes of action enumerated in the section. The judgment of the lower Court is therefore correct.

We dismiss this appeal with costs and assess the hearing fee at Rs. 32.

J. V. W. *Appeal dismissed.*

(1) 13 C. 95.

14 C. 572 (P.C.)=14 I.A. 77=11 Ind. Jur. 311=5 Sar. P.C.J. 5.

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PRIVY COUNCIL.

14 C. 572 (P.C.)= 14 I.A 77=11 Ind. Jur. 311=5 Sar. P.C. J. 5.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

SIMBHUNATH PANDE AND OTHERS (*Defendants*) *v.* GOLAP SINGH AND OTHERS (*Plaintiffs*). [11th and 26th February, 1887.]

Sale in execution of decree—Judgment debtor's share in joint ancestral estate—Mitakshara Law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.

The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right.

Held that, as the mortgage and decree, as well as the sale certificate, expressed only the father's right, the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported.

[573] The enquiry in recent cases regarding liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances—*Upooroop Tewary* v. *Lalla Bandhjee Suhay* (1) distinguished.

[**F.**, 15 B. 87 (88); 3 Bom. L.R. 97; 22 M. 110; **R.**, 9 A. 672 (678); 12 B. 431 (435); 12 B. 625 (631); 12 B. 691 (693), 3 Bom. L.R. 322; 4 Bom. L.R. 587 (595); 13 M. 47; 12 A. 99: 14 A. 179 (182) (**F.B.**); 23 C. 262; 27 M. 131 (142) (**P.C.**); 27 A. 97 (**F.B.**)=A.W.N. (1904) 174=1 A.L.J. 435; 34 M. 188=9 M.L.T. 235=1910 M.W.N. 799 (801)=21 M.L.J. 320=8 Ind. Cas. 1072; 21 Ind. Cas. 123 (126); 23 M.L.J. 610 (615)=1912 M.W.N 1188 (1191); **D.**, 15 B. 293 (296).]

APPEAL, by special leave from a decree (27th June, 1883) of a Divisional Bench of the High Court reversing a decree (5th December, 1881) of the Subordinate Judge of Bhagulpore.

The object of this suit was to establish the plaintiffs' claim to have their share in ancestral estate excluded from the effect of a sale made in execution of a decree against their father alone for a debt due by him. And the question now raised was whether the entire estate of the family—a one anna four pie share of mouzah Kindwar, in pergunnah and district Bhagulpore—passed to the purchaser at the sale, the principal defendant in this suit, or only the share of the father. The latter share would on partition be only two krants of the whole sixteen annas of the village.

Their grandfather's *biswa* was four annas, or one-fourth of mouzah Kindwar. He had three sons, one of them being Luchmun Singh, the father of the plaintiffs. Inheriting one-third the latter took, as a family, a one anna four pie share of the village, each being entitled on partition (the sons being four in number) to one-sixth, including the father and mother. The plaint claimed restoration of five-sixths with mesne profits and a declaration of the sons' right to *kamat* land held by them in proportion to their share in the village.

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(1) 6 C. 749.

1887 FEB. 26.

PRIVY COUNCIL.

14 C. 572 (P.C.) = 14 I.A. 77 = 11 Ind. Jur. 311 = 5 Sar. P.C. J. 5.

The defendants' answer relied upon the sale, and the possession that they had obtained under the order for delivery of possession, which gave them, as they contended, rightly, the whole one anna four pie share.

At the hearing before the Subordinate Judge of Bhagulpore it appeared that, on the 12th September, 1865, Luchmun Singh, having borrowed money of Bichuknath Pande executed to him a money bond of that date, mortgaging also his right and [574] interest in mouzah Kindwar; whereupon afterwards the decree (6th August 1869) now in execution was made by consent. Execution proceedings resulted in the now disputed sale on 7th September 1871, at which the right, title and interest of Luchmun Singh in mouzah Kindwar were purchased by Bichuknath Pande, one of the defendants.

The Subordinate Judge held that the entire estate of the family passed by the sale. His reason mainly was that the father bound the sons when he incurred a debt that was in no way attributable to his misconduct. There being no immorality in the nature of the debt the decree might have been against the whole family; and the family property having been sold on this account the sons had no power to interfere with the auction sale. He accordingly dismissed the suit.

On appeal a Divisional Bench of the High Court (PRINSEP and O'KINEALY, JJ.) gave judgment as follows:—

"It appears to us from the facts of this case that it does not come within any of the judgments of this Court which have been quoted in the course of argument, and that it is a case purely within the judgment delivered by the Privy Council in the *case of Dindyal* (1). From the terms of the bond (which is a simple money bond) it is clear that the obligation was simply on the part of the father.

"The obligee sued to recover money due on this bond, and the father put in a petition confessing judgment, in which, after admitting the debt, he states: 'I have mortgaged my right and interest in mouzah Kindwar,' the words in the vernacular being 'Hakiyat O milkiyat apna.' We think from the terms of this petition that it was clearly understood by the father that he was dealing with only his own property in the estate. That this was the interpretation accepted by the decree-holder appears from the terms of the decree, which states that the debtor, after confessing judgment, has mortgaged his right and interest in mouzah Kindwar, and that a decree is accordingly passed. 'The terms of the sale certificate granted to the decree-holder, purchaser, are to the same effect. In the 'specification of property' the words are: 'The right and interest of the judgment-debtor [575] 4 annas' (that is to say, the estate held by him and his sons) 'out of 16 annas mouzah Kindwar.' And the terms of the body of the sale certificate declare that the right and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by the decree-holder in the case, and that it is hereby notified that whatever right, title and interest the judgment-debtor had in that property was extinguished from that date. We cannot agree with the argument that under such circumstances the judgment-debtor, father, should be regarded as being proceeded against by the obligee as representing the family estate.

"Under such circumstances we think, as we have already laid down in another case, that, under the terms of the judgment in the *case of Dindyal*,

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(1) 4 I.A. 147=3 C. 198.

as the creditor has chosen to proceed against the father alone and to sell only the father's whole estate, he has by his own act given up whatever rights he might have had against the entire family property.

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"The order of the lower Court will accordingly be set aside and a decree given to the plaintiffs declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara Law, the defendant No. 1 being entitled to retain only the share of Luchmun Singh, the father.

"The appellants will receive their costs here and also in the lower Court."

The defendants' appeal against the above decree was specially admitted by an order of Her Majesty in Council of 30th December, 1884.

For the appellants Mr. *R. V. Doyne* argued that the Subordinate Judge had rightly held that the entire interest of the family in mouzah Kindwar, the one anna two pie share, had passed by the sale in execution. What was sold was the interest that was liable to attachment and sale in execution of a decree against the father in respect of a debt incurred by him, not for any immoral purpose. What was sold was the entire interest of the family for another reason, *viz.*, that the eldest son, being of full age, was himself a party to the taking of the loan by Luchmun Singh; and he, as well as other sons on their attaining full age, assented to the mortgage on which the decree **[576]** was based, as the evidence referred to in the judgment of the Subordinate Judge showed. *Dindyal* v. *Jugdip Narain* (1), relied upon in the judgment of the High Court, was distinguishable, as in that case the creditor had done nothing to show an intention on his part to regard any one as liable, save the father alone. The principles on which this decision should be placed were those explained in *Girdhari Lal* v. *Gantoo Lal* (2) and *Suraj Bansi Koer* v. *Sheo Pershad Singh* (3).

Reference was also made to the *Collector of Monghyr* v. *Hurdai Narain Shahai* (4) and *Nanomi Babuasin* v. *Muddun Mohun* (5).

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD HOBHOUSE:—This is one of the numerous cases relating to the amount of interest acquired by the purchaser at an execution sale where the sale relates to a joint family estate subject to the Mitakshara Law, and the father of the family alone has been party to the proceedings. Like several of its predecessors it has been heard *ex parte*.

Luchmun Singh is father of the joint family. He has a wife and four sons. The family property consists of a share of mouzah Kindwar, amounting to 1 anna 4 pie in extent. Other shares of the mouzah were, when the transactions now in question took place, vested in other branches of the family who had become divided from Luchmun. The share of Luchmun's father was 4 annas. The appellants, who were defendants in the suit, claim the whole 1 anna 4 pie. The respondents, the wife and sons, who were plaintiffs, claim five-sixths of it as the shares which would come to them on partition.

On the 17th September 1865, Luchmun took a loan of Rs. 219 from Bhichuk, one of the appellants, and executed a bond for payment

(1) 4 I. A. 147=3 C. 198.
(2) 1 I. A. 321=14 B. L. R. 187.
(3) 6 I. A. 88=5 C. 148.
(4) 5 C. 425=2 I. A. 26.
(5) 13 I. A. 1=13 C. 21.

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in a month's time with interest at 24 per cent., or after the month, with interest at 48 per cent. In July 1869, the [577] bond-holder sued Luchmun, and an agreement was made that Luchmun should pay Rs. 590-4, with interest at 24 per cent., in a given month, and by way of security should mortgage "his right and interest in mouzah Kindwar." This agreement is embodied in a decree of the Munsiff of Bhagulpore, dated the 7th August, 1869. The same decree goes on to direct that in the event of non-payment the mortgaged property shall be sold by auction for the realization of the decretal money. In the year 1874 a sale took place in execution proceedings under this decree.

The certificate of sale bears date the 21st December, 1874, and is as follows:—

"A petition being filed for execution of the decree of the Court of the Sudder Munsiff of Bhagulpore, dated 6th August, 1869, in Case No. 494 of 1869 *v.* Luchmun Singh of mouzah Kindwar, pergunnah Bhagulpore, judgment-debtor, and for holding auction sale of the under-mentioned property, an *istahar* was issued according to the order of this Court, and the said property after being advertised was sold by auction on the 7th September, 1874; and accordingly the right and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by Bhichuknath Pande, inhabitant and proprietor of mouzah Phoolwaria, decree-holder, who forthwith filed Court-fee stamps of Rs. 12-8 poundage fee and filed a receipt for the balance Rs. 612-8 out of his decretal money. Therefore this certificate is granted to Bhichuknath Pande, decree-holder, auction-purchaser of the said property; and it is hereby notified that whatever right, title and interest the said judgment-debtor had in the said property, being extinguished from the 7th September, 1874, the date of the sale, is transferred to Bhichuknath Pande, decree-holder, and that this certificate will be held a valid document with reference to the transfer of the right, title and interest of the judgment-debtor.

"*Specification of property.*

"The right and interest of the judgment-debtor in 4 annas out of 16 annas of mehal Kindwar (main and hamlet), toppa Chandipa, pergunnah Bhagulpore, the towzi number of the entire mehal being 82, and the sudder jumma Rs. 380-8.

"Dated 21st December, 1874."

The purchaser was put into possession on the 12th January, 1875, and he appears to have remained in the possession and enjoyment of the whole 1 anna 4 pie until this suit was brought on the 18th April, 1881. There is no distinct evidence as to the value of the property, but in the plaint the value is stated for [578] Court purposes at Rs. 5,500, which the defendant does not dispute in his written statement, though he objects to the insufficiency of the Court-fee on the ground that the plaintiffs sue to recover some *kamat* land worth Rs. 2,292-2. Their Lordships conceive that the Rs. 625 paid must be much below the value of the entirety, if indeed it is not below that of the sixth share which Luchmun would take on partition.

The Subordinate Judge dismissed the suit. He held that the debt was not tainted with immorality and that two of the sons had consented to the mortgage. But his principal ground appears to have been that he was bound by the decision in *Upooroop Tewary* v. *Lalla Bandhjee*

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Suhay (1), to hold that a mortgage of the right and interest of Luchmun passed the entirety of the family property.

On appeal the High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs a decree declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara Law, the defendant No. 1 being entitled to retain only the share of Lunchmun Singh, the father. They referred to the vernacular expressions used by Luchmun in his petition, on which the decree of the 7th August 1869 was founded, and which are rendered by the expression "right and interest;" and they though that Luchmun clearly understood that he was dealing with only his own property in the estate. Further they relied on the fact that the sons were not made parties to the execution proceedings, and to the treatment of that fact in *Dindyal's case* (2).

Their Lordships cannot agree with the Subordinate Judge. Whatever part any of the sons may have taken in negotiating between Luchmun and Bichuk, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what was done, but the question is, what was done? That must be answered by the documents.

Moreover, if Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings. In *Dindyal's case*, where the expressions used by the [579] mortgagor were much more favourable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's case*, where the decision was in favour of the purchaser, the same circumstance was recognized as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone.

In the *case of Upooroop Tewary* (1) Mr. Justice Mitter thought that the words "my proprietary share" in a mouzah were calculated to describe the entirety of the family property in dispute; and he distinguished them from the expression "right, title and interest." In *Hurdai Narain's case* (3) there was no conveyance, but a sale on a money decree. The only description was "whatever rights and interests the said judgment-debtor had in the property" these were purchased by *Hurdai Narain*. The High Court held that nothing passed beyond the debtor's interest which gave him a right to partition, and which perhaps may for brevity be called his personal interest, and this Committee affirmed the decision. Each case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree.

Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that, when a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a

(1) 6 C. 749. (2) 4 I.A. 147=3 C. 198. (3) 5 C. 425=2 I. A. 26.

1887 Feb. 26. — Privy Council. — 14 C. 572 (P.C.) = 14 I.A. 77 = 11 Ind. Jur. 311 = 5 Sar. P.C. J. 5.

document purporting to convey only the right and interest of the father. It is true that the language of the certificate is [580] influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdai Narain's case*, is calculated to express only the personal interest of Luchmun. It exactly accords with the expressions used in the decree of August 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *prima facie* conclusion instead of counteracting it, for the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety.

Their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed and this appeal dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Miller, Smith & Bell.*

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14 C. 580.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Trevelyan.

THOMSON *v.* THOMSON AND ANOTHER.*

[3rd May and 21st July, 1887.]

Costs of suit by husband against wife for divorce—Deposit of costs—Stay of Proceedings until costs paid—Poverty of husband.

In a suit brought for dissolution of a marriage solemnized in 1859 (the parties to such marriage being of Anglo-Indian domicile) the respondent, being possessed of no separate property of her own, applied to the Court for an order directing her husband to deposit in Court a sum sufficient to cover her probable costs of suit.

The Court made an order directing the Registrar to estimate and certify the wife's probable costs of suit, and directed the husband to pay the sum so certified into Court. The husband being a man of next to no means failed to pay into Court the sum certified by the Registrar. *Held,* on an application by the wife to stay proceedings until such costs were paid, that it would be unreasonable to stay proceedings on account of the husband being unable to pay into Court that which he did not possess; but that, inasmuch as the affidavits filed by the parties were contradictory as to the means of the husband. the matter should be referred (if the parties so desired it) for an enquiry by an officer of the Court into the question of means.

[**N.F.**, 19 B. 293 (296); **D.**, 21 B. 77 (82).]

[**581**] THIS was an application by one Margaret Matilda Thomson (the respondent in a suit brought for dissolution of marriage) praying that Charles Thomson, the petitioner in the suit referred to, might be ordered to deposit in Court a sufficient sum to cover her probable costs of suit. The parties were of Anglo-Indian domicile, and had been married in India in the year 1859.

The applicant stated that she had entered appearance, but was entirely unable to provide funds to meet the costs and expenses of the suit. Charles Thomson, who appeared in person, stated that the respondent was openly living with the co-respondent and under his name, and

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* Suit No. 2 of 1887.

1887 JULY 21. — MATRIMONIAL JURISDICTION. — 14 C. 580.

that they had started a joint tea business trading under his wife's maiden name; that he was employed in the Port Commissioner's Office on a salary of Rs. 150 a month and was supporting himself and four children out of that sum; that he had no other monies or means to pay any costs of the suit which might be incurred by his wife.

Mr. *Pugh* appeared for the applicant, and contended that the wife was entitled to the order; that the statements made as to her means were vague, citing *Young* v. *Young* (an unreported case), in which, following *Proby* v. *Proby* (1), an order refusing an application for wife's costs was made by Mr. Justice Pigot on the 12th January, 1886, and distinguishing the case from the present as the marriage there was solemnised in England after the passing of the Married Woman's Property Act, citing also *Ward* v. *Ward* (2), *Fowle* v. *Fowle* (3), *Proby* v. *Proby* (1), and contending that the consideration arising in *Walker* v. *Walker* (4) would not arise at the present stage of the proceedings.

ORDER.

TREVELYAN, J.—This is an application calling on the petitioner to show cause why he should not deposit the probable amount of costs to be incurred by the respondent in the suit brought against her by him. The parties were married before the Succession Act, and are of an Anglo-Indian domicile. I think I must follow the rule formerly in force in England and require him to deposit the necessary costs. To this rule there are two main exceptions: (*a*) cases such as *Proby* v. *Proby* (1), and [**582**] (*b*) where the wife has separate property sufficient for her support and for the costs of suit. The husband must, however, satisfy me that the wife has sufficient separate property for those purposes, but there is nothing in his affidavit to show what the means of the respondent are. I am not satisfied with Mr. Pugh's argument that the considerations arising in *Walker* v. *Walker* (4) do not arise at this stage; the husband there appears to have been a man of absolutely no means, but here the petitioner's affidavit does not show that he is a man of no means. I think I must make the ordinary order, and direct that it be referred to the Registrar to estimate and certify the probable amount of the costs of suit of the respondent up to and including the final hearing and decree and that the petitioner do pay the amount so to be certified to the credit of the suit. Costs of this application to be costs in the cause.

In accordance with this order the Registrar certified that the probable amount of such costs would amount to Rs. 1,732. The amount certified was not paid into Court, and the respondent, on the 21st July 1887, applied to the Court on notice for an order that the proceedings on the petition be suspended until the costs certified by the Registrar be first paid.

Mr. *Pugh* for the applicant cited *Keane* v. *Keane* (5).

The petitioner appeared in person, and read an affidavit, in which he swore that he was unable to find the sum required, he being in receipt of Rs. 150 per month only; that he believed that the application was made merely for the purpose of preventing the suit being brought to a hearing; that he had already borrowed money to support himself and his four children and for the marriage expenses of another of his daughters, who had been married at the beginning of 1887.

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(1) 5 C. 357. (2) 1 Sw. & Tr. 484. (3) 4 C. 260.
(4) 1 Curt. 560. (5) L.R. 3 C.P. & D. 52.

1887 JULY 21. — MATRIMONIAL JURISDICTION. — 14 C. 580.

TREVELYAN, J.—This is an application by a wife, respondent in a suit for dissolution of marriage, to stay proceedings in the suit until the costs estimated by the Registrar to be the costs she will probably incur in the suit are paid. Mr. Pugh for the respondent contended that I am bound by *Keane* v. *Keane* (1) to make the order. I cannot find any case in which [583] an order of this kind has been made against a husband who is possessed of no means. It would be unreasonable to stay proceedings because a person of no means has not deposited what he has not got. The whole question is, has the petitioner the means wherewith to pay his wife's costs; he himself says in his affidavit he is not able to deposit all the money required; the wife on the other hand says that he is able to do so. The affidavits therefore do not dispose of the matter, so the only course left is to refer it to Mr. Fink to enquire what the petitioner is possessed of. Costs to be costs in the cause. If, however, the respondent should be advised to waive the enquiry, the application will be dismissed, and the costs thereof will be costs in the cause.

Case referred.

Attorney for respondent: Mr. *H. C. Chick.*

Petitioner in person.

T. A. P.

14 C. 583.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ghose.

FAZAL RAHAMAN AND ANOTHER (*Plaintiffs*) *v.* IMAM ALI AND ANOTHER (*Defendants.*)* [18th May, 1887.]

Sale for arrears of revenue—Act XI of 1859, *s.* 36*—Certified purchaser, Suit against—Civil Procedure Code—Act XIV of* 1882, *s.* 317.

A, the certified purchaser of a taluk at a sale held under the provisions of Act XI of 1859 for arrears of revenue, and who had obtained symbolical possession, had at the time of the sale agreed with *B*, the former owner of the taluk, to reconvey to him (*B*) after the sale had been completed.

In a suit *B* to compel specific performancee of the contract, alleging that he had never quitted actual possession of the taluk, objection was taken that the suit was not maintainable under s. 36 of Act XI of 1859 and s. 317 of Act XIV of 1882: *Held* that the suit, not being one to [584] oust the certified purchaser from possesion, was not barred by s. 36; and that neither was it barred by s. 317 of the Civil Procedure Code, that section applying only to sales in execution of decrees of Civil Courts held under the Procedure Code.

[R., 17 C.W.N. 75 (76)=18 Ind. Cas. 100 (101).]

THIS was a suit for specific performance of a contract arising out of the following circumstances: In 1882 a certain taluk belonging to the plaintiffs was put up for sale for arrears of Government revenue under the

* Appeal from Appellate Decree, No. 2022 of 1886, against the decree of Baboo Jibun Kristo Chattopadhya, Rai Bahadur, Subordinate Judge of Chittagong, dated the 25th of June, 1886, affirming the decree of Baboo Joy Gopal Singha, Munsif of South Raojan, dated the 18th of January, 1886.

(1) L.R. 3 C.P. & D. 52.

provisions of Act XI of 1859, and was purchased by the defendants Nos. 1 and 2. The plaintiffs alleged that the defendant No. 2 was their mukhtear; that at the time of the sale an agreement had been come to between them and the defendants that the property in question should be purchased in the name of the defendants, but with the money of the plaintiffs; and that after the completion of the purchase the property should be reconveyed to the plaintiffs.

Subsequently to the sale symbolical possession was given to the defendants; but the plaintiffs alleged that they nevertheless were in actual possession of the taluk "as heretofore," notwithstanding the sale and the delivery of symbolical possession to the defendants. In accordance with the agreement defendant No. 2 executed a reconveyance in favour of the plaintiffs, in which, however, the defendant No. 1 refused to join, denying the plaintiffs' right to the taluk. In this suit, brought for specific performance of the agreement, the plaintiffs prayed for—(1) specific performance; (2) for a declaration of their rights as owners of the taluk; and (3) for confirmation of possession. The defendant No. 1 relied on s. 317 of Act XIV of 1882 and s. 36 of Act XI of 1859 as a bar to the suit. The Munsif dismissed the suit on the defence raised; and on appeal the Subordinate Judge affirmed the Munsif's decision.

On appeal by the plaintiffs to the High Court—

Moulvi *Mahomed Yusuf* appeared for the appellants.

Mr. *R. E. Twidale*, for the respondents.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by:—

JUDGMENT.

GHOSE, J. (who after stating the facts continued as follows):—We think that s. 317 of the Code of Civil Procedure has no application to the present case. Upon an examination [585] of the Code it will be found that the preceding section, that is s. 316, refers to sales of immoveable property held under the provisions of the Code, and it provides that after a sale has become absolute a certificate of sale is to be given to the purchaser; and then s. 317 provides that "no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims." It will be observed that ss. 316 and 317 find their place in the chapter on Execution of Decrees, Part G. of which is headed "Of Sale and Delivery of Property," that is to say, sales in execution of decrees of Civil Courts, and therefore it is obvious that s, 317 can have no application to any other kind of sale than sales in execution of decrees of Civil Courts held under the Procedure Code. That being so, it seems to us that we must decide this case with reference to the provisions of Act XI of 1859, under which the sale, with which we are concerned, took place.

Now s. 36 of that Act runs thus: "Any suit brought to oust a certified purchaser as aforesaid, on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

The question that arises upon this section is, whether or not the present suit is a suit to oust the certified purchaser. Now, looking at the plaint (and for the purpose of the question we have before us we must confine ourselves chiefly to the plaint), it is quite clear that this is not a

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APPELLATE CIVIL.

14 C. 583.

suit to oust the certified purchaser; for what the plaintiffs allege is that they are in possession, and all that they seek by this suit is to have specific performance of the contract that was entered into between them and the defendants at the time when the sale took place. And it seems to us to be also equally clear that the result of a decree, if made in favour of the plaintiffs, would not be to oust the defendants; for the plaintiffs would not be entitled, in execution of the decree, to be put in possession of the property in question.

[586] That being so, it appears to us that the present suit is not barred by the provisions of s. 36 of Act XI of 1859, and, unless it be clearly shown to come within the scope of that section, we should not be justified in dismissing it on the ground taken by the lower Courts. For these reasons, we think that the decrees of the Courts below must be set aside, and the case remanded to the Court of first instance to be tried upon its merits. The costs will abide and follow the result.

T. A. P. *Appeal allowed.*

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14 C. 586.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

FAKIR CHAND AUDHIKARI AND OTHERS (*Defendants*) *v.* ANUNDA CHUNDER BHUTTACHARJI AND OTHERS (*Plaintiffs*).*

[17th May, 1887.]

Declaratory decree—"Further Relief"—Arrears of Rent—Specific Relief Act (Act I of 1877), s. 42—Second appeal—New point.

In a suit for a declaratory decree in respect of plaintiff's right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed: *Held*, that the "further relief" referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying," and does not include a claim for arrears of rent.

On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the juridiction of the lower Courts, and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception it is purely discretionary with the Court whether to consider it or not.

[R.,1 N.L.R. 1 (2); 17 C.L.J. 30=18 Ind. Cas. 633 (634); 15 Ind. Cas. 552 (553); D., 26 C. 845 (850)=4 C.W.N. 162.]

THE facts which gave rise to this appeal were as follows:—

100 bighas 14 chittaks of debutter land belonged to one Gobindaram Audhikari as shebait, and on his death the same were inherited by his two sons Shafalram and Shagur Churn. [587] Shafalram died in 1240 without issue, and his share was inherited by his sister's son, Abhoy Churn Bhuttacharji, the father of the plaintiffs. The share of Shagur Churn who predeceased his brother was inherited by Kumari Debya,

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*Appeal from Appellate Decree, No. 2078 of 1886, against the decree of Baboo Kedar Nath Mojumdar, Subordinate Judge of Midnapur, dated the 18th of August 1886, affirming the decree of Baboo Chundi Churn Sen, Munsif of Midnapur, dated the 31st of July 1885.

the maternal grandmother of the defendants. Shafalram and Shagur Churn were separate in estate. Kumari Debya, who died in 1272, had two daughters, namely, Shama Sundari and Durgamoni Debya, the latter of whom died childless. Shama Sundari died in 1280, leaving two sons, *viz.*, Fakir Chand, defendant No. 1, and Romanath, the father of the other defendants.

The plaintiffs alleged that out of the 50 bighas 7 chittaks inherited by their father he took khas possession of 7 bighas 5 cottahs only and left the remaining 43 bighas 15 cottahs 7 chittaks in the possession and management of Kumari Debya, and that she used to pay him and them as his heirs Rs. 15 annually out of the net rental from the debutter tenure.

Of the 100 bighas 14 chittaks, 10 bighas 12 cottahs were lakhiraj, and the plaintiffs applied under Beng. Act VII of 1876 to have their names registered as maliks in respect of 5 bighas 6 cottahs.

This application was opposed by the defendants, who were in possession of the lands leased to Kumari Debya as well as the lands inherited by them, and was refused by the Collector on the 3rd September, 1883, and that officer's decision was confirmed on appeal on the 3rd December, 1883, and the defendants' names were registered in respect of the whole of the lakhiraj land.

The plaintiffs accordingly brought this suit praying for a decree declaring their maliki right to 42 bighas 15 cottahs 7 chittaks of land out of the moiety of the 100 bighas 14 chittaks, and directing the registration of their names in respect of the 5 bighas 6 cottahs of confirmed lakhiraj by setting aside the order passed in the registration of name case; and they included a prayer for whatever other relief the Court might think fit to grant.

The defendants pleaded amongst other matters that neither the plaintiffs nor their predecessor had ever been in possession of the disputed land, and that the suit was barred by limitation; that the suit was not, owing to its form, maintainable, and that [588] Kumari Debya never executed any kobala as alleged by the plaintiffs, nor did she ever pay rent at the rate of Rs. 15 to the plaintiff.

The following issues were fixed:—

(1) Whether the plaintiffs or their predecessors had ever been in possession of the disputed land at any time within 12 years of the institution of the suit.

(2) Whether the plaintiffs' father had inherited the disputed land on the death of Shafalram and exercised any proprietary right in respect to it, or Shafalram bequeathed his property to defendants' grandmother, Kumari Debya, by way of verbal gift.

(3) Whether Kumari Debya, the predecessor of the defendants, executed any kabuliat to plaintiffs' father agreeing to pay Rs. 15 annually out of the profits of the disputed land.

(4) Whether the suit had been undervalued.

(5) Whether plaintiffs' suit was not maintainable.

The first Court found that the oral gift in favour of Kumari Debya by Shafalram set up by the defendants was not proved, and that the kabuliat set up by the plaintiffs alleged to have been executed by Kumari Debya in favour of Abhoy Churn was not a genuine document. It further found that the plaintiffs had been receiving Rs. 15 per annum from the defendants, as well as from their predecessor, in respect of the

1887 MAY 17. — APPELLATE CIVIL. — 14 C. 586.

land claimed, and gave the plaintiffs a decree declaring their right to have their names registered as maliks of the disputed land.

The defendants appealed, and the plaintiffs preferred a cross appeal on the finding as to the genuineness of the kabuliat.

The lower appellate Court held the latter to be a genuine document and upheld the Munsif's decision on the other points.

The appeal was consequently dismissed with costs.

The defendants now preferred this second appeal to the High Court.

Mr. *E. T. Roberts* and Baboo *Taruck Nath Sen*, for the appellants.

Baboo *Ambica Churn Bose* and Baboo *Amarendra Nath Chatterji*, for the respondents.

The grounds upon which it was sought to have the decree of the lower Courts set aside and the nature of the arguments [589] are sufficiently stated in the judgment of the High Court (TOTTENHAM and NORRIS, JJ.) which was as follows:—

JUDGMENT.

The plaintiffs in this case are the maternal grandsons of one Gobindram Audhikari; their father was Abhoy Chunder Bhuttacharji, who married Tarani Debya, Gobindram's daughter.

Gobindram had also two sons, *viz.*, Shafalram, the elder, and Shagur Churn, the younger; these two brothers were separate.

Shagur Churn died first, leaving his widow Kumari Debya and two daughters, Shama Sundari and Durgamoni Debya. Durgamoni died childless, and Kumari Debya died in 1272. Shama Sundari died in 1280; she had two sons, *viz.*, Fakir Chand, defendant No. 1, and Romanath, the father of defendants 2 to 7.

Shafalram died leaving no son, daughter or wife, and Abhoy Churn, the father of the plaintiffs, was his heir.

The common ancestor, Gobindram, was in possession of 100 bighas 14 chittaks of rent-free land in Shebaiti right. Of this 50 bighas 7 cottahs was the share of Shafalram and 50 bighas 7 cottahs the share of Shagur Churn. The two brothers collected the rents of their respectives shares and performed the daily worship of the Thakur in turn.

Upon the death of Shafalram, Abhoy Churn, the father of plaintiffs, inherited Shafalram's 50 bighas 7 cottahs, and living at a distance and finding it inconvenient to manage the collection of rents and the worship he granted a lease of 42 bighas 15 cottahs 7 chittaks to Kumari Debya at an annual rent of Rs. 15 and held only 7 bighas 5 cottahs in khas possession. The lease was dated 26th Bysack 1242.

Kumari Debya paid the rent due under the lease down to her death in 1272; Shama Sundari paid it from 1272 down to her death in 1280, and after her death her sons, Fakir Chand, defendant No. 1, and Romanath, father of defendants 2 to 7, paid it down to 1287.

Of the aforesaid 100 bighas 14 cottahs, 10 bighas 12 cottahs were confirmed lakhiraj, and the plaintiffs applied under Beng. Act VII of 1876 to have their names registered as maliks in respect of 5 bighas 6 cottahs. This application was opposed by the defendants (who were in possession of the 42 bighas [590] 15 cottahs 7 chittaks leased to Kumari and also of the 50 bighas 7 chittaks which had belonged to Shagur Churn), and was refused by the Deputy Collector on 3rd September 1883; and his decision was confirmed on appeal on 3rd December 1883; and the defendants' names were registered in respect of the whole 10 bighas 12 cottahs confirmed lakhiraj. The plaintiffs then brought this

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suit asking for "a declaration of their maliki right to 42 bighas 15 cottahs 7 chittaks of land out of a moiety of the 100 bighas 14 chittaks," and "further directing the registration of their names in respect of the 5 bighas 10 cottahs of confirmed lakhiraj (measuring 5 bighas 6 cottahs according to the new measurement) by setting aside the order passed in the registration of name case." Both the lower Courts have given a decree in favour of the plaintiffs.

On second appeal the learned counsel for the defendants-appellants has raised a point, which, as far as we can see, was not raised in argument in either of the lower Courts, and which is clearly not raised in their written statement. Now I do not go so far as to say that under no circumstances will a special appellant be allowed to raise an entirely new point on second appeal, but I do say that he should not be allowed to raise such new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record. Nor do I say that this Court is bound to consider such new point even if it falls within either of the above exceptions: it is a pure matter of discretion.

One manifest inconvenience arises from allowing entirely new points to be raised on second appeal—the absence of what the Court always values—the intelligent judgments of the Judges of the lower Courts.

The point raised by the learned counsel for the appellants was a pure point of law, going to the question of jurisdiction and capable of being determined without the consideration of any evidence other than that on the record.

[**591**] The point was that the plaintiffs were not entitled to the declaratory relief they sought by reason of the proviso to section 42 of the Specific Relief Act, that being the section under which their suit was brought. To determine this point it is necessary, I think, to look somewhat closely at the words of s. 42. The section says: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration when the plaintiff being able to seek further relief, than a mere declaration of title, omits to do so." Now, as regards the 42 bighas odd, it is argued that the plaintiffs in this case are not entitled to the declaratory decree they ask for, because there was a "further relief" which they could have sought in this suit, and which they have omitted to do. That "further relief" is said to be the arrears of rent due from the defendants under the settlement made with Kumari Debya. If this contention is true, if a claim for arrears of rent is "further relief" within the meaning of the proviso to s. 42, then it would follow that as regards the 42 bighas odd no declaratory decree could be made. But that would still leave undisposed of the question of the decree sought with regard to the 5 bighas 6 cottahs of confirmed lakhiraj land. We do not however think that a claim for arrears of rent is such "further relief" as is contemplated by the proviso to the section.

The "further relief" referred to in the proviso is, we think, "further relief" in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right

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any person denies or is interested in denying." The recovery of arrears of rent in this case would only determine that during the years in respect of which the arrears were recovered the relation of landlord and tenant had existed between the parties, that the rent was so much, and that it had not been paid. But even supposing that a claim for arrears of rent is "further relief" within the meaning of the proviso, it is clear that it is not "further relief" which could [592] have been sought in the suit. The provisions of s. 78 of Bengal Act VII of 1876 prevent the recovery of such arrears until registration of names is complete.

This point alone is in our judgment sufficient for the determination of the case. It is not clear, upon the plaint and written statement and the judgments of the Courts below, whether, as a matter of fact, there were two separate applications to register—one in respect of the mal, and another in respect of the lakhiraj land. We are inclined to agree in the view presented to us by the learned counsel for the appellants that, as a matter of fact, there was but one application, and that was in respect of the lakhiraj land. But whether that is so or not, and whether it makes any difference in the plaintiff's position, it is not necessary to inquire, for the point was not taken in the Courts below, and we do not think we ought to allow it to be taken here. We are also of opinion that it may fairly be assumed that if the plaintiffs' title with regard to both the mal and lakhiraj land rested on the same basis, and if the defendants were interested in denying and did, as a matter of fact, deny the plaintiffs' right to have their names registered with respect to the lakhiraj land, they were certainly persons who were interested in denying the plaintiffs' legal character or right in respect of the mal land.

These being our views, we think that this appeal ought to be dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 592.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

SUNDARI DASSEE (*Defendant*) *v.* MUDHOO CHUNDER SIRCAR (*Plaintiff*).* [7th June, 1887.]

Possession, Suit for—Adverse possession—Case made in plaint—Issues—Variance between title alleged and proved in suit for possession.

The plaintiff sued to recover possession of certain land, alleging that it was lakhiraj land, which he had purchased from a third party. The Court of first instance found that he had not proved the title he alleged, and although it had been contended at the hearing that a title by twelve [593] years' adverse possession had been proved, the Court held that it was not proved, and as it was not alleged in the plaint and no issue was raised as to it, the plaintiff was not entitled to succeed and accordingly dismissed the suit. The plaintiff appealed, and one of his grounds of appeal was that he was entitled to succeed by virtue of the title of adverse possession proved. The lower appellate Court considered that the plaintiff had proved that he and his vendor had held adverse possession for a period of over twelve years and gave the plaintiff a decree on the strength of that title.

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* Appeal from Appellate Decree, No. 2284 of 1886, against the decree of Baboo Rajendro Coomar Bose, Subordinate Judge of Beerbhoom, dated 13th of July, 1886, reversing the decree of Baboo Janoki Nath Dutt, Munsif of Bolepore, dated the 30th of September, 1885.

The defendant appealed to the High Court, and it was contended on his behalf that the plaintiff was not entitled to succeed upon a title of adverse possession when it was not alleged in his plaint and no issue had been laid down in respect of it. 1887 JUNE 7.

Held, that, as the suit was one for possession and the defendant had express notice in the lower appellate Court that the plaintiff relied on the title of adverse possession, and as he took no objection on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower appellate Court, the decree of that Court should be confirmed. APPELLATE CIVIL. 14 C 592.

Bijoya Debia v. *Bydonath Deb* (1) and *Shiro Kumari Debi* v. *Gobind Show Tanti* (2) distinguished. *Joytara Dassee* v. *Mahomed Mobaruck* (3) discussed. [**Rel. on,** 12 C.L.J. 459 (463)=15 C.W.N. 138=8 Ind. Cas. 41 (43); **Cited,** 3 C.L.J. 316; **R.,** 6 C.L.J. 621 (635).]

IN this case the plaintiff sued to establish his right to, and to recover possession of, 2 bighas of land on the allegation that it was the lakhiraj land of one Deno Bhundoo Poramanick, from whom he had purchased it in the month of Assin 1284 (September-October 1877) by a registered kobala, and that he had been in possession of it by letting it out to one Kali Das Das, the son of a previous tenant Madhub Chunder Das; but that he had been wrongfully dispossessed by the defendant in Joisto 1291 (May-June, 1884), when he had gone to cultivate it on the tenants relinquishing it.

The defendant pleaded that the suit could not proceed without making the zemindar a party, and that it was barred by limitation; that the disputed land was not lakhiraj and did not belong to Deno Bhundoo Poramanick, and that the kobala set up by the plaintiff was collusive; that neither Madhub Chunder Das nor his son Kali Das Das had ever been in possession of the land, and that it was the mal land of the mehal which had been let out to him in 1288.

[**594**] The Munsif found that the zemindars were not necessary parties and that the plaintiff had proved that Kali Das Das and his father Madhub had been in possession of the land within twelve years of suit and had paid rent to the plaintiff, who was consequently in possession, and that the suit was therefore not barred by limitation. On the merits, however, he decided the case against the plaintiff. He held that the plaintiff had not adduced any evidence to show that the land was lakhiraj and belonged to his vendor Deno Bhundoo Poramanick, but merely proved that Deno Bhundoo had sold it to him as lakhiraj. It was contended on behalf of the plaintiff that Deno Bhundoo had acquired a title by twelve years' adverse possession, but upon that the Munsif observed that this case was not set up in the plaint and that there was not sufficient evidence to support it.

The first Court, therefore, held that the plaintiff had failed to prove that the land was the lakhiraj of Deno Bhundoo, and that he had acquired a title to it by his purchase from him, and the suit was accordingly dismissed.

The plaintiff then appealed to the Subordinate Judge, and in his grounds of appeal amongst other matters contended that he was entitled to succeed on the ground of adverse possession for twelve years.

The Subordinate Judge found that it had been proved clearly that the plaintiff had purchased the land from Deno Bhundoo Poramanick with other lands for a consideration of Rs. 321, and that after the purchase in

(1) 24 W.R. 444 (2) 2 C. 418. (3) 8 C. 975.

1887 JUNE 7. — APPELLATE CIVIL. — 14 C. 592

1877 he had been in possession by receipt of rent from Madhub's son, who had been the tenant on the land from the time when Deno purchased it, and that the plaintiff had so held possession down to Joisto 1291 (May-June 1884), when he was dispossessed by the defendant; that prior to 1877 Deno had been in enjoyment of the land by receipt of rent from the tenant for a period of five or seven years; and that therefore the possession of the plaintiff and his vendor prior to the ouster had extended to a period of over twelve years.

That Court therefore found that, as the defendant had not been able to show that he had a right to remain in possession of the land in suit and that it formed the mal land of the village, the fact that the plaintiff and his vendor had been in possession for [**595**] twelve years before ouster entitled him to recover possession of the lands in suit, and it accordingly reversed the decree of the Court of first instance and give the plaintiff a decree for possession.

The defendant now appealed to the High Court.

Baboo *Guru Dass Banerjee* and Baboo *Tarapodo Banerjee*, for the appellant.

Baboo *Karuna Sindhu Mukerjee*, for the respondent.

Baboo *Guru Dass Banerjee* (for appellant).—Plaintiff having failed to prove his lakhiraj title the Court below ought not to have decreed his suit upon a title by twelve years' adverse possession—*Bijoya Debia* v. *Bydonath Deb* (1); *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2); *Joytara Dassee* v. *Mahomed Mobaruck* (3).

Baboo *Karuna Sindhu Mukerjee* (for respondent).—The plaintiff in this case asks for possession as well as a declaration of his title. He alleged in his plaint that he had been in possession as lakhirajdar since 1877, and previously his predecessor in title was in possession. The first Court found his title proved. The plaintiff being in peaceful possession has been dispossessed by a person who has been found to be a trespasser, and he is therefore entitled to a decree—*Mohabeer Pershad* v. *Mohabir Singh* (4); *Brojo Sunder Gossami* v. *Koilash Chunder Kur* (5); *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (6).

The Privy Council case of *Wise* v. *Ameerunnissa Khatoon* (7) does not apply to the facts of the present case, as there the plaintiff relied upon *bare* possession, while the Government was *prima facie* entitled to the land in suit.

The cases of *Bijoya Debia* v. *Bydonath Deb* (1) and *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2) are distinguishable, as in those cases the plaintiff merely sued for a declaratory decree, and the Courts were therefore justified in not allowing the plaintiff to change his case. In the case of *Joytara Dassee* v. [**596**] *Mahomed Mobaruck* (3) there was a *bare* allegation of possession, and besides that case was a regular appeal.

In the present case the defendant had sufficient notice in the Court below that the plaintiff also relied upon a title by adverse possession. A distinct ground to that effect was taken in the grounds of appeal, and the Court below decided the point against the defendant, so that it does not lie in the mouth of the defendant now to say he was taken unawares.

Baboo *Guru Dass Banerjee* in reply.

The High Court (TOTTENHAM and NORRIS, JJ.) delivered the following judgments:—

(1) 24 W.R. 444. (2) 2 C. 418. (3) 8 C. 975. (4) 9 C.L.R. 164.
(5) 11 C.L.R. 133. (6) 8 B. 371. (7) 7 I.A. 73.

JUDGMENTS.

1887 June 7. —— Appellate Civil. —— 14 C. 592.

Tottenham, J.—This was a suit to recover possession of land, of which the plaintiff alleged himself to have been dispossessed by the defendant. The title he set up in his plaint was that this was lakhiraj land which he had purchased from one Deno Bhundoo Poramanick. The defendant denied the plaintiff's title altogether.

The lower appellate Court found that, although the plaintiff's lakhiraj title was not established, it was proved that he had purchased the land as lakhiraj from his alleged vendor; and the Subordinate Judge held that the possession of the plaintiff and of his vendor together extended to twelve years or more; and that that possession was adverse to the defendant. He was therefore of opinion that the plaintiff had established a title by adverse possession and was entitled to recover the land.

On second appeal Baboo Guru Dass Banerjee, for the defendant-appellant before us, raised the question whether the plaintiff was entitled to succeed upon a title of adverse possession when he had not set up that title in his plaint and when no issue had been laid down in respect of it in the first Court. The petition of second appeal does not specifically raise this question, but one of the grounds taken in that petition was that inasmuch as the plaintiff failed to prove the lakhiraj title set up by him, his suit ought to have been dismissed. We have allowed the appellant therefore to deduce from that ground of appeal the contention which Baboo Guru Dass [597] Banerjee has urged. In support of his contention he has cited the cases of *Bijoya Debia* v. *Bydonath Deb* (1), *Shiro Kumari Debi* v. *Govind Shaw Tanti* (2) and *Joytara Dassee* v. *Mahomed Mobaruck* (3). Those cases support the view that the plaintiff cannot succeed upon a title which he has not set up; but there is a distinction between two of those cases and the present case. In those two cases the suit was for a declaration of title, and the Court there very properly held that, unless the plaintiff proved the title in respect of which he asked for a declaration, he could not obtain such declaration. The present case is not for a declaration of title, but for possession upon proof that the plaintiff is entitled to have the land. The cases which have been cited by Baboo Karuna Sindhu Mukerjee for the respondent support the view that the plaintiff may succeed in obtaining possession on proof of a good title, though that title be not specifically set up. The most that I should have been inclined to do in the present case would be to order a remand if I thought that the defendant-appellant had been prejudiced or taken by surprise in this matter. But I find that, having lost his case in the first Court by reason of his having failed to prove his lakhiraj title, and by reason of his not being, in the opinion of the Munsif, entitled to a decree on the ground of adverse possession for twelve years because no issue on that point had been raised, the plaintiff, on appeal to the Subordinate Judge, distinctly raised the question and so gave notice to the defendant that he intended to rely upon his title by adverse possession. Had the defendant considered himself prejudiced in this respect he could then have applied to the lower appellate Court for an opportunity to go into evidence on the point; but he did not do so, and the case was apparently argued out from that point of view and terminated in a decree in favour of the plaintiff. Then, as has been observed, no specific objection was taken in the petition of second appeal to the trial of this issue in the

(1) 24 W.R. 444. (2) 2 C. 418. (3) 8 C. 975.

1887 JUNE 7. — APPELLATE CIVIL. — 14 C. 592.

lower appellate Court. I think, therefore, it cannot be said that the defendant has really been prejudiced by the course adopted in the lower [598] appellate Court. And being of opinion that the Subordinate Judge was entitled, upon finding facts which established the plaintiff's title, to give him a decree, I do not think that we ought to interfere in this Court.

The appeal is dismissed with costs.

NORRIS, J.—I should like to add just a word. This was an action of ejectment. The plaintiff based his title upon the allegation that the land which he sought to recover was his lakhiraj land. It is not quite clear, but I take it that he failed to prove that title. In the progress of the case, however, he proved a title which entitled him to a decree for ejectment.

It is urged that he ought not to be allowed to obtain a decree upon the strength of a title, which, though he has proved, he did not, as a matter of fact, set up in his plaint; and in support of that contention Dr. Guru Dass Banerjee has cited three cases. Two of those cases, as pointed out by my learned colleague, are clearly distinguishable from the present case. The cases of *Bijoya Debia* v. *Bydonath Deb* (1) *Shiro Kumari Debia* v. *Govind Shaw Tanti* (2) were cases where the suit was for a declaratory decree. It is plain, it is common sense, that a man ought not to be allowed to obtain a declaratory decree except in respect of the very title which he asserts and upon which he goes to trial. The case of *Joytara Dassee* v. *Mahomed Mobaruck* (3) is no doubt at first sight an authority in Dr. Guru Dass Banerjee's favour. But I think, when one comes to examine it, it is really not at all antagonistic to the view which we are prepared to take in the present case. That was a case on appeal from an original decree in which the plaintitff had succeeded, and a decree had been given him in the first Court upon the strength of a title which he had not set up; and Mr. Justice Field, who delivered the judgment of the Court, says: "Cases must be tried and determined *secundum allegata et probata*, and it is contrary to this principle, and may be fraught with injustice, to decide a cause upon a point not raised in the pleadings nor embodied in an issue, and to which in consequence the attention of the parties was not directed at the trial [599] so as to enable them to produce all the evidence relevant thereto, which was available to them." In the present case the plaintiff's suit was dismissed in the first Court. He appealed, and in his grounds of appeal to the lower appellate Court he distinctly gave notice to the other side that he would rely upon a title which had been proved in the course of the trial, namely, a title by adverse possession. It was open then to the defendant either to say "I object to this point being taken because it was not raised in the pleadings" or, "if this point is gone into, I ought to have an opportunity of adducing evidence with regard to it." If that opportunity had been asked and denied I should unhesitatingly have been inclined to remand this case; but that opportunity was not sought by the defendant, and I cannot therefore bring myself to think that he has been at all damnified or that his rights have been prejudicially interfered with, by the course adopted by the lower appellate Court.

Upon this ground I agree in dismissing the appeal with costs.

H. T. H. *Appeal dismissed.*

(1) 24 W.R. 444. (2) 2 C. 418. (3) 8 C. 975.

14 C. 599=12 Ind. Jur. 26.

1887 MAY 10. — APPELLATE CIVIL. — 14 C. 599=12 Ind. Jur. 26.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

MOHABIR PERSHAD NARAIN SINGH (*Defendant*) *v.* GUNGADHUR PERSHAD NARAIN SINGH (*Plaintiff*).* [10th May, 1887].

Mortgage—Foreclosure, Suit for—Conditional Sale—Regulation XVII of 1806—*Transfer of Property Act* (*IV of* 1882), *s.* 2, *cl.* (*c*) *and ss.* 86, 87—*Procedure.*

A suit was brought on the 24th January 1885, by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April 1881, and the mortgage money was repayable on the 13th May 1881. On the 9th July 1881, the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of Regulation XVII of 1806. The year of grace expired on the 10th July 1882. It was contended by the mortgagor that, as the Transfer of Property Act came into force on the 1st July 1882, the proceedings taken by the mortgagee should be regulated [600] by the procedure laid down in ss. 86 and 87 of that Act, and not by the procedure prescribed by Regulation XVII of 1806.

Held, that the procedure laid down by the Transfer of Property Act could not be applied to the case. Although the year of grace had not expired when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of Regulation XVII of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year, and such right and liability came within the meaning of these terms as used in cl. (*c*), s. 2 of the Transfer of Property Act.

[**F.**, 15 C. 357; **R.**, 2 C.P.L.R. 130 (131); 20 B. 759 (762).]

THIS was a suit to obtain possession on foreclosure of certain shares in villages which had been mortgaged to the plaintiff by a deed of conditional sale, dated the 6th April 1881.

The plaintiff alleged that the amount secured by the mortgage, *viz.*, Rs. 299, had not been repaid on the due date *viz.*, the 17th May 1881, and that he had thereupon taken proceedings against the defendant in the Court of the District Judge under the provisions of s. 8 of Regulation XVII of 1806, and caused the requisite notice to be served on the defendant, the mortgagor, on the 9th July 1881. As the amount due had not been repaid within the year of grace, he contended that the deed of conditional sale had become absolute, and that the mortgagor's right to redeem had been extinguished, and he, therefore, claimed to be entitled to possession of the mortgage properties.

The suit was instituted on the 24th January 1885, and in answer thereto the defendant pleaded amongst other things that, as the Transfer of Property Act came into force before the termination of the year of grace, and therefore during the pendency of the foreclosure proceedings, the suit was governed by that Act and the plaintiff was not entitled to the relief he sought. The other issues raised in the case were disposed of by both the lower Courts in favour of the plaintiff, and as no objection was taken to the findings of the lower Courts upon those issues at the hearing of the appeal before the High Court they are immaterial for the purpose of this report.

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* Appeal from Appellate Decree N. 2005 of 1886, against the decree of H. W. Gordon Esq., Judge of Sarun, dated the 19th of July, 1886, affirming the decree of Moulvie Mahomed Nural Hossein, Subordinate Judge of that district, dated the 17th of August, 1885.

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The decision of the lower appellate Court, upon the applicability of the Transfer of Property Act to the case was as follows: "The last objection taken is that, as the suit was instituted after [601] the Transfer of Property Act came into force, the foreclosure prescribed by s. 86 of that Act should be followed and defendant should be allowed six months to redeem. In support of this two rulings are relied on, one of the Allahabad High Court—*Ganga Sahai* v. *Kishen Sahai* (1)—and a recent ruling of the Calcutta High Court—*Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2). This objection, I think, cannot prevail. In the two cases referred to no proceedings had been taken under the provisions of s. 8 of Regulation XVII of 1806, and the Hon'ble Judges of the Allahabad and Calcutta High Courts held that, as Regulation XVII of 1806 had been repealed by Act IV of 1882, and that as the procedure of that Regulation was not saved by s. 2, cl. (c) of Act IV of 1882, the procedure of this latter Act applied. The present case is not similar to them. The procedure prescribed by s. 8 of Regulation XVII of 1806 had been commenced (9th July 1881) before the Transfer of Property Act came into force (July 1st 1882), and therefore under s. 6 of the General Clauses Act of 1868 these proceedings are not affected by the repeal of the Regulation by the Transfer of Property Act. It can scarcely be contended that the defendant is entitled to the benefit of the procedure of the repealed Regulation as well as of the new Act. Under the Regulation he has been allowed one year of grace to redeem; on his failure to redeem he was duly informed that the mortgage would be finally foreclosed. He cannot now ask for a further period of grace simply because the suit has been brought under a new Act prescribing a different mode of procedure."

Both the lower Courts having concurred in decreeing the plaintiff's suit, the defendant preferred this second appeal to the High Court, and the only point argued at the hearing was that referred to above.

Mr. *C. Gregory*, for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Akhil Chunder Sen*, for the respondent.

The nature of the arguments and the cases relied on by [602] Mr. *Gregory* on behalf of the appellant are sufficiently stated in the judgment of the High Court.

Baboo *Mohesh Chunder Chowdhry*, on behalf of the respondent was not called on.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

The defendant in this case borrowed Rs. 299 from the plaintiff, and as security for the repayment of the loan executed on the 6th April 1881 a deed of conditional sale covenanting to repay the mortgage debt on the 13th May 1881. The money was not repaid on that date, and a notice in compliance with the provisions of ss. 7 and 8 of Regulation XVII of 1806 was served upon the mortgagor by the mortgagee on the 9th of July 1881, so that the year of grace from the date of that notice would expire on the 10th of July 1882.

This suit was instituted on the 24th January 1885. The plaintiff asked for a declaration that the defendant's right to redeem the mortgaged premises should be foreclosed. Various defences were pleaded by the defendant, all of which have been disposed of adversely to him by the lower

(1) 6 A. 262. (2) 12 C. 583.

Courts. Mr. Gregory in special appeal has urged only one point before us, and that is a point of not inconsiderable importance. It was urged before the lower appellate Court, and was dealt with by the District Judge. The point is this, that, as the year of grace expired on the 10th of July 1882, and the Transfer of Property Act came into operation on the 1st July 1882, the proceedings taken by the plaintiff should be regulated by the procedure laid down in ss. 86 and 87 of the Transfer of Property Act, and not by the procedure prescribed by Regulation XVII of 1806. In support of this contention Mr. Gregory relied upon two cases which were cited and commented upon in the lower appellate Court, namely, a Full Bench case of the Allahabad High Court in *Ganga Sahai* v. *Kishen Sahai* (1) and the recent Full Bench decision of this Court in *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2). He also relied upon the case of *Baij Nath Pershad Narain Singh* v. [**603**] *Moheshwari Pershad Narain Singh* (3), decided by Wilson and Beverley, JJ. Neither of these cases is exactly in point. In the Allahabad case the mortgage by conditional sale was dated 3rd July 1877, and the foreclosure suit was instituted under the provisions of the Transfer of Property Act. In the Calcutta Full Bench case the mortgage by conditional sale was dated 4th September 1876, and the foreclosure suit was instituted on 18th December 1883. In the case before Wilson and Beverley, JJ. not only had proceedings been taken under Regulation XVII of 1806, but the year of grace therein referred to had actually expired before the Transfer of Property Act came into force. Mr. Justice Wilson, in delivering the judgment of the Court says: "The next question is one of more general importance. It was contended that in this case the suit, having been brought after the passing of the Transfer of Property Act, was governed by that Act, and that the form of the decree to be given in the case ought to be the form of a foreclosure decree prescribed by that Act in ss. 86 and 87. Several cases were referred to in support of that contention." Then the learned Judge goes on to mention the cases which were referred to. Two of them I have already named, and the third is *Pergash Koer* v. *Mahabir Pershad Narain Singh* (4). The learned Judge then proceeds to say: "All these cases differ materially from the present for this reason: In the present case, before the Transfer of Property Act passed, proceedings had been taken under the Regulation. They were valid and effectual proceedings, and they had arrived at a close, that is to say, the period of grace had expired. Now, when that period of grace expired, the Regulation being still in force, what were the rights of the parties? The mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. It did not become his absolutely without a decree, but his right to such a decree immediately accrued. On the other hand the mortgagor, the moment the period of grace expired, ceased to have any right of redemption. These rights and liabilities appear to us to differ essentially from the matters which in the other cases were held to be mere matters of procedure. It is impossible to say, in our judgment, that anything [**604**] can be described as a right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability, if these words do not apply to an actually existing right to an immediate decree declaring the property to be absolutely the property of the mortgagee: and, on the other hand, the entire loss of any right to redeem the property." Upon the strength of that decision

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(1) 6 A 262. (2) 12 C. 583. (3) 14 C. 451. (4) 11 C. 582.

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Mr. Gregory argued that the saving clause in s. 2 of the Transfer of Property Act would not avail to assist the plaintiff's case. That clause is clause (*c*), which says: "Any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." Mr. Gregory urged that the right of the plaintiff was not complete until the expiration of the year; that his right to a foreclosure decree was not complete until the expiration of the year of grace; and that therefore he had acquired no right nor had the debtor incurred any liability until the expiration of the year; and that the defendant was saved, as it were, by the fact that the Transfer of Property Act came into force ten days before the expiration of the year of grace.

We think that this contention ought not to prevail. It is true that the full and complete right of the mortgagee had not accrued; but we think it impossible to say that he had acquired no right, for at the time the Transfer of Property Act came into force he had acquired the right to bring a suit under the provisions of the Regulation of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year.

The appeal is accordingly dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 605.

[605] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

AZIZUDDIN HOSSEIN AND OTHERS (*Defendants*) *v.* RAMANUGRA ROY AND ANOTHER (*Plaintiffs*).*

[3rd June, 1887.]

Mesne profits—Decree for possession of immoveable property—Reversal of decree on appeal—Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 244.

A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that if the amount were not paid within fifteen days the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree.

It was contended on second appeal that the suit would not lie as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code.

Held, that as the suit was instituted in the Munsif's Court, and the Munsif under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was

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* Appeal from Appellate Decree No. 2272 of 1886, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 16th of September, 1886, reversing the decree of Syed Imam Ali, Munsif of Tajpore, dated the 8th of September, 1885.

at most only an error of procedure and no exercise of jurisdiction by the Munsif, which he did not possess, and that upon the authority of the decision in *Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (1) this could not be made a ground of objection on appeal. **1887 JUNE 3**

Held also that the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. APPELLATE CIVIL.

Quære.—Whether such a suit does not lie, and whether the decisions in *Lati Kooer* v. *Sahodra Kooer* (2) and analogous cases to the effect that such a suit does not lie are correct. *Ram Ghulam* v. *Dwarka Rai* (3) cited and approved. **14 C. 605.**

[**F.**, 8 C.P.L.R. 3 (4); 22 C. 483; 32 M. 425=4 Ind. Cas. 723; 101 P.L.R. 1901=63 P. R. 1901; **R.**, 18 A. 106 (107); 8 C.W.N. 49 (50); 17 C.P.L.R. 178 (182); 5 C.L. J. 328 (332); 12 C.L.J. 312 (320)=7 Ind. Cas. 55 (59); **D.**, 7 C.P.L.R. 40 (41).]

[**606**] THIS action was brought by the plaintiffs to recover mesne profits under the following circumstances: The present plaintiffs were the tenants of the defendants. The defendants in the year 1882 brought a suit against the plaintiffs for arrears of rent, and on the 24th April 1882 obtained a decree for the full amount of the claim. They had alleged in their plaint that the rent due from the now plaintiffs, then defendants, was Rs. 3-9 per bigha. Together with their decree for an amount of money they asked for and obtained a decree for ejectment under s. 52 of the Rent Act. The then defendants appealed against the decree, and on the 25th January 1883, the decree, which had been passed against them in April 1882, was modified. They were found liable to pay the arrears of rent, not at the rate of Rs. 3-9 per bigha, but at the rate of Rs. 3-5 per bigha, and a decree against them for the amount due at that rate was made by the lower Court, and an order for ejectment unless the amount so decreed was paid within fifteen days. The amount so decreed was, as a matter of fact, paid within the fifteen days mentioned by the lower appellate Court.

Pending the appeal, *viz.*, on the 27th July 1882, the plaintiffs in the rent suit, the now defendants, took possession of the land under the decree of the first Court, which had made an order for ejectment unless the amount claimed was paid within fifteen days from the 24th April 1882, and the now defendants remained in possession of the land from the 27th of July 1882 to the 31st March 1883; and it was to recover mesne profits in respect of their occupation of the land for that period that this suit was brought. The amount claimed in the suit did not exceed Rs. 1,000, and the suit was therefore instituted in the Munsif's Court.

The defendants in the first paragraph of their written statement stated as follows: "That the plaintiffs have not the right to institute the present suit, and to retain possession of the khas land alleged by the plaintiffs, because a decree was passed by this Court on the 24th April 1882, of the Christian era in favour of your petitioners, giving effect to s. 52, Act VIII of 1869, and the payment of the decretal amount ordered within fifteen days from the date of the preparation of the decree. But the [**607**] plaintiffs did not cause to be deposited the decretal amount according to the decree passed by the Court or even the arrears according to their statement within fifteen days from the date of the preparation of the decree by the first Court." The other objections taken by the defendants are immaterial for the purposes of this report.

The Munsif dismissed the plaintiffs' suit on the ground that the defendants were not trespassers or wrong-doers. The plaintiffs thereupon

(1) 19 W.R. 90. (2) 2 C.L.R. 75. (3) 7 A. 170.

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appealed to the Subordinate Judge, contending that as they had been deprived of possession of their lands by the act of the defendants they were entitled to a remedy for the wrong done to them. For the defendants it was argued that, as the plaintiffs could have prevented the execution of the decree of the Court of first instance by depositing the amount decreed within the time prescribed by that Court, no blame attached to the defendants for taking khas possession of their jotes in execution of their decree when the decree stood unaltered and unreversed.

The plaintiffs' right to bring a regular suit for remedying the injury occasioned in execution of the decree which was so altered on appeal was not questioned before the lower appellate Court by the defendants, and the Subordinate Judge refrained from passing any opinion on that point and decided the case on its merits, and gave the plaintiffs a decree for a certain amount of the mesne profits claimed by them.

Against that decree the defendants now appealed to the High Court.

Mr. *M. L. Sandel*, for the appellants.

Baboo *Abinash Chunder Banerjee*, for the respondents.

Mr. *Sandel* contended that this suit would not lie as the matter was one which should have been decided in the execution department in the previous suit, and in support of that contention cited and relied on the following authorities: *Lati Kooer* v. *Sahodra Kooer* (1); *Partab Singh* v. *Beni Ram* (2); *Mothoora Pershad Singh* v. *Mohunt Shumbboo Geer* (3); [**608**] *Bibee Hamida* v. *Bibee Bhudhun* (4); *Bama Soonduree Dabee* v. *Tarinee Kant Lahoree* (5); *Duljeet Gorain* v. *Rewul Gorain* (6).

Baboo *Abinash Chunder Banerjee*, for the respondents, contended that, as the Munsif would have been the proper officer to enquire into the matter under the provisions of s. 244 of the Code of Civil Procedure in the execution department, there had been only an error in the form of the procedure, and he relied upon the case of *Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (7) to show that this could not be made a ground of objection in appeal.

JUDGMENT.

The judgment of the High Court (Tottenham and Norris, JJ.) was delivered by Norris, J., who, after stating the facts, continued as follows:—

The point raised before us by Mr. Sandel in second appeal is that no suit such as this will lie, and in support of his contention he has referred to various decisions of this Court, which, if not completely in his favour, are at least very strongly in his favour. On the other hand, there is at least one case—*Ram Ghulam* v. *Dwarka Rai* (8)—a Full Bench case, to which the present Chief Justice of this Court, then the Chief Justice of Allahabad, was a party, which distinctly holds that such a suit as this will lie.

We were at first disposed to think that we ought to send this case to a Full Bench, because the balance of our judgment was rather to agree with the Allahabad case than with the cases decided by Division Benches of this Court; but after hearing the learned Vakil for the respondents we are satisfied that there is no necessity for our so referring this case; indeed, not only that there is no necessity, but that we ought not to do it.

(1) 2 C.L.R. 75. (2) 2 A. 61. (3) 19 W.R. 413. (4) 20 W.R. 238.
(5) 20 W.R. 415. (6) 22 W.R. 435. (7) 19 W.R. 90. (8) 7 A. 170.

It has been pointed out by Baboo *Abinash Chunder Banerjee* that, supposing Mr. *Sandel's* contention is right, there has been at most an error in the form of the procedure which has been adopted, and that there has been no exercise of jurisdiction by the Munsif which he did not possess, because, if this matter had [609] been, as Mr. *Sandel* contends it ought to have been, enquired into under the provisions of s. 244 of the Code of Civil Procedure in the execution department, it would in the first instance have been enquired into by the Munsif. The Munsif is the person who tried this suit. If the parties had been dissatisfied with the decision of the Munsif the appeal would have been to the Subordinate Judge. It is the Subordinate Judge who has heard the appeal from the Munsif in this case, and he has set aside his decision. This view of the case is fortified by an authority referred to by the learned Vakil—*Purmessuree Pershad Narain Singh* v. *Jankee Kooer* (1); the head note to the cases: "Where a question such as is provided for by Act XXIII of 1861, is 11, instead of being determined by order of the Court executing the decree, was made the subject of a separate suit in that Court, it was held that, though the form of proceeding was wrong, there was not a want of jurisdiction which could be made a ground of objection in appeal." That was a decision of Couch, C.J., and Dwarka Nath Mitter, J., in a regular appeal. Further, in one of the cases which Mr. *Sandel* quoted, an authority which undoubtedly is in his favour, the learned Judge who gave the judgment of the Court holding that the suit would not lie also intimated that the Court would have been prepared to have considered the plaint as an application for the ascertainment of mesne profits in the execution department, so that upon principle and upon authority we think the contention of Baboo *Abinash Chunder Banerjee* is correct. We have further to observe that we do not think this point was raised in the pleadings. We have been referred to paragraph 1 of the defendants' written statement, but we think that that does not mean that this suit will not lie because the proper method of ascertaining what the plaintiffs are entitled to is by proceedings in the execution department under s. 244 of the Code of Civil Procedure. We think what the defendants meant to assert in the first paragraph of the written statement was that this suit would not lie at all, because the defendants had been put in possession of the land by a decree of a competent Court, which is a very different question from the question argued before us to-day. But, [610] whether that is so or not, we think that the point was not raised in either of the lower Courts; and, it being a point which goes exclusively to the jurisdiction of the Court, we do not think that we ought to allow it to be raised here.

For these reasons we think that this appeal should be dismissed with costs.

H. T. H. *Appeal dismissed.*

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(1) 19 W.R. 90.

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June 7.

Appellate Civil.

14 C. 610=12 Ind. Jur. 61.

14 C. 610=12 Ind. Jur. 61.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

TULSHI PERSHAD (*Plaintiff*) *v.* RAJA MISSER AND OTHERS (*Defendants* Nos. 1 to 4).* [7th June, 1887.]

Civil Procedure Code (Act XIV of 1882), *s.* 561—*Practice—Objections to decree by respondent—Time for filing objections—Date fixed for hearing appeal—Partition—Joint family property—Suit for possession by member of family admittedly not joint—Limitation.*

Quære.—Whether under s. 561 of the Code of Civil Procedure objections to the decree by the respondent must necessarily be filed seven days before the date originally fixed for hearing the appeal, or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision of the Bombay High Court in *Rangildas* v. *Bai Girja* (1) to that effect is not correct, and the decisions of the Calcutta High Court to the contrary are not erroneous.

The plaintiff sued for possession of certain property, alleging that it had belonged to a joint family, of which he had been a member, and had been allotted to him on partition. The partition was not proved, and the suit was dismissed on the ground of limitation. On second appeal it was contended that if the partition was held not to be proved the family must be held to be joint, and as the possession of one member could not be adverse to another, the decree dismissing the suit on the ground of limitation was erroneous.

Held, that as the family was admittedly not joint the plaintiff was bound to remove the bar of limitation by showing some sort of possession by himself within twelve years before his suit could be entertained, and as he had not done so his suit was properly dismissed.

[611] IN this suit the plaintiff prayed for a declaration of his right to certain property and to recover possession thereof under the following circumstances:—

He stated that one Nund Ram had died possessed of houses and gardens, including those in suit, leaving three sons, and whose descendants are shown in the following genealogical tree:—

Nund Ram.
- Jokhi Lal.
  - Tulshi Pershad (Plaintiff).
- Dip Chand.
  - Gobind Pershad.
    - Suraj Bux.
  - Situl Pershad.
    - Mewal Lal.
- Ful Chand.
  - Hur Pershad.
    - Nukchhaidi Lal.
      - Autar Ram.
      - Anant Ram.

He alleged that there had been a partition of the joint property amongst the members of Nund Ram's family, and that he had obtained one-third of a pucca house, Gobind Pershad and Situl Pershad getting the remaining two-thirds. As the equivalent of his share in the house Nukchhaidi Lal got another house; that a garden was divided into four portions, he getting one share, and that he also got two houses, known

* Appeal from Appellate Decree, No. 2301 of 1886, against the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of Shahabad, dated the 28th of July 1886, reversing the decree of Baboo Tej Chunder Mukerjee, Munsif of Buxar, dated the 25th of August 1885.

(1) 8 B. 559.

as lots 5 and 6, for his share. He went on to state that the principal defendants in execution of a decree against Nukchhaidi Lal had fraudulently caused to be attached and sold the said houses and garden, and that this became known to him when the purchaser came to take possession; that he thereupon intervened under s. 269, Act VIII of 1859, but his claim was disallowed. He therefore brought the present suit. The sale took place on the 13th September 1874, and the plaintiff's claim was disallowed on the 14th September 1877. The present suit was instituted on the 10th June 1882. The plaintiff had previously instituted another suit for the same purpose, but had withdrawn it, liberty being given him to bring a fresh suit.

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APPELLATE CIVIL.

14 C. 610=12 Ind. Jur. 61.

The principal defendants amongst other things pleaded that the claim to have the sale, which had taken place eight years ago, set aside, was barred by limitation, only one year being the period allowed; that the claim to set aside the order under s. 269, Act VIII of 1859, was likewise barred; that the plaintiff's present statement was inconsistent with that in his previous suit; that the property in suit belonged exclusively to Nukchhaidi [**612**] Lal; that the partition alleged by the plaintiff never took place, and that this had been decided in a previous suit against Mewa Lal, to which the plaintiff had been a party; and that the plaintiff had not had anything to do with the property in suit or with Nukchhaidi Lal and the other members of the family for over twelve years.

The Munsif held that one year's limitation applied and dismissed the suit on that ground. He found however that, though the plaintiff had not proved the partition set up by him, the property was joint, and that the plaintiff was entitled to a one-third share in all the joint property.

The plaintiff then appealed, and the Subordinate Judge remanded the case to be tried on its merits, holding that twelve years' limitation applied to the suit, and that the Maharajah of Dumraon should be added as a party, as he had been a party-defendant in the plaintiff's previous suit, having purchased the property in execution of another decree. Upon the remand the Court of first instance held that the suit was not barred by limitation; that the partition alleged by the plaintiff had not been proved; that the properties in suit were the ancestral properties of the plaintiff and Nukchhaidi Lal; and that as the plaintiff only claimed one-fourth share he could only get that share allowed him. That Court accordingly gave the plaintiff a decree declaring his title to one-fourth of the properties in suit and for possession of that share.

The defendants then appealed, and the plaintiff filed cross objections to the decree under s. 561 of the Civil Procedure Code. It was admitted that the objections were not filed seven days before the date fixed for hearing the appeal, but the plaintiff contended that he had not seven days left him after service of the notice on him by the appellants.

The lower appellate Court held that, as the law was peremptory on the subject, and the objections were not filed in time, it could not pay any attention to them, but nevertheless expressed its opinion on them, amongst other things holding that the partition, which the plaintiff objected should have been held to have been proved, was not satisfactorily established. Upon the main appeal the Court held it had not been proved that the plaintiff [**613**] had ever been in joint possession of the property in suit

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during the last twelve years, or that he had any interest therein, and accordingly dismissed the suit of the plaintiff.

The plaintiff now preferred this second appeal to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey*, for the appellant.

Baboo *Mohesh Chunder Chowdhry* and *Raghunandun Pershad*, for the respondents.

The points taken and argued on the appeal are sufficiently stated in the judgment of the High Court (TOTTENHAM and NORRIS, JJ.), which was as follows:—

JUDGMENT.

The first point taken in this appeal is that the lower Appellate Court wrongly declined to allow the plaintiff, who is the appellant before us, and who was the respondent in the Court below, to urge objections to the decree of the first Court under s. 561 of the Code of Civil Procedure, on the ground that he had not fulfilled the condition of giving notice of such objections within the period allowed. Section 561 permits a respondent to take any objection to the decree which he could have taken by way of appeal, provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal. The appeal in the lower Appellate Court was originally fixed to be heard on the 14th December. The notice of objection by the respondent was filed only on the 10th of December. It is shown by his pleader on second appeal that the notice of appeal in the lower Court was received by him on the 9th December, that is, five days before the date fixed for hearing. It seems unreasonable in such a case that the strict letter of the law as laid down in s. 561 should be observed if "the date fixed for the hearing of the appeal" means the date originally fixed and does not mean the date when the appeal really comes on for hearing. But the rulings of this Court admittedly are to the effect that the first day is the one indicated by the section. The Bombay High Court has taken a different view in *Rangildas* v. *Bai Girja* (1). I should [**614**] consider myself bound by the decisions of this Court unless I was strongly of opinion that the Bombay decision was more correct and the circumstances of the case required a reference of the matter to a Full Bench. But, as pointed out by the Vakil for the respondent before us, Baboo Mohesh Chunder Chowdhry, it does not so much matter in this case that the Court did not formally admit the objections, because the Subordinate Judge states that the pleader for the respondent before him in his argument relied upon these objections; and the Court itself expressed an opinion upon the points raised. That opinion was unfavourable to the respondent in the lower Court. It is therefore unnecessary for us to say any more on this point.

The other objection taken to the lower Appellate Court's decree is that the Subordinate Judge has gone wrong upon the question of limitation in finding that the plaintiff has not shown that he has been in possession in any way within twelve years before he brought this suit. The plaintiff in the first instance based his case upon an alleged partition of the property belonging to the family, which had originally been joint. The lower Appellate Court found that partition not proved. The appellant's Vakil therefore contends that, if the partition was not proved, the family must be held to be joint and the possession of one member could not be adverse

(1) 8 B. 559.

to another. The plaintiff therefore, the learned Vakil contends, must be held to have had possession through that other member. Here again, however, there appears to be a fallacy, as pointed out by Baboo Mohesh Chunder Chowdhry. The family is admittedly not a joint family now, and had not been joint for many years before the suit was brought. The plaintiff would still have to remove the bar of limitation before his suit could be entertained. He would have to show some sort of possession by himself, some enjoyment of the profits of the property. The Court below found that he did not do so; therefore his suit failed in both respects. The partition which he alleged was not made out, and he has not proved possession within twelve years before the institution of this suit.

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The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 615.

[615] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF MAHOMED AMIR KHAN.
LARDLI BEGUM *v.* MAHOMED AMIR KHAN.* [6th June, 1887.]

Guardian—Guardianship of female minor—Female minor, Right to custody of—Mahomedan Law, Shia sect—Act IX of 1861—*Act XL of* 1858, *s.* 27.

A Mahomedan father of the Shia sect is entitled to the custody of a daughter above the age of 7 years as against the mother. The decision in *Fuseehun* v. *Kajo* (1) has no application to a case where the father is seeking to get the custody of his daughter.

THIS was an application under Act IX of 1861 by a father for the custody of his children—a boy aged eleven and a girl aged seven, as against the mother. The personal law to which the parties were subject was admittedly that of the Shia sect of the Mahomedans. It was not alleged by the mother that the father had been guilty of gross immorality, but she sought to justify her refusal to give up the children by alleging his poverty and the fact that he had married as his second wife a person who, for reasons stated, was not looked upon with favour by the first wife. She further alleged that he had an interest in getting rid of the children in order to increase his share of the property which he would inherit if she (his first wife) predeceased him.

The lower Court relying on the authority of the decision in *Raj Begum* v. *Reza Hossein* (2) considered the father was entitled to the relief he asked. In that Court the mother relied on the decision in *Mohomuddy Begum* v. *Oomdutoonissa* (3) as showing that the Court should go beyond the personal law of the parties and look to the question of fitness, but the lower Court distinguished that case and considered that none of the reasons alleged was sufficient to justify it in refusing to give the father the custody of his children. It accordingly made the order asked for. The mother now appealed to the High Court.

[616] Mr. *Amir Ali* and Baboo *Saligram Singh*, for the appellant.

Munshi *Syed Shumsul Huda*, for the respondent.

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* Appeal from Order No. 31 of 1887, against the order of J. F. Steven, Esq., Officiating District Judge of Gya, dated the 31st of December, 1886.

(1) 10 C. 15. (2) 2 W.R. 76. (3) 13 W.R. 454.

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The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

It seems to us impossible to interfere in this case with the decision of the District Judge.

This application was under Act IX of 1861 by a Mahomedan father for the custody of his two children—a boy aged eleven and a girl aged seven. The application was opposed by the mother, who appears to be living separately from her husband; and apparently the two are not on good terms. It is admitted that the District Judge's order is in accordance with the received precepts of the Mahomedan law governing the Shia sect, to which both parties belong. Mr. Amir Ali, however, has asked us, upon the strength of a decision in *Fuseehun* v. *Kajo* (1), to look further than the personal law of the Mahomedans, and to hold, as was done in that case, that only a female should be appointed, to have charge of a female minor. He asks us to direct that the minor daughter in this case should be left in the custody of the mother, while the boy should be handed over to his father.

We think that the case of *Fuseehun* v. *Kajo* (1) is not applicable to the present case for this reason, that in that case the minors had no father alive. The learned Counsel contends that in that case the uncles were the applicants, and that they stood in the shoes of the father, yet nevertheless this Court refused to give them the guardianship of the female minors. We find, however, that the Statute on which the Court relied in that case, namely, Act XL of 1858, s. 27, is itself fatal to the contention raised as regards the present case, for it is clear on the terms of that section that where a father is alive no guardian of the person of any minor can be appointed. If the father be dead a guardian of the minor may be appointed, but if the minor is a female, only a female can be appointed as guardian. The fact that in this case the father is not only alive but is the person himself who claims the custody of the children takes the case out of the purview of the ruling in *Fuseehun* v. *Kajo* (1) cited by [**617**] the appellant's Counsel. We think that the father is entitled, as found by the Judge, to the custody of both the children, the girl having attained the age of seven. If she had been under seven her mother would have been entitled to her custody until she was seven.

The appeal is dismissed. We shall make no order as to costs.

H. T. H. *Appeal dismissed.*

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(1) 10 C. 15.

1887 June 8.

Appellate Civil.

14 C. 617.

14 C. 617.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF HAMID BAKHUT MOZUMDAR. HAMID BAKHUT MOZUMDAR (*Claimant*) *v.* BUKTEAR CHAND MAHTO (*Decree-holder*) AND ANOTHER (*Judgment-debtors*).*
[8th June, 1887.]

Civil Procedure Code (Act XIV of 1882), s. 280—Attachment—Wakf—Trust property—Jurisdiction of Court under s. 280, Code of Civil Procedure.

The question to be determined under s. 280 of the Civil Procedure Code is the question of possession; the words "possession of the judgment-debtor or of some person in trust for him" refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances.

[**F.**, 18 C. 290 (295); 29 C. 543 (545); **R.**, U B.R. (1897-1901). Vol. II, 262; **D.**, U. B.R. (1910). 4th Qr. 75=10 Ind. Cas. 994.]

In this case Buktear Chand Mahto and others, in execution of a decree obtained against one Hajee Majid Bakhut Mozumdar, attached certain shares in two properties alleged by them to have been inherited by Hajee Majid Mozumdar from his father Syed Bakhut. A claim was put in to the attached properties by one Hamid Bakhut, who stated that Hajee Majid had no interest in the said properties, and had never been in possession; but that he, the claimant, had been holding possession for the last 20 years as *mutwali* under two deeds, dated 13th Bhadro 1274, and 25th Chaitro 1275 respectively. The evidence taken in the claim case showed that since the execution of the *wakfnama* of the 25th Chaitro 1275 the property mentioned therein had been in the possession of Hamid Bakhut as *mutwali*, and that he had administered [**618**] it in strict accordance with the directions of the settlor. But the District Judge in deciding the claim considered that he was bound to determine the question of the validity of the deed of endowment, and in determining this question found that the *wakf* of the 29th Chaitro 1275 had for its object nothing connected with the worship of God or religious observances, but was in reality a provision for the settlor and his family, containing a provision that on the extinction of the settlor's family the property should be devoted to religious and charitable purposes, and held that the *wakfnama* was therefore invalid, and that so much of the property attached as was dealt with by that *wakfnama* was liable to be sold in execution of the decree obtained by Buktear Chand Mahto, but directed that the remainder of the attached properties held under the *wakfnama* of the 13th Bhadro 1274 should be released from attachment.

Hamid Bakhut, thereupon, applied to the High Court, and obtained a rule calling upon the decree-holder to show cause why the order of the District Judge should not be partially set aside.

Mr. *Bonnerjee*, with him Mr. *Evans*, Baboo *Troilokianath Mitter* and Moulvie *Mahomed Yusuf*, in showing cause contended that the Court had no power to interfere with the order unless the lower Court had acted without jurisdiction; that on a perusal of ss. 278, 279, and 280, it was

* Civil Rule No. 532 of 1887, against the order passed by J. Kelleher, Esq., District Judge of Sylhet, dated the 28th of February, 1887.

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clear that the Judge was at liberty, for the purposes of deciding the question of possession, to enter into the question of title; and that the property was liable to attachment, citing *Ashutosh Dutt* v. *Durga Churan Chatterjee* (1).

The *Advocate-General* (Mr. *Paul*), with him Mr. *Woodroffe*, Mr. *Amir Ali*, and Munshi *Serajal Islam*, in support of the rule contended that the Judge had exceeded his jurisdiction in deciding the question of the validity of the *Wakfnama*—*In re Khellat Chunder Ghose* (2), such a question not being one which was open in an investigation under s. 278 of the Code; that the Judge should have confined himself to the question of possession only—*Koylash Chunder Sen* v. *Koylash Chunder Chakrabarti* (3); [**619**] and that the possession of the claimant was not that of a trustee within the meaning of s. 278.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

PETHERAM, C. J.—This is a rule which has been obtained for the purpose of setting aside an order dismissing a claim to a certain property attached in execution of decree, and the rule has been obtained under s. 622 of the Code of Civil Procedure, on the ground that in his proceedings in this matter the Judge has acted illegally in the exercise of his jurisdiction.

The facts of the case are, that the judgment-debtor in this case and the claimant are brothers, and that the property in question was the property of their father who, something like 20 years ago, executed a document by which he devoted his estate to certain charitable and other purposes, and made his eldest son, the claimant in this suit, the *mutwali* of this endowment, and laid down certain rules.

The judgment-creditor has, in these proceedings, attached the share of his debtor, which would have accrued to him, upon the death of his father, if this deed had not been executed and if the property had devolved from father to son, according to the ordinary course of succession under the Mahomedan law.

The Judge in his judgment in this case finds, as a matter of fact, that the claimant did take possession of the property at the time the deed was executed, and that he has been in possession of it ever since, administering it according to the terms of that deed. He then proceeds to discuss the question whether the deed itself is a valid or invalid document under the Mahomedan law; and he finds that the deed, in his opinion, is an invalid document. He says, at the end of his judgment: "I hold, therefore, that the *wakfnama* of the 25th Chaitra 1275 B. S. is invalid, and that the inherited share of the judgment-debtor in the property dealt with by that document is liable to sale in execution of the decree."

As I understand that, what the Judge means to say is, that the transaction of the 25th Chaitra 1275, which is the transaction which I have referred to before, was altogether inoperative; that it created no interest in the persons who professed [**620**] to take under it, and that the share of the deceased person devolved according to the devolution prescribed by Mahomedan law; and therefore he holds that the possession of the claimant is not a possession under that deed at all; but he does find in an earlier part of his judgment that this claimant is in possession of the entire property, and that the judgment debtor is not;

(1) 6 I. A. 182=5 C. 438. (2) 18 W. R. 403. (3) 10 C. 1057.

so that, for the purposes of s. 280 of the Code of Civil Procedure, he finds the first fact, which is necessary to let in the claimant in a case of this kind, namely, that the property is in possession of the claimant, and not in that of the judgment debtor.

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Having found so much the question then arises, whether he had jurisdiction to go further and ascertain whether the document of the 25th Chaitra 1275 was an invalid document, with a view to determine whether the possession of the claimant was that of a trustee for the judgment-debtor within the meaning of s. 280.

It seems to me that in doing that he has exceeded his jurisdiction, because what he had to do was to find, first of all whether the claimant was in possession, and, if he was, whether it was his own possession or that of the judgment-debtor. The Judge has assumed that, in every case in which he finds a claimant in possession, he has jurisdiction to go on further, and enquire into the nature of his title and the title of the judgment-debtor. I do not think he had jurisdiction to do that. It seems to me that the meaning of s. 280 was, that the question which was to be determined was to be a question of possession, and where the Legislature uses the words, "the possession of a trustee for the judgment-debtor," they mean cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not cases in which very intricate questions of law may arise as to whether valid trusts may result in particular instances.

For these reasons, I am of opinion that the Judge had no jurisdiction in this case to go on, after he had disposed of the question of possession, and deal with the question of title, and therefore, I think this rule must be made absolute.

There is only one thing I would wish to add, and that is, that upon the judgment of the Judge himself he nowhere finds [**621**] distinctly that the claimant here is a trustee for the judgment-debtor; he merely finds a state of facts from which we are asked to infer that he intended so to find. I do not think that we ought to draw that inference from those facts, and, therefore, we think that he was wrong in the conclusion to which he came, and that this rule must be made absolute with costs.

T. A. P. *Rule absolute.*

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14 C. 621.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

MOHESHWAR PERSHAD NARAIN SINGH (*Plaintiff*) *v.* SHEOBARAN MAHTO (*Defendant*) AND MOHESHWAR PERSHAD NARAIN SINGH (*Plaintiff*) *v.* DURSUN RAUT AND OTHERS (*Defendants*).*
[25th May, 1887.]

Right of occupancy—Agreement restricting right of occupancy—The Bengal Tenancy Act (VIII of 1885), s. 178, Applicability of, to suits pending when Act came into force.

Section 178 of the Bengal Tenancy Act (VIII of 1885) has no application to suits instituted before the date on which that Act came into force.

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* Appeals from Appellate Decrees Nos. 2138, 2139 and 2140 of 1886, against the decrees of Baboo Amrito Lal Chatterjee, Subordinate Judge of Sarun, dated the 29th of July, 1886, affirming the decrees of Baboo Harihur Churn, Munsif of Chupra, dated the 15th of March, 1886.

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APPELLATE CIVIL.

14 C. 621.

So where a landlord sued to eject a tenant who had executed a *solenamah* agreeing to hold the land in suit for a specified period at a specified rent, and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on the 6th October, 1885, and where it was found that at the date of the *solenamah* the tenant had acquired a right of occupancy with respect to some of the lands in suit: *Held*, that the tenant was not entitled to the benefits conferred by s. 178, cl. 1, sub-cl. (*b*) of the Bengal Tenancy Act, but was liable to be ejected.

THE suits which gave rise to these three appeals were instituted on the 6th October, 1885, and their object was to eject the defendants from certain lands in their possession.

It was alleged by the plaintiff that the defendants held their lands under the terms of a *solenamah*, dated the 21st September, 1878, from the year 1286 to the year 1290. The *solenamah* contained a stipulation that after the expiry of the term the landlord (the plaintiff in these suits) would be at liberty to enter upon [**622**] the lands, and the ryots (the defendants) would not be allowed to cultivate the same without executing a new lease.

The *solenamah* was alleged to have been made with a view to compromising certain suits then pending for the recovery of arrears of rent. The term covered by the *solenamah* expired in 1290, and as the defendants held over a verbal notice to quit was served and these suits were instituted.

The defendant in appeal No. 2138 admitted the *solenamah*, but the other defendants denied it. All the defendants pleaded limitation, denied notice and its sufficiency, and claimed a right of occupancy. The Munsif held that the defendants had admittedly held over after the expiry of the term and paid rents to the landlord; that at the time of the *solenamah* the defendants had acquired a right of occupancy in portions of the lands covered by the *solenamah;* and that in consequence, under s. 178, cl. 1, sub-cl. (*b*) of Act VIII of 1885, the *solenamah* taking away that right was invalid. Upon these grounds he dismissed the suits without deciding as to whether the *solenamah* was genuine or not.

The lower appellate Court found that as regards the defendants in the appeals Nos. 2139 and 2140 the *solenamah* had not been proved and was not genuine, and that even supposing it was genuine, its effect was to take away an occupancy right in existence at the date of its execution, and therefore under s. 178, cl. 1, sub-cl. (*b*) of Act VIII of 1885, it had no application to the case, and that the suit for ejectment did not therefore lie so far as the portion of the lands in which the defendants had a right of occupancy at the date of the *solenamah*. As regards the remainder of the lands in suit the lower appellate Court held that the defendants were equally protected from ejectment under the provisions of s. 21 of Act VIII of 1885. This decree of the lower Court dismissing the suits was accordingly confirmed.

The plaintiff now appealed to the High Court.

Baboo *Durga Dass Dutt*, for the appellant.

Baboo *Benode Behari Mookerjee*, for the respondent in appeal No. 2138.

Mr. *C. Gregory*, for the respondents in appeals Nos. 2139 and 2140.

[**623**] The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

These three appeals arise out of suits to eject the defendants upon the ground that the period of their holding had expired. The plaintiff's

case was based upon an alleged *solenamah* or agreement entered into between the plaintiff on the one hand and several ryots on the other in previous suits. The previous suits were for arrears of rent, and a dispute arose as to the amount of the jumma. In those suits a petition was put in by the plaintiff on the one hand, and it is said that there was a corresponding petition on the other side, agreeing to a particular rate of rent and agreeing between the parties that the ryots should hold a certain specified area for a term of five years at a given jumma. The term having expired the plaintiff sued to eject. In the first case before us, namely, appeal from appellate decree No. 2138 of 1886, the defendant in the lower Court admitted that he executed this *solenamah;* and we think that as he did so it is now impossible for him to escape the effect of it. The lower Courts gave him the benefit of s. 178 of the Bengal Tenancy Act, which provides that "nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall take away an occupancy right in existence at the date of the contract." The Court considered that, as regards a certain portion of the land in question, these defendants had acquired occupancy rights before the alleged *solenamah* was executed. We think, however, that in this suit, which commenced before the new Tenancy Act came into force, the tenant cannot get the benefit of s. 178. We think that the point to be looked to was, what was the right of the tenant at the time that the suit was brought. At the time the suit was brought there was nohing to prevent his contracting himself out of his rights. That being so we think that in the appeal from appellate decree No. 2138 of 1886 the plaintiff is entitled to succeed. That appeal therefore will be allowed with costs in all the Courts.

But as regards the other two appeals, Nos. 2139 and 2140 of 1886, the defendants in the lower Courts repudiated the alleged *solenamah* and denied having been parties to it. And the Courts found as a fact that they were not parties.

[**624**] For the appellant it was contended that the *solenama* had been confirmed by a decree. A copy of the judgment in the case in which the *solenamah* was filed has been put in, but no copy of the decree is produced. We think therefore that the lower appellate Court was justified in holding upon the evidence that the defendants in these two cases were not parties to the *solenamah;* and when it was found that they had rights of occupancy, certainly in respect of some portion of their holding, the Court below was right in dismissing the suit to eject them.

These two appeals are dismissed with costs.

H. T. H. *Appeal No.* 2138 *allowed.*

Appeals Nos. 2139 *and* 2140 *dismissed.*

1887 JUNE 29.

APPELLATE CIVIL.

14 C. 624.

14 C. 624.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

BASARUT ALI AND OTHERS (*1st Party Defendants*) *v.* ALTAF HOSAIN (*Plaintiff*).* [29th June, 1887.]

Bengal Act VIII of 1869, *s.* 27—*Limitation—Suit for possession—Question of title.*

Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed, and sued for a declaration of his title and for recovery of possession claiming a right of occupancy, and the defendant, while admitting that the plaintiff had for one or two years been a tenant of a small portion of the land in suit denied his title to the remainder, or that he had acquired a right of occupany:

Held, that the suit was one to try a *bona fide* question of title, and that it was not barred by 1 year's limitation under s. 27 of Beng. Act VIII of 1869, but was maintainable within 12 years from the date of the cause of action. *Srinath Bhattacharji* v. *Ram Ratan De* (1) distinguished.

[R., 17 C. 926 (928); 31 C. 647 (F.B.)=8 C.W.N. 446 (453).]

THE plaintiff sued for possession of 10 bighas of land and for a declaration of his right thereto, alleging that it was his gorabundi ancestral jote. He alleged that he had been dispossessed by the principal defendants on the 6th Sawan 1291 F. [625] (13th July, 1884), and that they had no right thereto except that of receiving the fixed rent payable in respect thereof. He also claimed mesne profits for the time he had been out of possession.

The principal defendants pleaded that the dispossession had taken place in Assar 1289 (June 1882), and that the suit which was instituted on the 16th May, 1885, was barred by one year's limitation. They further denied that the jote was ancestral, and stated that the plaintiff's father and grandfather lived at a place called Chura, about four coss distant from the land in suit, and that the plaintiff himself only came to Baru which adjoined these lands. They further stated that the first defendant, Basarut Ali, took some 3 bighas 19 cottahs of land from the jote of the defendant No. 4, Tika Gope, and gave it to the plaintiff in 1286 (1878-79); that in 1288 (1880-81) the rates of these jotes were increased, and both the plaintiff and defendant No. 4 began to cultivate both the plots jointly till 1289, when they took possession; and that the plaintiff had acquired no right of occupancy in the lands in suit.

Tika Gope was made a defendant, as the plaintiff alleged that he had been put in possession by the other defendants of some of the lands.

The Munsif held that the suit was not one under s. 27 of the Rent Act, and that it was not barred by one year's limitation, but that the period of 12 years was properly applicable. He further found that the plaintiff had acquired a right of occupancy, having proved possession for more than 12 years, and that the defendants, the ticcadars, were not entitled to dispossess him. He did not, however, decide the question as to whether the rent had been permanently fixed. He accordingly gave the plaintiff a decree for possession and for mesne profits.

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*Appeal from Appellate Decree, No. 2399 of 1886, against the decree of W. Verner, Esq., Judge of Bhagulpore, dated the 24th of September 1886, affirming the decree of Baboo Bemola Churn Mozoomdar, Munsif of Jamai, dated the 25th of January 1886.

(1) 12 C. 606.

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The defendants appealed. The lower appellate Court concurred in the finding of the Munsif as to the plaintiff's having established his right of occupancy and his right to recover possession, but considered that a decision should have been come to upon the question as to whether or not the rate of rent was fixed in perpetuity. As, however, that was not made a ground of objection to the decree, that Court merely confirmed the decree of the Court below and dismissed the appeal.

[**626**] The principal defendants now preferred this second appeal to the High Court, and contended that the siut was barred by limitation.

Moulvie *Mahomed Yusuff* and Baboo *Surender Nath Roy*, for the appellants.

Munshi *Shamsul Huda*, for the respondent.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

The only point taken in this second appeal is that the plaintiff's suit, which is one to recover land of which he had been dispossessed by the defendant, his landlord, is barred by limitation as not having been brought within one year from the date of dispossession.

According to the plaintiff's case, as stated in the plaint, the suit was brought within one year from the date of dispossession. According to the defendant's case, dispossession took place some two years before the suit was brought.

The Courts below, however, found it immaterial to decide which date of dispossession was correct, because they held that, as this was a suit to establish plaintiff's title to recover possession of land, the limitation would be 12 years and not one year. This question was decided only by the first Court. The lower appellate Court was silent in respect of that issue. We must conclude that the point was abandoned because the defendant-appellant must have acquiesced in the judgment of the first Court that, the suit being one for title, one year's limitation would not apply.

We are asked in this appeal to hold that one year's limitation does apply to the case, and that the suit should be sent back for a clear finding as to the date when the cause of action accrued.

In support of this contention we have been referred to a decision of this Court in *Srinath Bhattacharji* v. *Ram Ratan De* (1), and to a recent decision by the Chief Justice and Mr. Justice Cunningham in second appeal No. 1215 of 1886. The reported case held that, although the plaintiff might ask for a declaration of title, [**627**] still one year's limitation, under s. 27 of the Rent Act of 1869, would apply where the existence of the tenure is not disputed and the plaintiff's original title, as tenant, had not been questioned, and where there is no question of title raised in the suit or raised before the suit, except whether on the one hand the plaintiff has been dispossessed by force, or, on the other hand, his tenure has come to an end by his having relinquished it. The Court held that the suit was not a suit to try title within the meaning of the rule referred to.

In the present case, however, we find that the defendant from the commencement denied that the plaintiff had any title whatever. Of the 10 bighas claimed, he only admitted that, during one year or for two years, the plaintiff had been a tenant in respect of something under 4 bighas. On the other hand, the plaintiff set up a gorabundi tenure, and prayed

(1) 12 C. 606.

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the Court to decide that question of title in his favour. We think, therefore, that this case differs from the case of *Srinath Bhattacharji* v. *Ram Ratan De* (1) and that there being a *bona fide* question of title, the suit was maintainable within 12 years from the date of the cause of action.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 627.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

IN THE MATTER OF THE PETITION OF SHARUP CHAND MALA.
SHARUP CHAND MALA *v.* PAT DASSEE.* [10th June, 1887.]

Review—Error of law—Law, Mistaken view of—Civil Procedure Code (Act XIV of 1882), *s.* 623.

A review of judgment may be granted (if it is necessary for the ends of justice that the judgment should be reviewed), where there is an error of law on the face of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law. *Rewa Mahton* v. *Ram Kishen Singh* (2) referred to.

In this case, without deciding whether there was or not any error in law, the application for review of judgment was refused on the ground that it did not appear there was any danger of its causing a miscarriage of justice.

[F., L.B.R. (1893-1900) 568 (573); 124 P.R. 1906=97 P.L.R. 1907; R., U.B.R. (1892-1896), Vol. II, 153 (154); 11 C.P.L.R. 41 (43).]

[**628**] THIS was a rule obtained by one Sharup Chand Mala, calling upon one Pat Dassee, the plaintiff in the case of *Pat Dassee* v. *Sharup Chand Mala* (3), to show cause why the judgment obtained by her in that case should not be reviewed.

The facts of the case will be found fully stated in I. L. R., 14 Calc. 376. The question there decided was, that a judgment-debtor who has paid off the amount of a decree standing against him, but has done so out of Court, not having certified the fact of such payment to the Court under the provisions of s. 258 of the Civil Procedure Code, is at liberty (in a suit brought by him against the decree-holder for the purpose of setting aside a sale of properties fraudulently held in execution subsequently to payment of the decretal money) to prove the payment of the decretal money otherwise than by production of a certificate under s. 258.

The grounds on which the rule *nisi* were obtained were—

(1) That as the auction-purchaser was in no way implicated in the fraud practised by the decree-holder on the judgment-debtor, the sale ought not to have been set aside.

(2) That in accordance with the decision of the Privy Council in the case of *Rewa Mahton* v. *Ram Kishen Singh* (2), the sale should not have been set aside.

(3) That the question regarding s. 258 of the Code of Civil Procedure was never raised in the lower Courts.

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* Civil Rule No. 1025 of 1887 on an application for review of judgment in appeal from Appellate Decree No. 1272 of 1886.

(1) 12 C. 606. (2) 14 C. 18=13 I. A. 106. (3) 14 C. 376.

(4) That the decision of the High Court was in conflict with the decisions of *Jan Ali* v. *Jan Ali Chowdry* (1), *Chunder Kant Surmah Talookdar* v. *Bissesur Surmah Chuckerbutty* (2); *Ram Ghulam* v. *Hazra Kuar* (3). **1887** JUNE 10.

Mr. *Woodroffe*, Baboo *Rash Behary Ghose*, and Baboo *Kasinath Kant Sen* to show cause, supported the judgment, citing *Kristo Ram Roy* v. *Janokee Nath Roy* (4), *Lalit Mohun Roy* v. *Binodai Dabee* (5), remarking that in *Rewa Mahton* v. *Ram Kishen Singh* (6) the remarks made by the Privy Council in the [**629**] last seven lines of the second paragraph on p. 25 of the report were *obiter;* and as to the grounds for review being bad referring to the cases cited in the Notes to s. 623 of Mr. O'Kinealy's edition of the Code heading " any other sufficient reasons." APPELLATE CIVIL. **14 C. 627.**

The Advocate-General (Mr. *Paul*) and Mr. *R. E. Twidale* in support of the rule contended that under the Code the decree was never satisfied, for before satisfaction could be entered up under s. 258 the fact of the decree having been paid off must be certified to the Court, and that that not having been done, there was no satisfaction of the decree; that if execution had issued properly, on what ground could the sale be set aside? Clearly only for irregularity or fraud ; that neither of these matters were alleged as against the purchaser; that the case of *Rewa Mahton* v. *Ram Kishen Singh* (6) was not at the hearing of the appeal brought to the notice of the Court, that case being directly in conflict with the decision on appeal and directly governing the present case, it being there " held that a purchaser under a sale in execution is not bound to enquire whether the judgment-debtor has a cross judgment of a higher amount, such as would have rendered the order in execution incorrect. But that if the Court has jurisdiction, such purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues. These are questions to be determined by the Court issuing execution." That Mr. Woodroffe had stated that the latter part of these remarks were *obiter dicta*, but that was not so, a general principle being laid down thereby. As to whether there was a good ground in law to ask for the review, an error on a point of law was a good ground.—*Koh Pon* v. *Moung Tay* (7), referring also to *Chintamini Pal* v. *Pyari Mohan Mookerjee* (8), *Pentland* v. *Stokes* (9), *Reasut Hossein* v. *Hadjee, Abdollah* (10).

ORDER.

The order of the Court (Mr. Justice CUNNINGHAM being absent from the Court at the time of the granting of the rule and at the hearing) was delivered by

[**630**] PETHERAM, C.J.—This is an application to admit to review a judgment passed in March last by my brother Cunningham and myself, and the ground for the application is that there is a manifest error in law on the face of the judgment, because it is absolutely in conflict with a judgment of the Privy Council delivered in the month of July of last year, and which appeared in the January number of the Law Reports of this year, and which consequently was in existence and known in this city when the case was argued and judgment given, but was not cited in the argument before us. Now I have not the slightest doubt that if there is an error in law on the face of a judgment, or if it is shown that the decision of the Court has proceeded upon a mistaken view of the

(1) 1 B. L. R. A. C. 56=10 W. R. 154. (2) 7 W. R. 312.
(3) 7 A. 547. (4) 7 C. 748. (5) 14 C. 14.
(6) 14 C. 18=13 I A. 106. (7) 10 W. R. 143. (8) 6 B. L. R. 126.
(9) 2 Ball. and B. 76. (10) 3 I. A. 221 (229)=2 C. 131.

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APPELLATE CIVIL.

14 C. 627.

law, that is a ground for review of judgment if it be necessary for the ends of justice that the judgment should be reviewed. These are the words used by Mr. Justice Norman in a case which was cited before us; and if for any reason it could be shown to me that any judgment of mine was wrong in fact on a point of law, and that there was any danger whatever that the ends of justice would be defeated, or that justice would not be done by reason of that error, I should be the first man to set it right; but I do not think that in this particular case there is any necessity whatever for reviewing our judgment. In the first place, if there is an error, it is an error of law, which was just as great an error at the time the judgment was passed, and as apparent then as it is now, because the law, if the case now relied upon had then been brought before us, was just as clear at the time as it is now. I am not prepared to say whether, if it had been cited before us, this decision of the Privy Council might or might not have changed my view of this particular case; and I am not prepared to say that the decision of this case was wrong in law, because the facts of the case before the Privy Council were not the same as the facts of the case before us. The case before the Privy Council was one in which the decree was not satisfied, but this is a totally different case. If, however, as I said before, I thought that there was any danger from any possible error of law that the ends of Justice would be defeated, I would have no hesitation in granting the review; but I do not think in this [**631**] case that, whether the decision on the law is right or wrong, there is any danger at all that justice will not be done. The only question is, which of two innocent persons is, not to bear a loss, but to be put to his remedy against a third person for the recovery of a certain sum of money; there is no question of that money having to be recovered from a person unable to repay it; there is no question that the judgment-debtor has paid the money and satisfied the decree; and no question that there is a remedy against the fraudulent decree-holder to recover that money by the person who purchased the property at the auction sale held at the instance of the decree-holder on a decree which had already been satisfied.

Under these circumstances I do not think it necessary in this case, whether there is or there is not any error in law, that this judgment should be reviewed, and I therefore refuse to admit the review.

The opposite party will be entitled to recover the costs of this hearing from the petitioner.

T. A. P. *Rule discharged.*

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14 C. 631.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ghose.

IN THE MATTER OF DEEFHOLTS (*Claimant*).

DEEFHOLTS *v.* PETERS (*Decree-holder*) AND OTHERS (*Opposite parties*)*

[29th June, 1887.]

Civil Procedure Code (Act XIV of 1882), s. 278—Claim to property directed to be sold under a mortgage decree—Attachment.

Proceedings by way of claim under s. 278 of the Civil Procedure Code are applicable only to cases of money decrees where property has been attached, and not to claims preferred to properties directed to be sold under mortgage decrees.

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* Civil Rule No. 505 of 1887, against the order of Baboo Promotho Nath Banerjee, Subordinate Judge of Mymensingh, dated the 23rd of March 1887.

[F., 18 B. 98 (100); 12 C.P.L.R. 73 (75); 4 L.B.R. 82 (83)=14 Bur. L.R. 201; 18 Ind. Cas. 215 (216); **Expl.**, 1 N.L.R. 142 (143); **D. & Not Appl.**, 123 P.L.R. 1912=247 P.W.R. 1912=13 Ind. Cas. 563; **R.**, 19 A. 480 (481)=17 A.W.N. 115; 1 C.W.N. 701 (702): 2 L.B.R. 138 (139); 6 Bom.L.R. 1043 (1049); **D.**, L.B.R. (1893-1900), 509 (510); 17 M. 17 (19).]

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APPELLATE CIVIL.

14 C. 631.

THIS was a claim preferred by one Mrs. Deefholts under s. 278 of the Civil Procedure Code to certain properties which had been mortgaged in 1884 by her uncle to Mrs. Sophia Peters who had obtained a decree on such mortgage under ss. 86-88 [**632**] of the Transfer of Property Act for the sale of the mortgaged properties.

The Subordinate Judge hearing the claim case held that s. 278 of the Code applied only to claims preferred to the property which had been *attached* in execution of a decree; that it was unnecessary to issue an attachment in order to enforce a decree for sale of mortgaged property, the order for sale in the decree being in itself a sufficient authority for the sale; and that moreover s. 254 of the Code clearly showed that attachment is only necessary in the case of money decrees; he therefore dismissed the claim.

The claimant moved the High Court, and obtained a rule calling upon the decree-holder to show cause why the order of the Subordinate Judge should not be set aside, and why he should not be directed to entertain the claim on its merits.

Mr. *Evans*, Baboo *Lal Mohun Dass*, and Baboo *Baikunt Nath Dass*, in showing cause, contended that the order of the Subordinate Judge was correct, and cited *Dayachand Nemchand* v. *Hemchand Dharamchand* (1).

Baboo *Jogesh Chunder Rai*, in support of the rule.

The order of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

ORDER.

We think that this rule must be discharged. The rule was obtained for the purpose of compelling the Subordinate Judge to enquire into a claim which had been made by a person claiming to be interested in a certain property which had been ordered to be sold under a mortgage decree: the mortgage being a mortgage of that very property, and the decree sought to be executed being a decree passed upon the mortgage bond, and directing the sale of the property.

We think that proceedings by way of claim are not applicable to a case of this kind. Proceedings by way of claim are applicable only in cases of money decrees where property of the judgment-debtor has been attached; that is, where some property of the judgment-debtor is attached for the purpose of [**633**] satisfying any general money claim. In that kind of claim it is clear that there should be some speedy remedy for the purposes of ascertaining whether the property claimed is the property of the judgment-debtor at all; but in a case like this where the property has been dealt with in a solemn way by the decree of the Court, and has been declared liable to sale under the mortgage, that remedy would not be applicable. In cases like this the remedy is not by claim under s. 278, but is either by regular suit to establish his right to the property, or by resistance to the purchaser, or the mortgagee, or other person who would be put in possession of the property.

The rule will, therefore, be discharged.

T. A. P. *Rule discharged.*

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(1) 4 B. 515.

1887 June 10.

Criminal Reference.

14 C. 633.

14 C. 633.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

Queen-Empress *v.* Karim Buksh. [10th June, 1887.]

False charge—Penal Code, s. 211.

A false charge before the Police is a false charge falling within the first portion of s. 211 of the Penal Code.

The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and does not apply to false charges merely. *Empress of India* v. *Pitam Rai* (1) and *Empress* v. *Parahu* (2) followed.

[**Overruled**, 17 C. 574 (**F.B.**); **Diss.**, 20 M. 79 (80)=1 Weir. 189; **F.**, 7 C.W.N. 556 (557); **Expl. & R.**, 32 C. 180 (184); **R.**, 22 B. 596.]

The accused in this case, one Karim Buksh, a writer constable, had laid a charge of theft against a certain person before the Police. The Police reported the case to be false, whereupon the District Magistrate made over the case to a Deputy Magistrate for trial. On the day fixed for trial, Karim Buksh did not appear to prosecute, and the Deputy Magistrate therefore returned the record to the District Magistrate. The District Magistrate then [**634**] passed an order in the case declaring it to be false, and directed that Karim Buksh should be prosecuted under s. 211 of the Penal Code. The case against Karim Buksh was then taken up, and he was convicted of an offence under s. 211 of the Penal Code, and sentenced to a fine of Rs. 58, or in default to two months' rigorous imprisonment.

The District Magistrate sent up the case to the High Court for revision, considering that the order of the Deputy Magistrate was wrong in law, inasmuch as the criminal proceedings instituted by Karim Buksh having been taken under s. 380 of the Penal Code, which carried a maximum sentence of seven years' rigorous imprisonment, the Deputy Magistrate had no alternative but to pass a sentence of *imprisonment* under the latter part of s. 211 of the Penal Code.

Baboo *Makunda Nath Rai* for Karim Buksh contended that the sentence of fine was legal, the case falling under the first part of s. 211 of the Penal Code; that the first part of the section dealt with criminal proceedings as well as false charges, and a sentence of fine only would be perfectly legal, although such false charges related to offences punishable with death, transportation for life, or imprisonment for seven years or upwards; that in the latter part of the section, criminal proceedings only are spoken of; that here the false charge having been made before a Police officer, no criminal proceeding was instituted in any Court; that therefore the Deputy Magistrate was quite competent to pass a sentence of fine only. See *Empress of India* v. *Pitham Rai* (1) and *Empress* v. *Parahu* (2).

The order of the Court (Petheram, C. J., and Ghose, J.) was as follows:—

ORDER.

Petheram, C.J.—In this case we think there is no reason for the interference of the Court. This case has been referred to us by the Magistrate in order that this Court may revise the sentence of fine which has been

* Criminal Reference No. 137, of 1887, made by C. R. Marindin, Esq., Magistrate of Dinagepore, dated the 27th of May, 1887, against the sentence passed by H. Thompson, Esq., Deputy Magistrate of Dinagepore, dated the 10th of May, 1887.

(1) 5 A. 215. (2) 5 A. 598.

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14 C. 633.

passed on the accused on a conviction of having made a false charge before the Police, because the charge which he made was a charge of an offence under s. 380 of the Indian Penal Code, the punishment for which may be seven years' rigorous [**635**] imprisonment, and the Magistrate thinks that the sentence of fine was illegal, because by the latter portion of s. 211 of the Indian Penal Code, the punishment must be a punishment of imprisonment and there is no option to impose a fine only.

The facts of the case here are, that the accused made a charge before the Police which he did not afterwards press before the Magistrate, and the only offence which he has committed has been that of making a false charge before the Police, and not of instituting any criminal proceedings beyond that. The question which arises is, whether the offence which he has committed comes within the earlier or later portions of s. 211 of the Indian Penal Code.

The earlier portion of that section provides that " whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;" this is the first part of the section. And then the section goes on to say: " And, if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, the person instituting such criminal proceeding shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." The class of offence which is included in the last half of this section is punishable with imprisonment without option of fine; and the question is, whether the offence of which the accused has been guilty is within the latter half of the section.

Now, the latter half of the section is confined to criminal proceedings instituted on false charges, and by the earlier part of the section the distinction is drawn between criminal proceedings instituted and false charges alone. We think that we must make the same distinction and must hold, as has been held in several cases in the Allahabad Court, though not in this Court, that the latter part of the section is confined to cases in which [**636**] criminal proceedings have been instituted, and that it does not apply to false charges merely.

But, as I said before, the accused in this case did not institute any criminal proceedings in the sense of his instituting any proceedings in any Court. What he did was to make a false charge before the Police, and that, it seems to us, is the kind of false charges which is dealt with in the first part of the section, and consequently that the Magistrate was entitled to inflict the punishment which is provided by that part of the section, and that he was not compelled or, indeed, empowered, to inflict the punishment fixed by the latter half of the section, and therefore it was competent to him to award a fine only, if in his discretion he thought fit.

For these reasons we think that the Deputy Magistrate committed no legal error in the course he took in this case, and there is no reason for the interference of the Court.

T. A. P. *Order upheld.*

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FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

LAL MOHUN MUKERJEE AND GRISH CHUNDER MUKERJEE *v.* JOGENDRA CHUNDER ROY AND OTHERS; BONOMALI CHUNDER GHOSAL v. RAMKALI DUTT AND OTHERS.* [23rd May, 1887.]

Bengal Tenancy Act, s. 174—Act creating new rights, Effect of—Application for execution.

The provision of an Act which creates a new right cannot, in the absence of express legislation or direct implication, have a retrospective effect.

Held, accordingly, that a judgment-debtor's right under s. 174 of the Bengal Tenancy Act to set aside a sale did not avail where the sale was held in pursuance of a decree; the execution whereof had been applied for before that Act came into operation.

[**Overruled,** 22 C. 767 (**F.B.**); **Appl.,** 15 C. 383 (385) (**F.B.**); **R.,** 16 C. 267 (272) (**F.B.**); 21 C. 940 (**F.B.**); 23 B. 450 (452); 90 P.R. 1904=88 P.L.R. 1904 (**F.B.**); 17 C.W.N. 619 (620)=15 Ind. Cas. 479 (480).]

THESE proceedings arose out of applications made by certain judgment-debtors under the provisions of s. 174 of the Bengal [**637**] Tenancy Act to set aside some sales of tenures held in execution of decrees for arrears of rent. In one of the cases (Rule No. 592) execution proceedings up to sale proclamation were held before the Bengal Tenancy Act came into operation; but the sale took place after that date. In the other case (Rule No. 1401) the decree was passed under Bengal Act VIII of 1869; but application for execution was not made until the Tenancy Act had come into operation. The Munsifs of Furridpur and Alipore, before whom the applications were respectively made, granted the application and set aside the sales in conformity with the provisions of s. 174 of the Act.

The opposite parties in each case applied for and obtained rules in the High Court. The rules were argued before PRINSEP and BEVERLEY, JJ., who made the following reference to a Full Bench:—

These rules arise out of proceedings taken under s. 174 of the Bengal Tenancy Act, in which sales of tenures held in execution of decrees for arrears of rent have been set aside at the instance of the judgment-debtor. In both cases the decree was made while Bengal Act VIII of 1869 was still in force, but the sale actually took place after the 1st November, 1885, on which date the Bengal Tenancy Act came into force. But there is this difference between the two cases. In the case of Rule 592 execution was applied for, and the sale proclamation was issued under Bengal Act VIII of 1869, whereas in Rule 1401 the application for execution was made after the Bengal Tenancy Act came into force. The question is whether in either or both of these cases the provisions of s. 174 of the Bengal Tenancy Act are applicable. As the question is an important one, and as we understand that the matter is before the Court in several other cases, we think that the point should be referred to a Full Bench for decision. On the one hand it is contended that proceedings in

* Full Bench Reference in Rule No. 592 of 1886 against the order of the Second Munsif of Bhanga, Furridpur, dated 20th February, 1886, and in Rule No. 1401 against the order of the Munsif of Alipore, 24-Pargunnahs, dated the 16th August 1886.

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execution are proceedings in the suit, and that the sales must therefore be considered to be sales under Bengal Act VIII of 1869 and not under the Bengal Tenancy Act, and that the provisions of s. 174 will not apply to such sales. It is further urged that s. 174 is only one of several sections contained in Chapter XIV of the Bengal [638] Tenancy Act, many of which sections are expressly made applicable to sales under that chapter only. It is argued, therefore, that s. 174 will not apply in cases other than those in which the application and attachment have been made under ss. 162 and 163. On the other hand it is contended on the authority of the Full Bench decision in the case of *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (1) that the Bengal Tenancy Act must be held to have retrospective effect in matters of procedure, so far that its provisions will be applicable to proceedings commenced before the Act came into force. In reply to this, it is argued that the section in question confers a new right on the judgment-debtor and takes away an already existing right from the auction-purchaser, and that, therefore, upon the authority of the very case cited, the Act ought not to be allowed to have retrospective effect. Section 6 of the General Clauses Act (I of 1868) is also relied on. Two other cases were referred to in the course of the argument. One of these is *In the matter of the petition of Mulo* (2), in which it was held that an application under s. 315 of Act X of 1877 could be entertained in respect of sales held under the former Code (Act VIII of 1859), although no similar provision was contained in that Code. The other case referred to was that of *Hurro Sundari Debi* v. *Bhojohari Dass Manji* (3), in which it was held that where the repealing Act gave a right of appeal which did not exist under the Act repealed, no appeal would lie against a decree made before the passing of the repealing Act. The question, then, that we propose to refer to the Full Bench is this: Whether an application under s. 174 of the Bengal Tenancy Act can be entertained in respect of sales held in execution of decrees made before the passing of that Act—(*a*) when execution of the decree was applied for before the passing of the Act; (*b*) when execution of the decree was applied for after the passing of the Act.

Baboo *Guru Dass Banerjee*, Baboo *Jadub Chunder Seal*, and Baboo *Chunder Kant Sen*, for the petitioners.

[639] Baboo *Rasbehari Ghose*, Baboo *Karuna Sindhu Mukerjee*, Baboo *Bhuban Mohun Dass*, Baboo *Amarendra Nath Chatterjee* and Baboo *Surendra Nath Roy*, for the opposite parties.

Before the Full Bench Rule No. 1401 was compromised.

Baboo *Rasbehari Ghose* opposed the Rule.—Section 174 of the Bengal Tenancy Act applies to this case. If proceedings have already been commenced under the old Act and the rules in the new Act conflict with those in the old, the repealed Act shall regulate the proceedings; but where the change is a beneficial one and gives only an additional remedy, the procedure in the new law shall be adopted. *Framji Bomanji* v. *Hormusji Burjorji* (4), *Ratan Chand Srichand* v. *Hanmantrav Shibaksh* (5); *Ranjit Singh* v. *Meherban Koer* (6), have explained the terms "proceedings" and "procedure." Procedure affects rights. In the present case no vested right has been taken away or abriged. Even conceding the most liberal construction to

(1) 12 C. 583. (2) 2 A. 299. (3) 13 C. 86.
(4) 3 B. H. C. R. O. C. 49. (5) 6 B. H. C. R. A. C. 166. (6) 3 C. 662,

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the word "proceedings," in the present case they came to a close with the sale.

Authorities cited: Maxwell on Statutes, pp. 377-379; *Van Bovan's case* (1); *Gurupadapa Basapa* v. *Virbhadrapa Ibsangopa* (2); *In the matter of the petition of Mulo* (3).

Baboo *Guru Dass Banerji* in support of the Rule.—There must be some distinction between "procedure" "and proceedings." Statutes will not have retrospective effect except when they deal with procedure. Proceedings cannot be said to trminate with the sale. Confirmation of sale forms part of the previous proceedings—*Hurro Sundari Debi* v. *Bhojohuri Dass Manji* (4) Maxwell on Statutes 195.

JUDGMENT.

The judgment of the Court (MITTER, PRINSEP, WILSON, TOTTENHAM and NORRIS, JJ.) was delivered by

MITTER, J.—We are of opinion that an application under s. 174 of the Bengal Tenancy Act cannot be entertained in respect of sales held in execution of decrees made before the date when that Act came into operation, the execution of the decree having been applied for before the aforesaid date. [640] Section 174 of the Bengal Tenancy Act confers upon the judgment-debtors a *new right* which they did not possess under the old Act. Therefore the presumption is (in the absence of express legislation or direct implication to the contrary) that its operation is not intended to be retrospective. Its provisions cannot, therefore, be applied to proceedings commenced before the Act came into operation. The rule will be made absolute with costs.

PRINSEP J.—As one of the Judges who referred this case, I think it necessary to state that it was referred as cognate to another case already referred,* in which the point raised was one of some difficulty and importance, so as to secure uniformity of practice. It is much to be regretted that the parties have since compromised that case and thus prevented the settlement of this matter.

K. M. C. *Rule absolute.*

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14 C. 640 (F.B).

FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Norris.

BASUDEO NARAIN SINGH AND OTHERS (*Objectors*) *v.* SEOLOJY SINGH (*Decree-holder*).† [18th April, 1887.]

Civil Procedure Code, s. 244—Finality of order—Competency of Court.

S. S. brought a suit under a mortgage bond, making *R. S.*, a subsequent incumbrancer, a defendant, and obtained a decree for sale of the whole of the mortgaged premises. After the decree, a compromise was effected between all

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*Rule No. 1401.

†Full Bench Reference in appeal from Order No. 421 of 1886, against the order of T. M. Kirkwood, Esq., Judge of Patna dated the 30th of August 1886, reversing the order of Baboo Ram Pershad Roy, Bahadur, Subordinate Judge of that district, dated the 12th of May 1886.

(1) 9 Q. B. D. 669. (2) 7 B. 459. (3) 2 A. 299. (4) 13 C. 86.

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the parties *with the exception of R. S.*, by the terms of which, in consideration of the judgment-debtors (mortgagors) undertaking to do certain acts, *S. S.* promised to execute his decree against only a 3 annas 12 dams share of the mortgaged premises. The judgment-debtors (mortgagors) having failed to carry out the compromise, *S. S.* applied for a sale of the whole of the mortgaged premises, but on the petition of *R. S.* setting out the terms of the compromise to which he was no party, the Subordinate Judge by on order of the 7th September 1885 held that under the agreement *S. S.* was entitled to sell only a 3 annas 12 dams share of the mortgaged premises, which was accordingly directed to be sold. That order was not **[641]** appealed against, but subsequently in March 1886, *S. S.* made a fresh application for sale of the remainder of the premises, *R. S.* objecting.

Held, that the order of the 7th September was one which the Court was competent to make under s. 244 of the Code of Civil Procedure, and by reason of that order not being appealed, it became final.

SEOLOJY SINGH brought a suit against the members of a joint family, some of whom were minors, for the recovery of a sum of Rs. 2,767, principal and interest, due under a registered mortgage bond executed by the adult members of the family, by a sale of the mortgaged premises. Ramnarain Singh, a subsequent incumbrancer and the appellant's predecessor in title, was also made a defendant. The suit was decreed, and a sale of the whole of the mortgaged premises directed to be made in default of the mortgagors redeeming within a certain time. After the decree, the Court, at the instance of the minor defendants, ordered a re-trial of the suit as against them, which terminated in an *ex parte* decree upon the terms of the former decree. Thereafter an application was made on behalf of the minors to set aside the *ex parte* decree, and during its pendency a compromise was effected between the judgment-creditor and the judgment-debtors mortgagors, by the terms of which Seolojy Singh, the decree-holder, in consideration of the judgment-debtors, mortgagors, paying off a *ticcadar* who had an incumbrance on the whole of the mortgaged premises, and executing a registered agreement to pay him off, promised to execute his decree against only a 3 annas 12 dams share of the mortgaged premises. The terms of the compromise were embodied in a petition and filed in Court, and thereupon the application against the *ex parte* decree was struck off. The judgment-debtor having failed to pay off the *ticcadar*, or execute the agreement, Seolojy Singh applied on the 24th June, 1885, for a sale of the whole of the mortgaged premises. Notice of this application was served upon the judgment-debtors, and also on Ramnarain Singh. On 6th August, 1885, Ramnarain put in a petition, setting up the compromise to which he was no party, and objecting that the sale should be limited to a 3 annas 12 dams share of the mortgaged premises. On the 7th September 1885, the Subordinate Judge passed an order to the effect that, upon the terms of the compromise, the decree-holder was entitled [**642**] to sell only a 3 annas 12 dams share of the premises, leaving the decree-holder to take such steps as he might be advised for getting the agreement, as stipulated between him and the judgment-debtors (mortgagors), executed. On the occasion of this order of 7th September 1885, the judgment-debtors, mortgagors, do not appear to have been present or represented; but on the 16th September they put in a petition, saying that they were unable to pay off the *ticcadar*, and that they had no objection to the sale of the whole of the mortgaged premises. On the 26th September 1885, the judgment-creditor again applied for a sale of the whole of the mortgaged premises, but his application was refused by the Subordinate Judge. On the 15th December, the 3 annas 12 dams were sold, and purchased by the decree-holder for

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Rs. 700, which was insufficient to satisfy the amount of his decree. On 1st March 1886, Seolojy Singh applied for a sale of the remainder of the mortgaged premises; but upon the objection of the sons of Ramnarain Singh, deceased, the Subordinate Judge rejected the application on the ground that, as the decree-holder had neither preferred an appeal against the orders of the 7th and 26th September, nor filed " a petition of review " thereof, those orders had become final. The decree-holder, thereupon, appealed to the District Court, which did not regard the orders of the 7th and 26th September as *re-judicata*, and allowed the appeal with the following observations:—

" I find that the judgment-debtors having entirely failed to carry out any portion of the terms of the compromise, the promise therein, on the part of the decree-holder to sell no more than 3 annas 12 dams, is in no way binding on the decree-holder. Therefore, even as regards the parties to the compromise, the compromise cannot stand in the way of the decree-holder in executing the decree as now prayed for. Much less can it stand in his way, when Ramnarain, who was not one of the owners of the property but only a subsequent incumbrancer, of it, and was no party to the compromise, steps forward to bar the way of the decree-holder with that document."

Basudeo Narain Singh and others, the heirs and representatives of Ramnarain Singh deceased, appealed to the High Court. The Court (Petheram, C. J., and Norris, J.) referred the case to **[643]** a Full Bench with (after stating the facts as above) the following opinion:—

We are clearly of opinion that the orders of 7th and 26th September were altogether wrong, the compromise having failed, as the mortgagors had not carried out their portion of the agreement.

We refer to a Full Bench the question, whether the orders of 7th and 26th September, 1885, finally decided that only the 3 annas 12 dams share of the mortgaged premises could be sold in execution of the decree as between the judgment-creditor and Ramnarain, so as to prevent the judgment-creditor from ever re-opening the question.

Before the Full Bench,—

Mr. *Twidale*, for the appellants, contended.—The order of the 7th September is conclusvie between the parties. The Court made that order in the exercise of its jurisdiction. That order was not appealed against, and whether right or wrong has become final—*Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1); *Ram Kirpal Shukul* v. *Rup Kuari* (2); *Bani Ram* v. *Nanhu Mal* (3).

Mr. *C. Gregory* (with him Baboo *Mohesh Chunder Chowdhry*) for the respondent.—The order cannot operate as *res judicata*—*Hurrosoondary Dassee* v. *Jugobundho Dutt* (4). The Court had no jurisdiction to pass the order at the instance of the subsequent incumbrancer, who was no party to the compromise. The cases cited in support of the appeal are thus distinguishable from the present case. The order is of no effect—*Forester* v. *Secretary of State for India in Council* (5).

The judgment of the Full Bench (Mitter, Prinsep, Wilson, Tottenham, and Norris, JJ.) was as follows:—

JUDGMENT.

The question whether the decree-holder was entitled to sell the whole 8 annas or a 3 annas 12 dams share of the mortgaged premises, was

(1) 8 I. A. 123=8 C. 51. (2) 11 I. A. 37=6 A. 269. (3 11 I. A. 181=7 A. 102.
(4) 6 C. 203. (5) 4 I. A. 137=3 C. 161.

decided by an order, dated 7th September, 1885. The Court which made the order had full authority to make it under s. 244 of the Code of Civil Procedure. By reason [644] of that order not being appealed from, it became final. The question disposed of by it is, therefore, no longer an open question between the decree-holder and the appellants before us. We, therefore, set aside the decision of the lower appellate Court so far as the appellants are concerned. We do not interfere with the decision of the lower appellate Court so far as the original judgment-debtors are concerned, as they have not appealed against it.

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The appellants are entitled to recover the costs of this appeal and in the lower appellate Court from the respondents. We assess the costs of both hearings at Rs. 50.

K. M. C. *Appeal allowed.*

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14 C. 644.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

KISHORI MOHUN ROY CHOWDHRY AND OTHERS (*Plaintiffs*) *v.* CHUNDER NATH PAL AND OTHERS (*Defendants*).* [23rd May, 1887.]

Possession, Suit for—Suit for possession by purchaser at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), *ss.* 11, 318—*Concurrent remedies—Limitation Act (XV of* 1877), *art.* 138, *sch. II.*

A purchaser at a sale in execution not having applied to the Court for possession under s. 318 of the Code of Civil Procedure, brought a regular suit to obtain possession of the property purchased: *Held* that, although a remedy might be open to the plaintiff under s. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent.

The words "the date of the sale," in the third column of art. 138, sch. II of the Limitation Act, 1877, signify the date of the actual sale, and not that of the confirmation of such sale.

[**F.**, 29 A. 463=A.W.N. (1907) 131=4 A.L.J. 434 (436); 31 M.177=3 M.L.T. 306; **R.**, 15 M. 331 (333); 2 L.B.R. 140 (143) (**F.B.**); 16 C.P.L.R. 135 (139); 74 P.R. 1907=16 P.L.R. 1908; 5 A.L.J. 285 (288)=A.W.N. (1908) 122; 31 A. 82=6 A.L.J. 71=5 M.L.T. 185=1 Ind. Cas. 416; 17 M. 89 (91); **D.**, 18 M. 144 (145); 23 C. 49 (51); 3 Bom. L.R. 94 (97); 30 A. 72=5 A.L.J. 20=A.W.N. (1908) 12.]

ON the 20th July 1883, the plaintiffs brought a suit to recover possession of certain lands and a house standing thereon, alleging that the house and land formerly belonged to one Chunder Nath Pal, and that they had purchased the same at two separate auction sales held in execution of decrees against [645] Chunder Nath Pal; the house being purchased at a sale held on the 18th July, 1871, and the sale confirmed on the 22nd August 1871; the land being purchased at a sale held on the 26th July, 1871; and that they had taken possession and retained possession of these properties for two years but had subsequently been dispossessed by the defendants.

The defendants contended that the plaintiffs, not having been put into possession through the Court under s. 318 of the Code, were, there-

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*Appeal from Appellate Decree, No. 179 of 1886, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 6th of October 1885, affirming the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of that district, dated the 28th of February 1884.

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14 C. 644.

fore, debarred from bringing a regular suit for possession; they denied that the plaintiffs had ever been in possession of the properties, and pleaded limitation as far as the claim to the house was concerned.

The Subordinate Judge found that the plaintiffs had never been in possession of the property, and that the claim as regards the house was barred, twelve years having elapsed since the date of the sale of the 15th July 1871; and that as the plaintiffs had not applied to the Court for possession of the land under s. 318 of the Code, no suit would lie. He, therefore, dismissed the suit.

The plaintiffs appealed to the District Judge, who affirmed the finding of the lower Court as to the plaintiffs never having obtained possession of the properties after the sale, and also on the point of limitation; holding on the question under s. 318 that the authorities showed "that in all cases in which an auction-purchaser had been allowed to bring a suit for possession, he has had to show that he has done his best in the execution department first, and that he had either obtained possession and been subsequently dispossessed, or that his efforts to obtain possession had been infructuous;" and finding that the plaintiffs had failed to show any such efforts, he dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Sharoda Churn Mitter*, for the appellants, contended that the suit would lie without first having recourse to an application under s. 318, citing *Iswar Pershad Gurgo* v. *Jai Narain Giri* (1); *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (2) and *Seru Mohun Bania* v. [**646**] *Bhagobun Din Pandey* (3), and contending that on the point of limitation, limitation ran from the date of confirmation of the sale.

Baboo *Hari Mohun Chuckerbati* and Baboo *Srinath Banerjee*, for the respondents, contended that the suit would not lie, citing *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (4), and that limitation ran from the date of the actual sale—*Kalee Dass Neogee* v. *Hur Nath Roy Chowdhry* (5); *Bhyrub Chunder Bundopadhya* v. *Soudamini Dabee* (6).

JUDGMENT.

The judgment of the Court (Petheram, C. J., and Ghose, J.) was delivered by

Petheram, C. J.—This is a suit to recover possession of two parcels of property purchased by the plaintiff at auction sales some years ago. One of them was purchased at an auction sale on the 18th July, 1871, and the sale was confirmed on the 22nd August 1871. The second parcel was purchased on the 21st July, 1871, within twelve years of suit, which was instituted on the 20th July 1883. So that as to the first parcel, that is to say the house, the question arises whether the suit is barred by limitation, it being admitted that the auction sale took place more than twelve years before suit, although the sale was confirmed on a date which would bring it within twelve years. As to that a question arises as to the meaning of the word "sale" in art. 138 in the second schedule to the Limitation Act. That Article provides that in a suit by a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale, the limitation is twelve years from the date of sale. The only question

(1) 12 C. 169. (2) 10 C. 402. (3) 9 C. 602.
(4) 10 C. L. R. 258. (5) W. R. (1864) 279. (6) 2 C. 141.

1887 MAY 23. — APPELLATE CIVIL. — 14 C. 644.

is, whether the word "sale" means auction sale, or when the sale was confirmed. In ordinary language "sale" means auction sale, that is to say, the transaction which completes the contract, although the conveyance is not complete until a subsequent time when the sale is confirmed. That being the ordinary meaning of the word, it is necessary to look into the Limitation Act to see how the word is used. Apparently it is used for the first time in art. 12, where in a suit to set aside any of the sales [**647**] there mentioned, limitation runs from the date that the sale is confirmed or would, otherwise, have become final and conclusive, had no such suit been brought. So that, upon the face of the Schedule, we have a distinction between the sale and the confirmation of sale, that is to say, we have the contract to sell, that is the bidding at the auction which forms the contract, and the confirmation which does not take place until some time after.

Article 166 deals with this matter. On an application to set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court, we have it that the time from which limitation is to run is the date of the sale. It is clear that the date of the sale in this Article must mean the date of the auction sale, that is to say when the bidding took place, because a suit to set aside that sale might be brought before the sale is confirmed. So that the word "sale" there must mean the time of the auction sale. Then we have it that, in the Schedule to the Act, "sale" has a different meaning from "confirmation of the sale." Under art. 12, in a suit to set aside the sales therein mentioned, limitation begins to run from the confirmation of the sale, whereas in art. 138 the word "sale" only is used. Therefore we think the word "sale" must have the same meaning as in the other portions of the Schedule and which it has in common language, that is, the date of the auction sale.

The auction sale in this case took place on the 18th July, 1871. The suit was not brought until the 20th July, 1883; that is, more than twelve years after the sale, and therefore in our opinion the suit, as far as this part of the case is concerned, is barred by limitation, and the suit must be dismissed.

The other part of the case is to recover possession of the land on which this house stands. The suit was instituted within twelve years from the date of sale.

The only question which arises on this part of the case is that it is held by the lower appellate Court that this suit cannot be maintained until it is shown that the plaintiff has exhausted any remedy that he would have under s. 318 of the Civil Procedure Code, which gives the auction-purchaser a speedy remedy to [**648**] obtain possession of the land which he has purchased if it is in the possession of the judgment-debtor, and it may be taken to be admitted that there are cases which take different views of this matter. In our opinion that forms no answer to the action, because we think that, though there may be a remedy under s. 318 which the auction purchaser may put in force, still the ordinary remedies are open to him notwithstanding, and the remedies are concurrent.

We think that this is abundantly clear from s. 11 of the Code of Civil Procedure, which lays down that persons may have recourse to the Civil Courts for the trial of all suits of a civil nature, unless their cognizance is expressly taken away. This remedy has not been taken away by the Legislature, and therefore the other remedy is concurrent

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only. Article 138 of the Limitation Act refers to this very kind of case, so that it is clear that in the contemplation of the Legislature at that time this class of suits could be maintained. Therefore, so far as principle is concerned, this suit can be maintained, and proceedings not having been taken under s. 318, is no answer. In several cases the opposite view is indicated, but in no recent cases has it been laid down that the action cannot be maintained.

In the case of *Seru Mohun Bania* v. *Bhagoban Din Pandey* (1) McDONEL and TOTTENHAM, JJ., decided that such a suit could be maintained. And in a case which has not been reported, but which has been referred to in a subsequent decision by TOTTENHAM and AGNEW, JJ.—*Iswar Pershad Gurgo* v. *Jai Narain Giri* (2)—WILSON and BEVERLEY, JJ., who decided that case, distinctly held that the suit was maintainable. and put no limitation to its being maintainable. In the case before TOTTENHAM and AGNEW, JJ., they say that they agree with WILSON and BEVERLEY, JJ., in their judgment in which they unreservedly said that the action is maintainable. They only qualify their opinion by saying that they would have referred the case to the Full Bench, had they not found that the Chief Justice in a similar judgment, to which he had been a party, did not intend to say that the action was not [**649**] maintainable on any terms whatever, but that it was necessary that before a suit is brought other remedies should be exhausted—*See Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (3). WILSON and BEVERLEY, JJ., in their judgment, considered that that case was not in point as the purchaser had not perfected his title.

In this particular case the same remark applies, but, speaking for myself, I should like to say that in any decision which limits the jurisdiction of these Courts, unless the jurisdiction is expressly taken away, I do not agree; and that in my opinion whether the remedy under s. 318 has or has not been put in force, the plaintiff, who has purchased the property and has been refused possession of it, has a right to come to the Civil Court and obtain possession of that property. We have examined the cases bearing on this matter, and we find the balance in favour of that view. Therefore we do not refer this case to the Full Bench.

So far, therefore, as the action for the land is concerned, the suit can be maintained and this suit must be decreed, there being no other defence but this technical one.

The result is that the appeal will be dismissed as far as regards the house, and it will be decreed as far as the land is concerned.

Under the circumstances of this case, and in order to save the trouble of taxation, we think that each party should pay his own costs of this appeal.

T. A. P. *Decree varied.*

(1) 9 C. 602. (2) 12 C. 169. (3) 10 C. L. R. 258.

14 C. 649.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF TARINI MOHUN MOZUMDAR.
TARINI MOHUN MOZUMDAR *v.* GUNGA PROSOD CHUCKERBUTTY *alias* TIN COWRIE CHUCKERBUTTY.* [15th June, 1887.]

Specific Relief Act, I of 1877, s. 9—Possessory Suit—Constructive possession by receipt of rents.

The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act.

The object of that section is to provide a speedy remedy for the class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent.

[**Appr.**, 19 C. 544 (571) (**F.B.**); R., 57 P.L.R. 1903=13 P.R. 1903; 5 M. L. J. 95 (98); 24 C. 296 (304); 16 C.P.L.R. 154; 13 C.W.N. 305=1 Ind. Cas. 152; 13 C.W.N. 307 **N.**=1 Ind. Cas. 151; **D.**, 13 C.W.N. 303 (304)=1 Ind. Cas. 150; 12 C.L.J. 483 (485)=15 C.W.N. 294=7 Ind. Cas. 924 (925).]

THIS was a suit under s. 9 of the Specific Relief Act.

The plaintiff alleged that he was in constructive possession of certain lands by receipt of rent from tenants, and that he had been dispossessed therefrom against his consent by the defendant, who had realized rent from some of such tenants and had prevented others from paying rents to him.

The defendant contended that the suit was not maintainable under s. 9, and raised various questions of title, relying upon certain facts justifying his collection of rent from the tenants.

The Munsif dismissed the suit on the ground that it was not maintainable under the Specific Relief Act, stating that the plaintiff did not seek to recover tangible possession of the lands in dispute, but merely sought to get rents from the tenants in occupation of the land; that the point for decision was really one involving a question of priority of the plaintiff's or the defendant's right to receive rents, and that such a question could not be determined in a suit brought under s. 9 of the Specific Relief Act.

The plaintiff moved the High Court, and obtained a rule calling upon the defendant to show cause why the decision of the Munsif should not be set aside.

Baboo *Chandra Kant Sen* to show cause.

Baboo *Ishwar Chunder Chackravati*, in support of the rule, cited *In re Sutherland* (1) as showing that a person is not in actual possession where the rents are paid by the actual occupier, not to him, but to an intermediate holder, and that in accordance with that decision he was out of possession, and could sue under the Specific Relief Act.

ORDER

The order of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

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* Civil Rule No. 717 of 1887, against the order of Baboo Jogendra Nath Mukerjee, Munsif of Gaibandha, dated the 19th of April, 1887.

(1) 9 B. L. R. 229.

1887 JUNE 15. — APPELLATE CIVIL. — 14 C. 649.

GHOSE, J.—The facts of this case, so far as they are necessary to be mentioned for the purposes of the rule before us, are these: There is a certain property which is occupied by a number of [651] ryots. The plaintiff alleges that he was in constructive possession of this property by receipt of rent from the ryots, but that, on a certain day, the defendant induced them to discontinue paying their rent to the plaintiff and to pay it instead to him, the defendant. The plaintiff, thereupon, brought the present action under s. 9 of the Specific Relief Act for the purpose of recovering possession of the said property from the defendant.

The Munsif has held that this suit does not fall within the scope of s. 9 of that Act, and has accordingly dismissed it. That section runs thus: "If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit."

The learned vakil for the petitioner contends that his client was the party in possession of this property, and that the only mode in which that possession could, in the circumstances, be enjoyed was by receipt of rent, and that, when the ryots discontinued paying him rent and paid the same to the defendant, he was practically dispossessed within the meaning of s. 9, and that he was, therefore, entitled to maintain the present suit; and he relied upon certain remarks made by Sir Richard Couch in the case of *In re Sutherland* (1).

What Sir Richard Couch was called upon to determine in that case was as to the meaning of the word "possession" in s. 318 of Act XXV of 1861, and he held that if a person was in possession of a property through his servant, or if he was in possession through ryots paying rent to him directly, that would be a possession within the meaning of that section; and, if a dispute with regard to such possession arose before the Criminal Court, that Court would have jurisdiction to take cognisance of it.

But the question that we have to consider in the present case is a wholly different one. What we have to determine is whether the plaintiff has been dispossessed, without his consent, [652] of the property in dispute within the meaning of s. 9 of the Specific Relief Act.

According to the plaintiff's own case the actual possession of the property was with the ryots, and the only way in which possession was enjoyed by him was by receipt of rent from those ryots. Now, if he was in the receipt and enjoyment of the rents from the ryots, the mere discontinuance of the payment of that rent would not constitute a dispossession without his consent within the meaning of the Specific Relief Act, for he might very well bring a civil action against the ryots for the recovery of the rent; and the mere fact of the defendant having persuaded the ryots to pay to him the rent, said to be due to the plaintiff, would be no answer to the claim. Therefore it appears to us that the plaintiff was not dispossessed against his consent so as to entitle him to maintain the action.

It appears to us that the real object of the Legislature in engrafting this section into the Specific Relief Act was to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent. It is not the plaintiff's case that the ryots have been dispossessed; his case is that the

(1) 9 B. L. R. 229.

ryots are still in occupation of the property. If they had been dispossessed they might have maintained a suit for recovery of possession; and in certain circumstances he might himself bring such a suit. But they are in possession and, as I said before, the mere non-payment of the rent by them cannot be taken to be a dispossession of the plaintiff without his consent.

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Reference was made to ss. 2 and 4 of Act IV of 1840 and s. 15 of Act XIV of 1859. We have considered those enactments; and we observe that the language of s. 4, Act IV of 1840, is very different from that of s. 15, XIV of 1859, and of s. 9 of the Specific Relief Act, so far as the particular point before us is concerned. It seems to us that, notwithstanding what might have been laid down in s. 4 of Act IV of 1840, the Legislature, when it promulgated the Specific Relief Act, did not intend to provide that, where a person was not in actual possession of property, but only in constructive possession of it by receipt of rent from ryots, and those ryots [**653**] continued in occupation of that property, a suit by the landlord might be brought under the Specific Relief Act for recovery of possession by reason of discontinuance by the ryots to pay him rent.

For these reasons we think that this rule must be discharged with costs.

T. A. P. *Rule discharged.*

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14 C. 653.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF ISWAR CHUNDER GUHO AND OTHERS.* [30th June, 1887.]

False evidence—Affidavit affirmed before a Deputy Magistrate—Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate—Penal Code (Act XLV of 1860), ss. 193, 199—Declaration by law receivable as evidence—Sanction to prosecute, Order for, quashed.

A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code.

[**F.**, 5 S.L.R. 102=12 Ind. Cas. 651; 12 Cr.L.J. 563; **Cited**, 35 A. 58 (60)=13 Cr. L.J. 769=10 A.L.J. 462=17 Ind. Cas. 401.]

THIS was a rule calling upon the District Magistrate of Mymensingh to show cause why an order passed by him sanctioning a prosecution under s. 199 of the Penal Code should not be quashed.

The sanction referred to was given under the following circumstances:—

One Dherai Duffadar, a cattle dealer, had preferred a complaint against Sarat Chunder Bhoomick and Gazi Shaik, charging them with wrongful restraint in having prevented his cattle from being taken to a certain mela. Baboo Shama Chunder Dass, a Deputy Magistrate of Jamalpur, referred the complaint to the police for investigation, and the police subsequently

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* Criminal Motion No. 163 of 1887, against the order passed by E. G. Glazier, Esq., District Magistrate of Mymensingh, dated the 27th of April, 1887.

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sent up the two accused with a report that the charge was true. On the [654] application of Gazi Shaik the Magistrate of the District made an order transferring the case to the Court of Baboo Akhoy Coomar Bose, Deputy Magistrate of Mymensingh, but the order not having for some reason or another reached Baboo Shama Chunder Dass, the case was heard by him. Before, however, the case was actually entered into, one Iswar Chunder Guho, at the request of Sarat Chunder Bhoomick, drafted a petition praying Baboo Shama Chunder Dass not to proceed with the case, inasmuch as he was practically the prosecutor in the case, and an order for transfer had already been made, but that that order not having been received, the petitioner was desirous of renewing his application for such transfer.

This petition was presented by Sarat Chunder Bhoomick together with an affidavit affirmed before the Deputy Magistrate, which contained an allegation that the police had started the case with the assistance, and under the direction, of the Deputy Magistrate himself, and that the charge was false. The case was, however, proceeded with, and the accused acquitted.

Baboo Shama Chunder Dass subsequently to this applied to Mr. Glazier, the District Magistrate, for sanction to prosecute Sarat Chunder Bhoomick and Ishwar Chunder Guho for giving false-evidence in a stage of a judicial proceeding, the alleged false evidence being the statement contained in the affidavit of Sarat Chunder Bhoomick charging the Deputy Magistrate with having inspired the prosecution in that case. Mr. Glazier thereupon sanctioned the prosecution of those persons, and made over the case to Moulvie Mahomed, a Deputy Magistrate of Mymensingh, for trial.

The accused applied for and obtained the rule abovementioned, calling upon Mr. Glazier, the District Magistrate of Mymensingh, to show cause why the order directing proceedings to be taken against them should not be quashed.

Mr. *Monomohun Ghose* for the accused contended that Sarat Chunder Bhoomick had committed no offence, the Deputy Magistrate having no authority to receive an affidavit in the course of a criminal trial, nor any authority under the Criminal Procedure Code to administer an oath to a person making a declaration to an affidavit, and the accused could not, [655] therefore, be prosecuted under s. 199 of the Penal Code; that Iswar Chunder Guho had merely drafted the petition; and that the proceedings held by Baboo Shama Chunder Dass were *coram non judice*, they being held at a time when the order for transfer was in force.

No one appeared to show cause.

The order of the Court (PETHERAM, C. J., and GHOSE, J.) was as follows:—

ORDER.

This rule was obtained to set aside certain pending proceedings taken against two persons for perjury. They have been ordered to be prosecuted, but no commitment has taken place, and the question is whether there is any evidence of their having committed perjury. What is alleged is that they have made an affidavit under the sanction of an oath or affirmation before the Deputy Magistrate who was enquiring into the case of one of them for the purpose of intimating to him that he intended to apply under s. 526 of the Code of Criminal Procedure to have the case removed for trial to some other Court.

Upon that statement of the case the question arose whether he had power to administer an oath to a person for the purpose of swearing an affidavit so as to make it binding upon him under s. 199 of the Indian Penal Code.

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We have searched the Code and have enquired about this matter, but we can find no power in a Deputy Magistrate to administer an oath to a person making a declaration in the shape of an affidavit.

Under these circumstances we do not see how this case can come under s. 199 of the Indian Penal Code, inasmuch as this was not a declaration which any public servant was bound or authorised by law to receive as evidence of the facts stated in it.

Under these circumstances we think that upon the admitted facts of this case these persons are not alleged to have made any affirmation or taken any oath within the meaning of the Penal Code, and therefore they are not liable to prosecution for perjury under s. 199 or s. 193. The proceedings pending before the Deputy Magistrate against Iswar Chunder Guho and Sarat Chunder Bhoomick will, therefore, be quashed.

T. A. P. *Rule absolute.*

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14 C. 656.

[**656**] CRIMINAL MOTION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF UMESH CHUNDER KAR AND ANOTHER.* [9th July, 1887.]

Public nuisance—Penal Code, Act XLV of 1860, *ss.* 268, 283, 290—*Obstruction on tidal navigable river.*

Persons placing a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such stockade a narrow opening for the passage of boats, which passage was, however, kept closed except on the actual passage of a boat, were charged at the instance of a sub-divisional officer with causing an obstruction under s. 283 of the Penal Code.

Held, that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code.

[**Diss.,** 20 C. 665 (669); **D.,** 10 A.L.J. 362 (363)=13 Cr. L.J. 830=17 Ind. Cas. 574.]

THE accused were charged at the instance of a sub-divisional officer under s. 283 of the Penal Code with causing obstruction to the public by raising a bamboo stockade for the purpose of fishing across the whole breadth of the Bharu, a tidal navigable river, close to the ferry at Mirzapur. It was proved at the trial before the Deputy Magistrate that the stockade reached across the river from one bank to the other; that an opening four or five cubits wide near the northern bank of the river was made for the passage of boats, but this passage was kept closed by bamboos, it being opened only when necessary to allow boats to pass through, and that only at convenience of the people using the stockade; that a light was placed on the stockade at night; that the stockade had

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* Criminal Motion No. 188 of 1887, against the order passed by Baboo Bhoyrub Nath Palit, Deputy Magistrate of Burdwan, dated the 11th of February, and confirmed on appeal by W. Oldham, Esq., District Magistrate of Burdwan, dated the 4th of March 1887.

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never been used in former years; and that, although the passage was large enough for dinghies to pass freely, yet a larger cargo boat could only do so with great difficulty, and several manjhis were called, who proved that their boats had been prevented from passing freely over all parts of the river at the point. The Deputy Magistrate on the above facts held that the public were entitled to the use of the entire breadth of the river, and that the [657] accused had by placing this stockade across the river caused an obstruction, and thereby committed an offence under s. 283 of the Penal Code; he therefore sentenced them to pay a fine of Rs. 25 each, or in default to undergo imprisonment for fifteen days.

The prisoners moved before a Bench of the High Court consisting of Petheram, C. J., and Ghose, J., and obtained a rule calling upon the Crown to show cause why the conviction and sentence should not be set aside on the ground that there was no evidence of injury to any particular individual, and no complaint by any one of any such injury, and that therefore no offence, under s. 283 of the Penal Code, had been committed, inasmuch as that section contemplated an injury to some particular person.

The rule came on for hearing before the Chief Justice and Mr. Justice Beverley.

Mr. *O. C. Mullick* and Baboo *Jashoda Nundun Paramanick* in support of the rule cited *Empress* v. *Ram Singh* (1) and *The Queen* v. *Khader Moidin* (2) as showing that it must be proved that obstruction was caused to some particular individual before a conviction could be had under s. 283.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) to show cause contended that, whether or no s. 283 applied, the case fell under ss. 268 and 290 of the Penal Code.

The order of the Court (PETHERAM, C. J., and BEVERLEY, J.) was as follows:—

ORDER.

This rule has been obtained for the purpose of setting aside a conviction and sentence passed upon the petitioners for committing a public nuisance by obstructing a navigable river. Now the facts which are absolutely undisputed are that there is a navigable river somewhere in Bengal across which the defendants in this case have set up a bamboo dam of some kind for the purpose of catching fish. That bamboo dam seems to extend all the way across the river, but there is a place which is opened at times, and through which boats can then proceed. This place is also kept lighted and guarded by men for the purpose [658] of seeing that no accidents happen. The first question, and in fact the only question, is whether this is a public nuisance under s. 268 of the Indian Penal Code. I do not think there can be the slightest doubt about it myself, because this being a navigable river, the public have a right to navigate over the whole place, and any one who interferes with the free navigation of it, without any right to do so, commits a public nuisance. It is admitted that this obstruction extends over the whole width of the river with the exception of a small outlet, through which boats can pass by using considerable precaution. Under these circumstances I do not feel any doubt that this is a public nuisance. Then the only other question is whether this is an offence which can be punished by fine under the Indian Penal Code. When this rule was applied for it was moved and granted upon the ground that there was no evidence of injury to any

(1) 11 C. L. R. 462. (2) 4 M. 235.

particular individual and no complaint by any one of any such injury, and that for that reason the petitioners were not liable to be punished under s. 283, which contemplates an injury to some particular person; but on looking further to s. 290 that section provides for cases in which there is no special punishment provided for a public nuisance, and it is clear that when a person is guilty of a public nuisance of any kind he may be punished under s. 290. Under these circumstances I do not think that there is the slightest doubt that this was a public nuisance under s. 268 of the Code, and as I said before, although I had some doubt whether it was punishable under s. 283, I have no doubt that it is punishable under s. 290 of the Indian Penal Code, and the fine of Rs. 25, which has been imposed in this case, is not too heavy.

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We think therefore that this rule must be discharged.

T. A. P. *Rule discharged.*

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14 C. 659.

[659] CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF FAZEL ALI CHOWDHRY AND OTHERS.

FAZEL ALI CHOWDHRY AND OTHERS *v.* ABDUL MOZID CHOWDHRY AND OTHERS.* [18th July, 1887.]

Bengal Tenancy Act (VIII of 1885), s. 93—Manager—Co-sharers—Practice in making applications under s. 93 of Act VIII of 1885 where the co-sharers hold various and complicated shares in the property—Notice.

Where a property consisted of 243 estates or tenures, sixty of which were entered under separate numbers in the Land Register of the Collector, other portions of the property being taluks, dependent tenures, and ryoti holdings, and a single application is made by twelve of the co-sharers in such property (many of whom held shares in several of the tenures and estates) calling upon the remaining four sharers in the property to show cause why a common manager should not be appointed under s. 93 of the Bengal Tenancy Act, the Court should, before granting the application, call upon the applicants to state whether all of them are entitled in common to the various estates and tenures and, if not so entitled, should call upon them to divide themselves into as many groups as there are properties held by them in common; and in the latter case each group of shareholders should put in separate applications, on which separate Court-fees should be levied. The notice in the case of tenures should be as provided by s. 93 of the Act, and should be of the same character and to the same effect as in the case of estates.

[F., 11 C.W.N. 1143 (1148).]

THIS was an application made jointly by twelve of the co-sharers of a certain property under s. 93 of the Bengal Tenancy Act, calling upon the four remaining sharers in the property to show cause why a common manager should not be appointed to certain property consisting of 243 estates or taluks, of which about 60 bore separate numbers on the Collector's Land Register, whilst other portions of the property were taluks and dependent tenures, howlahs and ryoti holdings, and did not therefore appear in the Collector's Register at all. The petitioners were holders of

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* Civil Reference No. 8A of 1887 made by J. Posford, Esq., Judge of Backergunge, dated the 29th of April, 1887.

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different proportions of the entire property; for [660] example, petitioner No. 11 had a 1 anna 15½ gundas share in ten of such estates; petitioner No. 12 had a 2 annas 13¼ gundas share in estate No. 214, and also a 2 annas 9 gundas share in estate No. 215; petitioner No. 1 had a 17 gundas 3 karas share in estate No. 58 of such properties, and a 2 annas 13 karas share in two others; and the four persons called upon to show cause likewise held various shares in many of the estates. The grounds on which the application was made were that there existed disputes which were likely to lead to normal injuries to private rights in the collection of rents and the letting out of these lands.

The opposite party made no objection to the appointment of a manager.

The District Judge being of opinion that it was inexpedient to deal with all these properties by one single order, seeing that the interests of the different parties were so various and complicated, considered that a separate application should be made with regard to each separate estate, and, further considering that great difficulty would arise in determining the question on whom, and in what manner, notice ought to be served with regard to the inferior tenures and holdings which did not appear in the Collector's Register, referred the following questions to the High Court before dealing finally with the application, *viz*:—

(1) Whether the application then before him should be considered as one miscellaneous case, and be dealt with as one application, or whether there should be as many applications as there were estates or tenures.

(2) Whether the usual Court-fee should be levied on each application (if more than one application should be thought necessary), or whether a separate Court-fee should be levied in respect of every estate or tenure.

(3) When a petition under s. 93 of the Act relates to properties or tenures that do not appear in the Collector's Register, what is the proper notice to be given to the co-sharers?

Neither party was represented at the hearing of the reference.

The opinion of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

OPINION.

[661] We think that the questions submitted by the Judge should be answered as follows:—

(1) There need not be as many applications as there are estates or tenures mentioned in the application. But in the circumstances as disclosed in the reference it would be necessary for the Judge to call upon the applicants to state whether all of them are entitled in common to the various estates and tenures mentioned in the application; and if not to divide themselves into as many groups as there may be properties held by them in common. In this latter case it would be necessary that each group of shareholders should put in separate applications.

(2) If such separate applications have to be put in and not otherwise, separate Court-fees should be levied upon each application.

(3) The notice in the case of tenures will be as provided by s. 93 of the Bengal Tenancy Act; it will be of the same character and to the same effect as in the case of estates.

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

MASEYK (*Judgment-debtor*) v. STEEL & CO. AND ANOTHER (*Decree-holders*), (*Auction-Purchasers*).* [11th July, 1887.]

Execution of decree—Mortgage decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XIV of 1882), ss. 19, 223 (c), Sch. IV, Form 128—Jurisdiction.

A decree obtained in a suit, brought under the provisions of s. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshaye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshaye and Nyadumka, directed that the properties mentioned in the mortgage should be sold and the proceeds applied in payment of the mortgage debt. The properties were sold by the Court of Rajshaye. *Held* that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshaye Court was within its jurisdiction in directing and carrying out the sale.

[662] *Quære*—Whether, where a sale takes place under a money decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure.

Per GHOSE, J.—S. 223 of the Code of Civil Procedure merely provides that, when it may be necessary for a Court to send a decree for execution to another Court by reason of the property being situated beyond its local jurisdiction, it ought to do so; and the words of sub-section (*c*), "sale of immoveable property situate without the local limits of the jurisdiction of the Court which passed it," contemplate a case where *the whole of the property*, and not any portion of it, is situate beyond the local limits of the Court which passes the decree.

[F., 15 C. 667 (671); 91 P.R. 1898; **Commented upon.** 19 C. 13 (16); **R.**, 39 C. 104 (109)=14 C.L.J. 228 (231)=16 C.W.N. 402 (404)=11 Ind. Cas. 417 (418)]

THIS was an application to set aside the sales of 37 properties, each bearing a towzi number in the Collectorate of Nyadumka, held in execution of a mortgage decree obtained in the Court of the Subordinate Judge of Rajshaye.

The properties in question were situated as follows:—Mehal No. 120, called Gobindpore Palasgachi, was divided into six mouzahs, four of which were in Nyadumka and two in the district of Maldah, which is in the division of Rajshaye; mehal No. 116 was divided into two mouzahs, of which mouzah, Oodna and Nimgachi were situated in Nyadumka, some arable lands appertaining to mouzah Oodna being, however, situated in the district of Maldah, the mal cutchery of the mehal being at Nyadumka; mehal Dahoolotoolah, No. 128, situated partly in Nyadumka and partly in Maldah, the inhabited portion of the mouzahs forming this mehal being in Maldah, but the greater portion of the mouzahs being in Nyadumka, the collections being made by the Naib in charge of mehal Gobindpore, mehals Nos. 142 and 143, Araji Sokhepore and Mustangar Sokhepore, were situated in Nyadumka, and thirty-two jagirs entered in the towzi of the Collectorate of Nyadumka, three of which, Nos. 197, 217, and 271, were in the district of Nyadumka, the remaining twenty-nine being in Maldah.

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* Appeal from Order No. 79 of 1887, against the order of Baboo Aghore Nath Ghose, Subordinate Judge of Zillah Rajshaye, dated the 3rd of February, 1887.

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These jagirs were formerly granted to soldiers retiring from the service as rewards, but many years having elapsed since the date of these grants, it was at the present time impossible to give the boundaries of these jagirs, added to which the land had since been diluviated and re-formed.

[663] The suit in which the decree for sale was obtained had been brought in the Court of the Subordinate Judge of Rajshaye under the provisions of s. 19 of the Civil Procedure Code. In pursuance of such decree the properties above set out were sold by the Rajshaye Court. The judgment-debtor applied to set the sales aside on the ground, amongst others, that the notification of sale with regard to Gobindpore Palasgachi, mehal No. 120, had been posted on the cutchery of Palasgachi only; that the notification of sale with respect to Dahoolotoolah had not been posted on any portion of the inhabited part of the village, but was posted in the mal on the Maldah side of the river Ganges; that the notification with respect to mehals Nos. 142, 143, 116, had not been posted on conspicuous parts of the mehals; that the notification with regard to the jagirs had been posted haphazard without first ascertaining the boundaries of each jagir; and that on account of these irregularities an inadequate price had been obtained at the sales, and that some of the sales had been held without jurisdiction.

The Subordinate Judge of Rajshaye held the Rajshaye Court had jurisdiction to sell mehals Nos. 120, 116 and 128, parts of which were situate within and parts without the jurisdiction, and the twenty-nine jagirs, which were situate in the Maldah district, but that it had not jurisdiction to sell mehals Nos. 142 and 143 and the three jagirs numbered Nos. 197, 217 and 271, which were all situated entirely outside the jurisdiction, and that for that reason the sales of mehals Nos. 142 and 143 and the jagirs Nos. 197, 217 and 271 should be set aside; and further that the sales of Oodna, Nimgachi, Dahoolotoolah and Mustangur Sokhepore should be set aside on the ground that there had been material irregularity in publishing the sales, in consequence of which the properties had been sold at an inadequate price; and that the sales of Gobindpore Palasgachi and of the twenty-nine jagirs should hold good.

The judgment-debtor appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Hem Chunder Banerjee* and Baboo *Benode Behary Mookerjee*) for the appellant.—The Rajshaye Court had no power to execute its decrees outside its own territorial limits, but when it became necessary to [664] execute the decree outside the limits, the decree should have been sent to the district within the limits of which the property to be sold was situated. Mehal No. 120 being situate in Nyadumka, the Nyadumka Court alone could sell it—*Unnocool Chunder Chowdhary* v. *Hurry Nath Koondoo* (1), *Ram Lall Moitra* v. *Bama Sundari Dabia* (2) and *Kally Prosonno Bose* v. *Dinonath Mullick* (3), distinguishing the case of *Shurroop Chunder Gooho* v. *Ameerunissa Khatoon* (4), and citing *Gunga Narain Gupta* v. *Annunda Moyee Burrooanee* (5). The proclamation of sale must be posted in a conspicuous part of the property—*Megh Lall Pooree* v. *Shib Pershad Madi* (6), and with regard to the proclamation of sale for the twenty-nine jagirs it was not posted on the land itself.

(1) 2 C. L. R. 334. (2) 12 C. 307. (3) 11 B. L. R. 56=19 W. R. 434.
(4) 8 C. 703. (5) 12 C. L. R. 404. (6) 7 C. 34.

Mr. *Evans* (with him Mr. *Adkin* and Baboo *Dwarka Nath Chuckerbutty*) for the respondents.—The sales were adveritsed in the *Exchange Gazette* and the Calcutta English and Native newspapers, and private notices had been sent to all the neighbouring land-owners; the Palasgachi cutchery was the largest of the properties. As a guide to the effect of s. 19 of the Code the corresponding clause, cl. 12 of the Letters Patent should be looked at; under that clause the High Court had jurisdiction in suits for land outside the jurisdiction. A sale of property under a morgtage decree is not a sale in execution, the usual practice being for the purchaser to bring a suit if he did not get possession. There is an exception to this rule cited in Belchambers' Rules and Orders, ss. 255, 256, *viz.*, where the Registrar delivered to the purchaser an order to be taken personally to the Mofussil Court for transfer of the decree. From the practice on the Original Side of this Court under cl. 12 of the Charter in mortgage suits it is apparent that the High Court had power to sell properties outside its jurisdiction. The Charter of 1862 directed the practice then in force to be continued, and these rules were subsequently regulated by the rules laid down in Act VIII of 1859. There can be no doubt that the Court could sell the [**665**] security if it had power to entertain the suit. Subsequently Act X of 1877 was made applicable as a Statute to the High Court, Original Side. In Belchambers' Rules, pp. 188, 189, are to be found the rules in sales in execution, but such rules are inapplicable to mortgage sales. See case cited in Belchambers' "Dacca." The High Court has construed the rules as being applicable to sales in satisfaction of money decrees and not to mortgage decrees. The Transfer of Property Act provides that there must be decrees for foreclosure and sale. The Mofussil Court seems to have thought it was bound to attach in mortgage suits, but the Code and the case of *Dayachand Nemchand* v. *Hemchand Dharamchand* (1) show that this is not necessary. Sections 223 and 295 of the Code raised a question as to whether these sections applied to all decrees, but in 1879, s. 295, cl. (*c*) was added. It is only necessary here to decide whether the Courts have been right in holding these sections not to apply to sales under mortgage decrees. We are within the limits of the law if these sections are applicable to mortgage decrees. In s. 223 the word "may" is not imperative; the word is one of convenience or necessity and leaves the Court a discretion. The only way in which these sections can be treated consistently is by holding that s. 223 is permissive if they apply at all to Registrars' sales. In *shib Narain Singh* v. *Gobind Doss Bhukut* (2) there was a right to attach and sell piecemeal. If sub-s. (*c*) of s. 223 is read as imperative it can only refer to cases in which the whole of the lots to be sold are out of the jurisdiction. There is no reason for saying the sales were irregular; the real question here is one of jurisdiction. There is no cross appeal, because we have no right to object when the sale is set aside (s. 588). The objection of non-jurisdiction is not an objection with regard to publishing the notice of sale as the price might be good, and yet the sale might be set aside, as a sale without jurisdiction is a nullity. I submit, therefore, that the sections in Chap. XIX of the Code do not apply to mortgage sales by the Registrar; that it is not possible to hold that the properties could not have been sold, as ss. 19 and 644 give the form to be used. From 128 of sch. IV is for mortgage decrees. Reading that [**666**] Form

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(1) 4 B. 515.

(2) 23 W. R. 154.

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with s. 19, is it possible to say that the Court must send away the decree for execution? I contend the Mofussil Courts have the powers which are exercised here by the Court on the Original Side.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.)—

JUDGMENTS.

PETHERAM, C.J.—This is an application which arises out of a suit brought by Messrs. Steel and Co., against Mr. Maseyk for the purpose of realizing a sum of money secured by the mortgage of a number of properties. The properties consist of five mehals situate in the Nyadumka and Rajshaye districts and thirty-two pieces of land, known as jagirs.

The suit was brought in the Rajshaye Court under the provisions of s. 19 of the Code of Civil Procedure, which gives jurisdiction to a Court to entertain a suit in respect of properties partly situated within its territorial limits and partly out of it, where the same relief is sought in respect of the whole of the properties, and a decree was obtained in the suit that a certain sum of money was due, and directing the sale of the properties.

In pursuance of that decree the properties were sold by the Rajshaye Court, in which the suit was brought.

Two of the mehals were situate entirely outside the Rajshaye district. The sales as regards them have been set aside for that reason, and no question arises upon this appeal with reference to them. The mehal which is known as No. 120 is registered in the Nyadumka Collectorate, and is situate partly within the Nyadumka Collectorate and partly within the Rajshaye Collectorate. As regards this mehal the sale has not been set aside, and a part of this appeal is directed against the order which confirms the sale of this mehal, and it proceeds upon the ground that the property is not wholly situate within the Rajshaye district. The rest of the order relates to that portion of the property which is known as the jagirs. As I said just now there are thirty-two jagirs. Of these three are found to be in Nyadumka, and with regard to these three the sale has been set aside, but twenty-nine are found to be situate in Rajshaye, and the sale of these has not been interfered with, but is now attacked on the ground that the proclamation has not been shown to be served [667] upon the land itself. I propose to deal with the question of these jagirs first. These jagirs appear to be pieces of land granted, many years ago, to soldiers retiring from the service as a reward for their military services. At that time, no doubt, each plot of land was properly marked out, and each recipient knew exactly what was the land assigned to him, but these soldiers have disappeared long ago, and probably they sold their holdings to somebody, and they have now found their way into the hands of Mr. Maseyk. In the course of time the boundaries of these jagirs were lost, and the only thing that is known is that they were situate in a certain district and formed part of the same plain. I may say here that the loss of the demarcations of these plots has become more complete by the fact that the land was diluviated, and they have re-formed by the action of the river, so that it is practically impossible to say what were the boundaries of each particular plot, but it is known that they all formed part of a particular tract of land, and it appears that the sale proclamation was stuck up on this land.

Under the circumstances we think that that is all that it was possible to do, and all that could reasonably be expected to be done.

The lower Court has found that there was no service upon the land for the reason that each plot was not capable of being distinguished one from another; but, as I have said, it was for this very reason that service on each plot could not be effected. But, apart from this consideration, the Court below has found that the jagirs have not been proved to have been sold for an inadequate price, and we see no reason to differ from that conclusion, and we, therefore, think that, so far as these properties were concerned, the sale was perfectly good, and the appeal in that respect must be dismissed.

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Then comes the question as to the sale of mehal No. 120, which is situated partly within the Rajshaye district, and partly within the Nyadumka district, in the Collectorate of which district it is registered.

The suit was brought in the Rajshaye district, and the decree for the sale of the mortgaged property was obtained in the Rajshave district, and the sale of this property was held by an [668] officer of the Court of Rajshaye, acting under the instructions or the decree of the Court. It is attacked now upon the ground that the Court has no power to execute its decree outside its own territorial limits, but that, when it is necessary to execute a decree outside of its limits, it must be sent to the district within the limits of which the property is situated.

A good many cases have been cited on this point. I do not think it is necessary for me to consider these cases in detail, because I do not think they deal with the question raised in this case. In this particular case the decree, which is sought to be executed, is a mortgage decree, which finds that a certain sum of money is due from the mortgagor to the mortgagee and directs that the property included in the mortgage shall be sold and the proceeds applied in the payment of the mortgage-debt, and, if there is any residue, it shall be paid to the mortgagor. It is under the provisions of that decree, which is practically a decree for specific performance of the contract between the mortgagor and mortgagee, that this sale has been ordered and has been carried out, and it seems to me that the authority given by s. 19 of the Code of Civil Procedure must include the authority to make an order of this kind, that the property shall be sold, and to direct the mode in which the sale shall take place. And this does nothing more, because it directs that the property shall be sold and the money received and handed over in the way directed to the mortgagor and mortgagee. The question as to the mode in which the purchaser is to get possession of the property purchased by him is a totally different matter, and it is not until the purchaser seeks to obtain possession of his purchase that this question could arise. The practice of the High Court here has been cited, and it seems to me that it makes the thing abundantly clear. It appears that, when a decree of this kind is pronounced by this Court and when a sale is ordered, the sale is carried out by the Registrar of the Court. He conducts the sale and receives the money, and it is then distributed by him or by the Court in due proportion to the parties entitled to it. But where the sale takes place in execution of a money decree under which property is attached and is sold to satisfy a money decree [669] the procedure is totally different. In that case this Court could not execute its decree upon property outside the jurisdiction of this Court for the simple reason that in that case the property would be attached and sold by the Sheriff of Calcutta, but the Sheriff of Calcutta could not hold the sale in that case, because he could not go outside his jurisdiction for the purpose of selling the property which he had to sell.

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It seems to me that this analogy makes this case absolutely clear. But in the mofussil they have neither a Registrar nor a Sheriff, and with the machinery the Courts have they have to do both duties. If it is a money decree the officer of the Court has to attach the property in accordance with the provisions of the law, and has to proceed to sell the property and to give possession of it in his capacity of officer of the Court, which corresponds with that of Sheriff of Calcutta, and in doing that his powers would be limited by the territorial jurisdiction of the Court of which he is an officer. But, when it comes to selling property which is ordered to be sold in pursuance of a contract between the parties, the Court may by its decree order that that contract shall be specifically performed, because the parties could not sell the property or lay down the mode in which it should be sold. The Court in its decree directs the mode and appoints the person who is to carry out the sale. If the sale was to take place here the person appointed would be the Registrar. In the mofussil, where there is no Registrar, the only convenient person is the Nazir, who takes action in the matter.

It seems to me then that the procedure in execution of money decrees, and the local limits of the Court, have no reference to sales of this kind. Consequently, in my opinion, the Rajshaye Court was perfectly within its jurisdiction when it directed that the sale of this property should be carried out in the way it was carried out.

Some of the cases cited by Mr. Woodroffe and examined by Mr. Evans uphold that view; and with reference to these cases it is only necessary for me to say that I entirely agree with them. In some of those cases it was held that, where a sale takes place under a money decree of property partly within the local jurisdiction of the Court, whose decree was being [670] executed, and partly without its jurisdiction, the sale of the property without the jurisdiction of the Court executing the decree was valid and binding in consequence of the provisions of ss. 19 and 223. As I said just now I do not think it is necessary that that point should be discussed, and I only wish to guard myself by saying that I am not prepared to accept that view of the law. If I thought it was necessary to decide that point in this case, I should have felt it my duty to refer that point to a Full Bench. That is all that it is necessary to say here.

As I said before I think the case of a sale of this kind under a mortgage decree is absolutely and entirely different from a sale under a money decree.

For these reasons I think that the appeal as to the sale of mehal No. 120 should also be dismissed.

GHOSE, J.—I concur generally in the judgment pronounced by the Chief Justice. It is undisputed that under s. 19 of the Civil Procedure Code the Rajshaye Court had full jurisdiction to take cognizance of the suit that was brought before it, and to pronounce a decree. Now the decree that was passed was a decree ordering the sale of the properties comprised in the mortgage-deed. It appears that some of the properties comprised in that deed were situate wholly beyond the local jurisdiction of the Rajshaye Court, and one of them, and that is one of the properties with which we are dealing, *viz.*, mehal No. 120, was situate partly within the jurisdiction of the Rajshaye Court and partly within the jurisdiction of the Nyadumka Court; and the question raised before us by Mr. Woodroffe for the appellant is, whether or not the Rajshaye Court had authority to sell the said mehal No. 120 or, at any rate, that

portion of it which is situate on the other bank of the river Pudma, that is to say on the Nyadumka side. Now it seems to me in the first place that, if the Court which made the decree, had jurisdiction to entertain the suit in respect of the whole of the properties comprised in the mortgage-deed, it would also have jurisdiction to sell them in execution of that decree, unless it be shown that that authority has been taken away or curtailed by any of the provisions of the Civil Proeedure Code. The only section relied upon in the Code is s. 223, [**671**] cl. (*c*) which runs thus: "A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution, under the provisions hereinafter contained. The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it." Now it seems to me that, if the argument of Mr. Woodroffe were carried to its legitimate extent, the result would be that neither the Rajshaye Court nor the Nyadumka Court would have jurisdiction to sell this property. But it is contended by Mr. Woodroffe that, because mehal No. 120 was recorded in the Collectorate of Nyadumka, therefore the Nyadumka Court alone had jurisdietion to sell it, and in support of that contention he has cited a ease of *Kally Prosonno Bose* v. *Dinonath Mullick* (1), in which the judgment was delivered by Sir Richard Couch, late Chief Justice of this Court. Now, upon a careful consideration of that case, it will be found that the true question raised before the Court on that oeeasion was a very different one from the one we have now to eonsider. It would appear upon the facts as disclosed in the judgment in that case that the property that was sold was situate partly within the jurisdiction of the Court of the 24-Pergunnahs and partly within that of the Nuddea Court. The Court of the 24-Pergunnahs passed the decree upon a mortgage bond, by which the said property was hypothecated, and upon application made by the decree-holder sent the decree for execution to the Nuddea Court, within whose jurisdiction the other portion of the property was situate; and the question that was raised was whether the latter Court acted beyond its jurisdiction in selling the property, and it was held that it had, in the circumstances mentioned in the judgment, authority to sell, one of the circumstances being that the property stood in the Revenue roll of the Collectorate of Nuddea. The suit was for the purpose of recovering, not the whole of the property sold but that portion of it which was situate beyond the limits of the Nuddea Court and within the limits of the Court of the 24-Pergunnahs; and it was held that the plaintiff eould not succeed. [**672**] The question we have to determine in this case is a different one from that which was considered in that case, it being whether or no the Rajshaye Court, which made the decree in the suit, had authority to sell the property beeause a portion of it was situate beyond its local jurisdiction, and if it had any authority whether it could sell that portion of it which is situate in the other jursidiction. Now, if we turn to s. 223, cl. (*c*), which is the only section in the Code that has been relied upon, we find that it is only in the case where it may be necessary for the Court which passed the decree to direct that the proceedings be sent to a different Court within the jurisdiction of which the property may be situated that it shall send the decree to that Court for execution, certifying the fact

(1) 11 B. L. R. 56=19 W. R. 434.

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of non-satisfaction of the decree. In the present case, if the Court of Rajshaye had sent the decree to be executed in the Nyadumka Court, the same objection which is now raised for the appellant would arise as to the jurisdiction of the Nyadumka Court, and the only way in which that objection is sought to be met is by affirming that the mehal No. 120 being recorded in the Nyadumka Collectorate, the Nyadumka Court would have jurisdiction to hold the sale. I do not find anything in the Civil Procedure Code or any other law to warrant such a position. The jurisdiction of the Court is not given by the Collectorate in which the property is registered; and the point that we have to consider is not whether the Collectorate of Nyadumka had jurisdiction, but whether the Rajshaya Civil Court had jurisdiction to sell the property. If the Rajshaye Court had authority to make the decree, it would have also authority to sell the property, and this would seem to be pretty clear upon the wordings of Form No. 128 in the Fourth Schedule annexed to the Procedure Code; and the only question is whether this authority has been taken away by s. 223 of the Procedure Code. As I read that section it does not take away that power; it only provides that, when it may be necessary for the Court to send a decree for execution to another Court by reason of the property being situate beyond its local limits, it ought to do so. The question which arises upon this is. when the Legislature uses the words "sale of immoveable property [**673**] situate outside the local limits of the jurisdiction of the Court which passed it," whether it means the *whole* of the property or *any portion* of it. I hardly think that the latter construction is the right construction. I think it contemplates a case where the *whole* of the property, and not any portion of it, is situate beyond the local limits of the jurisdiction of the Court which passed the decree; or in other words cl. (*c*) (1) of s. 223 ought to be read as follows: "If the decree directs the sale of immoveable property situate *wholly* outside the local limits of the jurisdiction, &c., &c." This view was also at any rate practically adopted by a Divisional Bench of this Court in the case of *Shurroop Chunder Gooho* v. *Ameerrunnissa Khatoon* (1), and if it be the right view there could be no doubt as to what the procedure ought to be where an application is made to the Court which made the decree for the purpose of selling the properties comprised in the mortgage deed, some of which may be situate outside the limits of its jurisdiction, while others are partly within and partly out of its jurisdiction. As to the question raised whether the Rajshaye Court had authority to sell that portion of the property which is situate within the jurisdiction of the Nyadumka Court, I think that the observations already made answer it; and I may here add that, although there can be no legal objection to a property being sold by parts, still it seems to me that the Legislature in framing cl. (*c*) of s. 223 could not have intended to deprive the Court of its authority to sell that portion of it which may be situate beyond its local jurisdiction, for it is well known that, if a property is sold in parts, it would, in many instances, lessen its proper price, and if it be a revenue-paying estate, each of the purchasers would, until partition, continue liable for the whole of the revenue. I think upon these considerations we ought to hold that the Rajshaye Civil Court had ample jurisdiction to sell the property No. 120.

Two or three other minor points were raised by Mr. *Woodroffe* and Baboo *Hem Chunder Banerjee* for the appellant, such as the sufficiency

(1) 8 C. 703.

or otherwise of the service of the sale notifications as regards mehal No. 120 and the adequacy of the price fetched [674] for the jagir mehal; but they were disposed of in the course of the argument, and I do not think it necessary to notice them again here. It is sufficient to say that we agree with the lower Court in the view it took of these questions.

T. A. P. *Appeal dismissed.*

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14 C. 674.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

NUNDO LAL ADDY (*Plaintiff*) v. JODU NATH HALDAR (*Defendant*).* [29th June, 1887.]

Limitation—Mortgagee—Adverse possession.

A mortgagee of an entire undivided estate does not, by a subsequent purchase of a certain share therein from one not in actual possession at the time of conveyance, thereby change his character from a mortgagee to that of an owner, but his possession continues as a mortgagee.

B held an entire undivided estate under a mortgage (usufructuary) from *C* since 1273 (1866), and as such mortgagee in 1282 (1875) *B* purchased share therein from *D* who had not been in actual possession since the date of the mortgage. On the 20th January 1885 *B* brought a suit to recover possession of his purchased share.

Held, that the subsequent purchase did not change the character of *B* from that of a mortgagee to that of an owner, and that his suit was barred by 12 years' limitation.

THE plaintiff obtained an usufructuary mortgage of 18½ bighas of land in 1273 (1866) from Krishna Mohun Ganguli. He entered into possession, and in 1282 (1875) he got a kobala of one-third share of the said land from Jugadamba Dabia, defendant No. 2, the widow of Ram Pershad, one of the two brothers of Krishna Mohun Ganguli. In 1284 (1887) the defendant No. 1 bought the equity of redemption of the whole of 18½ bighas from the sons of Krishna Mohun, and after suit redeemed the whole from the plaintiff. The High Court in the redemption suit declined to get into the question of the plaintiff's right, title, and interest to one-third of the share purchased by him. Hence he brought the present suit.

[675] The plaintiff alleged that Krishna Mohun Ganguli was not the malik of the 16 annas share of the property in dispute, and that the same was the ijmali property of the three uterine brothers, Krishna Mohun, Ram Pershad and Nobin Chunder Ganguli; and that the said Jugadamba Dabia became entitled to one-third of the entire estate after the death of her husband. He further alleged that Jugadamba Dabia was a member of a joint family with Krishna Mohun and his sons, and that thereby her possession continued in the land in dispute up to her conveyance to plaintiff in 1282 (1875).

The defendant No. 1 averred that the plaintiff's vendor became witness to the mortgage deed, dated the 12th Chaitro, 1273 (23rd March,

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* Appeal from Appellate Decree, No. 1823 of 1886, against the decree of R. Towers, Esq., Judge of Midnapur, dated the 8th of July 1886, reversing the decree of Baboo Akhoy Coomar Sen, Rai Bahadur, Munsiff of Ghattal, dated the 30th of November 1885.

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1866), and thereby she admitted that Krishna Mohun was the exclusive owner of the disputed property; that she was never in possession of the land in dispute, and the plaintiff's suit was barred by 12 years' limitation.

The Court of first instance held that Jugadamba Dabia was owner of one-third of the disputed property, and was in possession of it till she sold it to plaintiff in 1282 (1875) and decreed the plaintiff's suit.

The lower appellate Court reversed the decision of the Munsif, and held that at least from 1273 (1866), the date of the mortgagee to plaintiff, Jugadamba Dabia was not in possession of the property in dispute, and hence the plaintiff's claim was barred by 12 years' limitation.

The plaintiff appealed to the High Court.

Baboo *Rash Behari Ghose* (with him Baboo *Bhobani Churn Dutt*) for the appellant.—The lower appellate Court was wrong in holding that the possession of the plaintiff from 1282 (1875) was adverse to himself. That possession in fact ceased only when the plaintiff had to give up the whole land after the redemption suit. The plaintiff as a mortgagee could not be treated as a trustee for the mortgagor. The nature of his possession after the purchase was changed, and thereafter he remained mortgagee as to two-thirds and owner as to one-third of the land in dispute.

Mr. *W. M. Dass* (with him Baboo *Golab Chunder Sircar*) for the respondent. The whole of the 16 annas was mortgaged in 1273 (1866) by Krishna Mohun as being his self-acquired property [**676**] and with the knowledge of Jugadamba Dabia, who was an attesting witness to the mortgage deed. The limitation as against Jugadamba Dabia must be taken to have run from the date on which the bond was executed. The subsequent purchase by the mortgagee would not save him from limitation continuing to run against him. The mortgagee was in possession of the property both before and after his purchase, and his possession was through and under Krishna Mohun. His possession of one-third of the share after the purchase could by no means be adverse to Krishna Mohun.

The case of *Lall Dass* v. *Jamal Ali* (1) was cited at the hearing of the appeal.

The Court (Tottenham and Norris, JJ.) delivered the following judgment:—

JUDGMENT.

The point for decision in this appeal is one of limitation, which has been decided by the lower appellate Court adversely to the plaintiff-appellant before us.

Baboo *Rash Behari Ghose*, in opening the appeal, complained that, in thus deciding, the District Judge had held that the plaintiff's possession of the property in dispute had been adverse to himself, that possession having ceased only a few days before the present suit was instituted.

This apparent anomaly is, however, explained by the fact that plaintiff's possession was held to be that of a mortgagee only, whereas in this suit he claims to establish his title as owner by purchase of an undivided one-third share of the mortgaged property. It was contended on his behalf that his possession, *quoad* that share, had been that of owner, and not that of mortgagee, from the date of the conveyance under which he claims, *viz.*, the 29th Aughran 1282. It was alternatively contended that plaintiff's vendor should be held to have been in possession at that date, and that inasmuch as this suit was instituted within 12 years thereof it is not barred.

(1) B. L. R. Sup. Vol. 901=9 W. R. 187.

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The question really depends upon whether the plaintiff's vendor, Jugadamba Dabia, was in possession actually or constructively at the time of the conveyance.

That she was in actual possession of the property is not [677] pretended. All that is contended is that the possession of plaintiff's mortgagor was not adverse to her and that the mortgage did not prejudice her. The mortgagor was one Krishna Mohun Ganguli, and the mortgage (usufructuary) was executed in 1273, about 20 years before the institution of this suit. At that time Krishna Mohun's two brothers, who had formed a joint family with him, were dead; but their two widows, one of whom was plaintiff's vendor, Jugadamba, are said to have been still in commensality with him and to have had the rights of Hindu widows in their deceased husband's undivided shares in the joint family property. Be that as it may, it is certain that the mortgage deed in favour of the plaintiff dealt with the whole 16 annas of the property in question, and recited that it was the *self-acquired* property of Krishna Mohun; and the two widows signed the deed as attesting witnesses.

It appears, however, from the lower appellate Court's judgment that, subject to the plea of limitation, it was there admitted that Jugadamba was entitled to a one-third share.

After Krishna Mohun's death the plaintiff in 1275 obtained a simple mortgage of the same property from the heirs, who afterwards sold the equity of redemption to the defendant No. 1 in this suit. With this last mortgage Jugadamba and the other widow had nothing to do either as principals or witnesses. This one was paid off by the purchaser; and he subsequently in 1879 brought a suit against plaintiff for redemption of the mortgage of 1273. Plaintiff, having in the meantime obtained from Jugadamba a conveyance of her supposed one-third share, pleaded that purchase as a reason why he should not be required to give up the whole property upon the mortgage being paid off.

This Court in a second appeal held that he could not be heard in support of that plea, but must give up the whole mortgaged property and take what steps he chose to establish his proprietary right if any. Hence the present suit was brought.

As regards the plea of limitation we think that the plaintiff cannot defeat it merely by his possession as mortgagee down to the time immediately preceding the institution of the suit. He must show that he acquired possession as purchaser of the share before the title derived from his vendor had become [678] extinguished. Baboo Rash Behari Ghose contended that, upon his purchase, *ipso facto*, the character of the possession changed, and that he remained mortgagee as to two-thirds only and became owner as to one-third. But the redemption suit showed that he was still mortgagee of the whole, and he was compelled to give up the whole. It is not pretended that after his purchase he separately appropriated the profits of one-third of the property, and that the profits of two-thirds only were thence-forth devoted to the liquidation of the mortgage-debt. If, as pointed out by the learned Counsel for the respondent, his vendor was not in possession when she executed the conveyance, she did not by that act either get possession herself or impart it to him. All that he then acquired was the right to get into possession, which right he had to enforce before it became extinguished by lapse of time.

The lower appellate Court found that plaintiff's vendor had been out of possession *at least* from the year 1273, so that the plainttiff, purchasing her right in 1282, would have to bring his suit

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within three years more. He did not do so until after the lapse of about ten years. Upon the Judge's finding therefore it seems clear that he is barred. It was argued that the Judge was wrong in law in finding that Jugadamba was ousted from possession by the mortgage of 1273 inasmuch as she was a widow living in joint family with the mortgagor. In that state of circumstances it might, doubtless, be held that the granting of the mortgage by the kurta would not prejudice her rights. But it is found by the Judge that the mortgagor did not act as kurta, but that he distinctly set up his own exclusive right, one adverse to Jugadamba, and with her express knowledge of it and assent. No rent was reserved in the mortgage lease, so there was no actual possession enjoyed by the mortgagor after the date of the deed. We think that upon the evidence the lower appellate Court could legally hold that Jugadamba was dispossessed in 1273 and that she never had any possession afterwards. Her title may still have been alive in 1282, the time of plaintiff's purchase, but it had become extinguished several years before this suit was brought.

The appeal is therefore dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 679.

[679] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

Gobind Chandra Mazumdar (*Judgment-debtor*) *v.* Uma Charan Sen and another (*Decree-holders*).* [21st July, 1887.]

Civil Procedure Code (Act XIV of 1882), ss. 311, 312—Sale in execution, Application to set aside—Limitation Act (XV of 1887), s. 18, and sch. II, art. 166—Fraud.

An application under s. 311 of the Civil Procedure Code to set aside a sale cannot be made after the expiry of thirty days from the date of such sale and after such sale has been confirmed, even though it be alleged that the sale was fraudulently kept from the knowledge of the applicant until after such confirmation.

Semble, that if before such sale had been confirmed an application had been made, although after thirty days from the date of the sale the Court would possibly have been justified in granting the application and extending the period of limitation if sufficient cause under s. 18 of the Limitation Act were made out.

[**Diss.** 17 C. 769 (**F.B.**).]

This was an appeal from an order refusing to set aside a sale in execution of an *ex parte* decree.

On the 22nd December, 1886, one Gobind Chundra Majumdar (judgment-debtor) applied under the provisions of s. 311 of the Code of Civil Procedure to set aside a sale held on the 21st September, 1886, which sale had already been confirmed on the 20th November, 1886. It was alleged by the applicant that the purchaser and the decree-holder had fraudulently kept him in ignorance of the sale until the 17th December, 1886, and that therefore he was entitled to make the application at any time within thirty days from the discovery of this fraud. The Munsif held that the

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* Appeal from Order No. 88 of 1887, against the order of Baboo L. K. Bose, Rai Bahadur, Munsif of Goalundo, dated the 26th of February, 1887.

application was barred under art. 166 of sch. II of the Limitation Act, and that s. 312 of the Civil Procedure Code did not admit of any such application after the sale had been confirmed. The judgment-debtor appealed to the High Court.

Baboo *Guru Dass Banerjee* (with him Baboo *Srinath Das*, Baboo *Rash Behari Ghose* and Barboo *Troylokhonath Mitter*), for the appellant contended that, the sale having been fraudulently [680] concealed from his client until the 17th December, he was entitled to the benefit of s. 18 of the Limitation Act, and that therefore the application was not barred.

Baboo *Grija Sunkur Mozoomdar*, for the respondents.

The judgment of the Court (PETHERAM, C. J. and GHOSE, J.) was as follows:—

JUDGMENT.

This appeal arises out of an application made by the appellant before us on the 22nd of December, 1886, under the provisions of s. 311 of the Code of Civil Procedure, to set aside a sale which had been held on the 21st of September 1886. This sale was confirmed on the 20th November, 1886, and the application that was made to the lower Court to set it aside has been refused upon the ground that it is barred by limitation under art. 166 of the second schedule of the Limitation Act. It appears to us that the view taken of the matter by the lower Court is right. The sale in question having taken place on the 21st September 1886, it was open to the judgment-debtor to apply to the Court to set it aside upon the grounds mentioned in s. 311 within thirty days from the date of the sale, that being the period prescribed by art. 166 of the second schedule of the Limitation Act. If such an application had been made within thirty days it would have been the bounden duty of the Court to entertain it, and to determine whether or no there were sufficient grounds within the meaning of s. 311 to set aside the sale. But no such application was made; and it became the duty of the Court to confirm, as it did confirm, the sale under s. 312 of the Procedure Code. The present application was not made until some time after, and therefore it would be barred under art. 166 of the Limitation Act already referred to. But then it is contended by Baboo Guru Dass Banerjee that, under s. 18 of the Limitation Act, his client is entitled as a matter of right to an extension of time, because the main ground of th application was, and is, that the decree under which the sale took place and all the proceedings taken in execution of that decree are fraudulent, and that his client is, therefore, entitled to thirty days from the time when he, for the first time, became aware of a fraud having been practised upon him. It appears to us that this contention cannot be maintained. Section 18 of the Limitation [681] Act, so far as it bears upon this case, could not be invoked in favour of the applicant after the sale had been confirmed. If, before the sale was confirmed, an application had been made, although after thirty days from the date of the sale, the Court would possibly be justified in granting the application and extending the period of limitation if sufficient cause under s. 18 of the Limitation Act were made out. But, as I have already said, the sale was confirmed under s. 312 on the 20th November, 1886, no application having been made to set it aside; and it, therefore, appears to us that no application could be entertained under s. 311 of the Code. If the sale was really a fraudulent sale it is open to the judgment-debtor to bring a suit to set it aside upon the ground of fraud; but we are not

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concerned with that matter on the present occasion. All that we have to consider is whether the application that was made to set aside the sale under s. 311 is within time; and we are of opinion that it is not. We are informed that an application has been made by the decree-holder to set aside the decree itself upon the ground of fraud, and that the said application has been allowed, but that the order passed in that matter is now the subject of an appeal to a higher Court. If it be found that the decree has been fraudulently obtained, the decree-holder in the present case being the purchaser at the sale, there will be no difficulty in the way of the present applicant getting back his property; but, perhaps, it is not necessary in this case for us to express any opinion upon the subject.

The appeal will be dismissed. We make no order as to costs.

T. A. P. *Appeal dismissed.*

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14 C. 681.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

RAM NARAIN DUT (*Plaintiff*) *v.* ANNODA PROSAD JOSHI AND OTHERS (*Defendants*).* [10th June, 1887.]

Multifariousness—Misjoinder of causes of action—Misjoinder of parties.

The plaintiff, a talukdar, obtained a decree under s. 52 of the Rent Act (Bengal Act VIII of 1869) to eject his tenant for arrears of rent and to obtain **[682]** possession of his tenure. In attempting to execute that decree he was opposed as regards certain plots, which he alleged were comprised in the tenure, by parties in possession, who instituted proceedings against him under s. 332 of the Civil Procedure Code. These proceedings resulted in their claim being decided in their favour. The plaintiff thereupon instituted one suit against his judgment-debtor and all parties who had opposed him in such proceedings, to obtain a declaration that all the several plots claimed against him belonged to the tenure in respect of which he had obtained a decree for khas possession, and he also prayed for khas possession of the various plots.

It was found that the titles relied on by the defendants, and which had been set up by them in the proceedings under s. 332, were quite distinct one from another, and that there had been no collusion or combination amongst them to keep the plaintiff out of possession, but on the contrary that the defences were *bona fide*.

Held, that the suit was bad for misjoinder of causes of action and was properly dismissed.

[**Appr.**, 6 C.W.N. 585 (588); **R.** 16 A. 279 (282)=14 A.W.N. 82; 9 C.P.L.R. 125 (128); 13 C.P.L.R. 9 (15); 27 M. 80 (85); 83 P.L.R. 1905=1 P.R. 1905; 18 Ind. Cas. 852 (853).]

IN this case there were twelve defendants. The plaintiff alleged in his plaint that the first defendant, Lolit Mohun Goswami, held a jumma of Rs. 78-13-7½ gundas in mouzah Bhaitya of which he was the talukdar, and that on the 8th of September, 1881, he obtained a decree for arrears of rent and for ejectment against Lolit Mohun, and in execution got possession of some of the lands appertaining to the Jumma, but that the defendants other than Lilit Mohun had wrongfully in collusion with each

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* Appeal from Appellate Decree No. 2400 of 1886, against the decree of Baboo Mohendro Nath Mitter, Subordinate Judge of Burdwan, dated the 13th of August, 1886, reversing the decree of Baboo Debendra Lal Shome, Munsif of Burdwan, dated the 17th of July, 1885.

other withheld possession of the remaining lands, some 35 plots, which were described in the Schedule to the plaint. The plaintiff stated that he brought this suit to establish his mal title to the lands in question and to recover possession, and that his cause of action arose on the 8th September 1881, the date of his decree against Lolit Mohun.

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Lolit Mohun did not appear to the suit, but the other defendants filed written statements, some of them pleading misjoinder of causes of action and limitation, and setting up their respective titles to the plots of which they respectively held possession.

It appeared from the proceedings in the suit that after the plaintiff obtained his decree on the 8th September, 1881, against Lolit Mohun, he obtained possession of some of the lands in the [683] jote, including some of those in the possession of some of the present defendants; that thereupon those defendants applied under s. 332 of the Code of Civil Procedure, and got their separate lands separately restored to them in July, 1882. As regards other lands, the subject of the suit, the plaintiff admitted that he had not included them in his list of lands filed in the execution department, and that no attempt had been made to take possession of them, and hence that he had not been resisted. These facts, however, were not stated in the plaint.

The Munsiff framed an issue as to whether the suit could proceed against all the defendants, and upon such issue he said: "There is no doubt a misjoinder of different causes of action. Each defendant claims separate plots of land by separate title deeds, and therefore a separate suit should have been brought against each defendant for possession of those plots from which he kept the plaintiff out of possession. As the law does not lay down that such a suit should be thrown out on account of such a defect I pass it over." He then proceeded to try the suit on its merits, and decreed it in part.

The defendants appealed.

The Subordinate Judge held that the plaintiff had no cause of action against those defendants against whom he had not attempted to execute his decree, and who had consequently offered no resistance, and as regards the others that his cause of action did not accrue on the 8th September, 1881, but on the dates upon which the defendants had respectively resisted him and got a decision in their favour in the proceedings under s. 332 of the Civil Procedure Code. He further found that the defendants disclosed their separate titles and claimed their separate plots in those proceedings, and that the plaintiff in order to get rid of the effect of their proceedings suppressed them altogether and charged the defendants with collusion and combining to keep him out of possession, to prove which there was not a particle of evidence, and that on the contrary the plaintiff's own gomastah had proved that the defendants were in separate possession of separate plots of land and that there was nothing in common between them. He accordingly held that [684] the case was clearly within the purview of the Full Bench Ruling in *Raja Ram Tewari* v. *Luchman Pershad* (1), and relying upon that case and the cases of *Motee Lall* v. *Ranee* (2), and *Maniruddin Ahmed* v. *Ram Chand* (3), held that the suit must be dismissed on the ground of misjoinder of cases of action. In that Court the case of *Janoki Nath Mookerjee* v. *Ramrunjan Chuckerbutty* (4) was relied on on behalf of the plaintiff,

(1) B. L. R. Sup. Vol. 731=8 W. R. 15.
(2) 8 W. R. 64.
(3) 2 B. L. R.; A. C. 341.
(4) 4 C. 949.

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but the Subordinate Judge in referring to it stated that there the facts were entirely different, and that it was an authority for holding that, when distinct causes of action were improperly joined against *the same defendant* or *the same defendants jointly*, the Court instead of dismissing the suit could proceed to separate them and try them separately. The Subordinate Judge also referred to the Full Bench case of *Narsingh Das* v. *Mangal Dubey* (1) as an authority in support of his decision, and also to the cases of *Bhagwati Prasad Gir* v. *Bindeshri Gir* (2) and *Haranund Mozoomdar* v. *Prosunno Chunder Biswas* (3).

He therefore held that the defendants had nothing in common with each other; that they had suffered injury by the improper joinder of several causes of action against them separately; and that consequently the plaintiff's suit must fail.

He therefore set aside the decree of the Court below, and dismissed the plaintiff's suit with costs.

The plaintiff now preferred this second appeal to the High Court upon grounds which are sufficiently stated in the judgment of the High Court.

Baboo *Karuna Sindhu Mukerjee*, for the appellant.

Baboo *Guru Doss Bannerjee* and Baboo *Juggut Chunder Bannerjee*, for the respondents.

The following cases were cited and relied on at the hearing of the appeal:—*Raja Ram Tewari* v. *Luchman Pershad* (4) *Motee Lall* v. *Ranee* (5); *Maniruddin Ahmed* v. *Ram Chand* (6); *Narasingh Das* v. *Mangal Dubey* (1); *Loke Nath Surma v.* [685] *Keshab Ram Doss* (7): *Haranund Mozoomdar* v. *Prosunno Chunder Biswas* (3).

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

This is an appeal against the decree of the Subordinate Judge of Burdwan reversing the decree of the Munsif in favour of the plaintiff, and dismissing the suit on account of misjoinder of several causes of action. For the appellant it is contended that the lower appellate Court was wrong in holding that the suit was liable to be dismissed for such misjoinder.

It was contended that there was no misjoinder, and it was contended that, if there was misjoinder, then, inasmuch as the first Court exercised its judicial discretion in not dismissing the suit upon that ground, the Subordinate Judge in appeal ought not to have interfered. It seems that the first Court was of opinion that there was misjoinder of different causes of action in the suit. The Munsiff was of opinion that a separate suit should have been brought against each defendant; but he says, as the law does not lay down that such a suit should be thrown out on account of such a defect, he passed it over.

It appears to us that the Munsiff was quite right in saying that there was a misjoinder of causes of action, and it appears to us that the lower appellate Court was quite right in saying that the suit must be dismissed.

The plaintiff had obtained a decree under s. 52 of the Rent Law of 1869 to eject his tenant for arrears of rent and to obtain possession of the

(1) 5 A. 163. (2) 6 A. 106. (3) 9 C. 763.
(4) B. L. R. Sup. Vol. 731=8 W. R. 15. (5) 8 W. R. 64.
(6) 2 B. L. R. A. C. 341. (7) 13 C. 147.

tenure. In attempting to execute that decree he was opposed as regards certain plots of land which he alleged to be comprised in that tenure. As to some of the lands he got possession without opposition, but as to many plots he was opposed. Those who opposed him apparently instituted proceedings under s. 332 of the Code of Civil Procedure, and their claims were decided under that section in their favour.

The present suit was brought by the plaintiff to obtain a declaration that all the several plots claimed against him by the several defendants in these proceedings belonged to the tenure [**686**] in respect of which he had obtained a decree for khas possession, and prayed for khas possession of the various plots.

There appear to be some twelve different defendants named in the plaint. They filed separate defences and several pleaded misjoinders. They set up totally different titles, quite distinct one from another, in respect of the various plots of land, and equally distinct one from another. The plaintiff's case as stated in the plaint made no mention of the proceedings under s. 332. It merely mentioned that the defendants in collusion had prevented him from getting possession under his decree under s. 52 of the Rent Act. He sought therefore to treat them as having combined to prevent his executing his decree.

The lower appellate Court, in coming to the conclusion that the case was bad for misjoinder, did go to a certain extent into the evidence, and we think that he could not have done otherwise.

It has been objected by the appellant's pleader in this case that the lower appellate Court had no right to consider the evidence in the case, and then, upon that evidence, to hold that the suit was bad for misjoinder. We think, however, that the course adopted by the lower Courts was right.

If the allegation set forth in the plaint had been correct, then perhaps there would be no misjoinder; but, upon the contentions set out in the written statements, it is clear that the defendants did not admit any combination or joint action on their part in opposing the plaintiff. We think that the lower appellate Court, therefore, was right in looking to the evidence to see whether the allegations of the plaintiff were made out. He found that the allegation of collusion or combination was altogether unfounded. The several defences were found to be *bona fide*, which they put forward in respect of various plots of land claimed by the plaintiff, and, inasmuch as the proceedings under s. 332 had given the plaintiff full notice of these claims, it would certainly have been competent to the plaintiff to sue them separately in respect of the lands separately claimed; and further it appears to us that the plaintiff had no right to sue the defendants jointly in respect of the separately-claimed lands.

[**687**] The lower appellate Court has relied upon the Full Bench decision in *Raja Ram Tewari* v. *Luchman Pershad* (1), and it is contended for the appellant that the principle laid down in that case was not applicable to the facts of the present case, inasmuch as the plaintiff in the present case had one object, *viz.*, to establish title to the lands which he got possession of in execution of a decree under s. 52 of Bengal Act VIII of 1869; and the defendants who contest his claim had but one defence, which is common to them all, *viz.*, to invalidate the plaintiff's title. This we find upon perusal of the judgment is by no means the case. The plaintiff may have had one object, *viz.*, to get possession

(1) B. L. R. Sup. Vol. 731=8 W. R. 15.

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of all the lands, but it is not correct to say that the defendants had joint defences common to all. We think, therefore, that the lower appellate Court was right in saying that the suit was bad for misjoinder. The Code of Civil Procedure, s. 31, provides that no suit shall be defeated by reason of misjoinder of parties. This is not a case of misjoinder only of parties; it is a case of misjoinder of causes of action. There is no section of the Code which permits a person to sue various defendants together in respect of various causes of action. We think that in this case the plaintiff had a distinct cause of action against each of the defendants who set up his own title in respect of one or other of the different plots of land. That being so we dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

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14 C. 687.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

MADHO MISSER (*Plaintiff*) *v.* SIDH BINAIK UPADHYA *alias* BENA UPADHYA (*Defendant*).* [13th June, 1887.]

Transfer of Property Act (IV of 1882), s. 100—Charge on immoveable property—Mortgage—Construction of document—Limitation.

Under s. 100 of the Transfer of Property Act, for a document to create a charge on immoveable property, it must be a document that creates such charge immediately on its execution, and not operate only as a charge at some **[688]** future time, such as in the event of non-payment of the money secured by it, the latter being the possibility of a charge ultimately arising on the land, and not "a charge" within the meaning of that section.

A lent *B* Rs. 99, and *B* executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Baisakh 1289 F.S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should lose his right to certain land, and that *A* should take possession thereof, and that after *A* took possession of the land no interest should be paid by him (*B*), and that *A* should pay the rent of the landlord out of the profits of the land without any objection. *A* instituted a suit on the 3rd August 1885 to recover the Rs. 99.

Held, that the document did not amount to a mortgage, nor did it create a charge under s. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years being the period applicable.

[**Dis. Appr.**, 21 M.L.J. 562=11 Ind. Cas. 629; **R.**, 1 N.L.R. 76 (77); 2 A.L.J. 754 (757); 14 Ind. Cas. 29.]

In this suit the plaintiff sought to recover the sum of Rs. 259 under the following circumstances:—

He alleged that the defendant borrowed from him the sum of Rs. 99 on the 13th Srabun 1288 F. S. (24th July 1881), and duly executed and delivered to him a bond or document on that day, whereby he covenanted to repay the said sum with interest in the month of Baisakh 1289 F. S. (April 1882), and that if he did not pay the money according to such stipulation, he should lose his right to 1 bigha 7 cottas of guzashta land, and that the plaintiff should take possession of the said land, and that no interest

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* Appeal from Appellate Decree No. 2383 of 1886, against the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of Arrah, dated the 11th of August, 1886, revising the decree of Baboo Sheo Sarun Lall, Munsiff of Arrah, dated the 9th of January, 1886.

should be payable after the plaintiff had so taken possession. This document will be found set out at length in the judgment of the High Court.

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The plaintiff further alleged that, as the defendant did not pay the money due, he took possession of the land covered by the document in 1290 F. S. (1882) and cultivated it himself; that subsequently on the 25th Assin 1290 F. S. (22nd October 1882), the defendant borrowed a further sum of Rs. 99-8 from him, and executed a similar document in his favour to the effect that if he failed to pay the amount due in Baisakh the plaintiff should take possession of, and have power to cultivate and appropriate, the produce of 1 bigha 10 cottas of land situate in Kurnampur and 1 bigha in Kutha, in all 2 bighas 10 cottas. The plaintiff further stated that neither sum was repaid, and that in 1291 F. S. (1883), disputes arose [689] between them, and the defendant re-took possession of the land covered by the first bond or document; that their disputes were referred to arbitration, and a sum of Rs. 235, principal and interest, was found due to him from the defendant, but that the defendant put off executing the mortgages directed to be executed by the arbitrators in their award, and had not complied with the award.

He therefore on 3rd August 1885, brought this suit to recover the sum of Rs. 259, and prayed for an order directing that the holdings covered by the two documents should be sold.

The defendant denied that he ever borrowed any money from the plaintiff or that he ever executed either of the documents, and alleged that they were forgeries. He also denied that the plaintiff had ever had possession of the 1 bigha 7 cottas covered by the first document; and he contended that after the arbitration alleged by the plaintiff, which he also denied, the plaintiff should have sued to carry out the arbitrators' award, and not to recover the amount of the loans. He further contended that the suit as regards the first loan was barred by three years' limitation as the plaint was only filed on the 3rd August 1885.

The Munsif held that the plaintiff was never in possession of the 1 bigha 7 cottahs under the document of the 24th July 1881, and that the plaintiff's claim in respect of the money covered by that document was barred by limitation, three years being the period applicable. As regards the claim for Rs. 99-8 and interest, in respect of which the second document was alleged to have been executed on the 25th Assin, 1290 F. S. (22nd October 1882), the Munsif held that the same was valid and that the document was genuine, and he accordingly gave the plaintiff a decree for Rs. 99-8 principal and Rs. 15 interest with costs upon that amount.

Both parties appealed against that decree to the Subordinate Judge, who held that the Munsif was right in holding that the claim for Rs. 99 and interest due on the first document was barred by limitation, and that there was no lien or charge created on the land by the document. As regards the second document he held that it was not genuine, and he accordingly set aside the decree of the Court below and dismissed the plaintiff's suit altogether with costs.

[690] The plaintiff now preferred this second appeal to the High Court, and on his behalf it was only contended at the hearing that the Courts below were wrong in dismissing his suit so far as the claim under the first document was concerned on the ground that it was barred by limitation, as the document itself amounted to a mortgage, or at all events a charge, and that therefore a period of only three years should not have been held applicable.

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Baboo *Uma Kali Mukerjee*, for the appellant.

Baboo *Boidonath Dutt*, for the respondent.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

The only point which arises in this second appeal is whether or not art. 132, sch. II of the Limitation Act, is applicable to the facts of this case.

The suit was brought by the plaintiff to recover the sum of Rs. 99 with interest.

Both Courts have held that the plaintiff's claim is barred by limitation, the document upon which he sued being dated the 24th of July 1881, and the suit not being brought until the 3rd of August 1885.

The document runs thus: "I, the declarant, Sidh Binaik Upadhya *alias* Bena Upadhya, inhabitant of Kurnampur, pergunnah Behya, zillah Tirhoot, do execute this deed. Whereas I have borrowed Rs. 99 from Madho Misser, inhabitant of Kurnampur, pergunnah aforesaid, I shall pay interest at the rate of one rupee six annas per cent. per mensem without any objection. I shall pay the entire principal with interest in the month of Baisakh 1289 F. S. without any objection. If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to 1 bigha 7 cottas of guzazhta land situated in mouzah Kutha. If I do not pay money according to the promise then the aforesaid Misser shall take possession of the land. Since the Misser shall take possession of the land no interest of the money shall be paid by me, and he shall pay the rent of the landlord out of the profits of the land without any objection."

[691] It was first of all argued before us that this document amounted to a mortgage. We are clearly of opinion that it is not a mortgage within the meaning of the Transfer of Property Act; and indeed this point was not seriously pressed.

The learned pleader for the appellant then contended that, if this document does not amount to a mortgage, it is a charge under s. 100 of the Transfer of Property Act. We are of opinion that it is not a charge. When the Legislature speaks of a charge under s. 100 it speaks of something which operates as a charge upon land immediately as it is executed. This document seems to us, not to create a charge at the time of its execution, but to operate only as a charge upon the land in question upon the non-payment of the principal money in 1289. All that it does is to create the possibility of a charge ultimately arising on the land. That is not a charge under s. 100 of the Transfer of Property Act.

We think that the case has been rightly decided by the lower appellate Court, and accordingly dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

14 C. 691.

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14 C. 691.

Before Mr. Justice Tottenham and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF JOWALLA NATH.
JOWALLA NATH (*Judgment-debtor*) *v.* PABBATTY BIBI AND OTHERS (*Decree-holders*).* [20th June, 1887.]

Insolvent judgment-debtor—Civil Procedure Code (Act XIV of 1883), *s.* 351, *ch. XX.*

A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of ch. XX of the Civil Procedure Code unless it finds affirmatively that the applicant has brought himself within cls. (*a*), (*b*), (*c*) or (*d*) of s. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief.

A judgment-debtor applied to be declared an insolvent under the provisions of chap. XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities, and that he had made no effort for a period of two years to realise his property for the benefit of his creditors.

[692] *Held,* that the District Judge was bound to grant the application, as the applicant had not brought himself within cls. (*a*), (*b*), (*c*) or (*d*) of s. 351, in which cases alone he had a right to refuse the application.

[**Disc.,** 19 A. 125 (126)=16 A.W.N. 197; **R.,** 21 A.W.N. 79.]

THIS was an appeal by a judgment-debtor against an order by the District Judge of Patna refusing to declare him an insolvent under the provisions of chap. XX of the Civil Procedure Code.

The judgment-debtor had made a previous application in 1885 to be declared an insolvent, but on his application being opposed by some of his creditors it was withdrawn. His present application was made on the 26th January 1887, and the 28th March was fixed by the Court of first instance for the hearing under s. 350 of the Code. At the hearing on that date he was opposed by some of his creditors, and the lower Court dismissed his application. The material part of the judgment of the lower Court, which began by setting out a list of the petitioner's debts and assets, and showing that the latter exceeded the former by about Rs. 1,000, was as follows:—

"On the application itself as it stands I think there is no case for insolvency. The assets are, even on the showing of the applicant, Rs. 1,000 in excess of the liabilities. Then it is urged that this is not all cash in hand, the judgment-debtor cannot realize it at once, and meanwhile it will be hard on him if he has to go to jail. To that I can only reply that, though there was an effort to be declared insolvent on his property being attached just two years ago, which was opposed by these same decree-holders, and was then withdrawn, it is not alleged that in the interim any effort has been made to realize the amount due and pay off the debts by sale of the property or by realization of bond and khatta debts. As the applicant has not availed himself of this long period of grace allowed by the creditors in order to take any steps towards liquidating their claims, I see no reason whatever to suppose that, if he is enlarged for another two years, he will take any steps in that direction.

"He says, 'Oh, I am quite ready to hand over to my creditors all my claims and let them realize what they can out of them,' but it has been

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* Appeal from Order No. 94 of 1887, against the order of T. M. Kirkwood, Esq., Judge of Patna, dated the 28th of March 1887.

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his bounden duty himself all this time to realize [693] them on behalf of his creditors, and he has made no effort in that direction.

"I do not think the case is one in which the applicant should be treated as an insolvent.

"No doubt s. 356 provides for realization of an amount which in some cases exceeds the claims of the creditors; but I think the case of a man who has, during the two years that his creditors have let him alone, made no effort to effect realizations is not a man to whom any favour should be shown. It cannot be said that circumstances have been too much for him and that he is unfortunate; it can only be said that he has exhibited a culpable lethargy in taking no steps towards getting in his dues in order to satisfy the claims against him, and that the creditors are not acting harshly to him in now seeing, as a final effort, what a term in jail will effect towards making his duty manifest to him.

"I reject the application with costs."

The judgment-debtor now appealed to the High Court against that order.

Mr. *Abdul Hossain* and Baboo *Saligram Singh*, for the appellant.

Mr. *C. Gregory* and Baboo *Jogendra Chandra Ghose*, for the respondents.

Mr. *Abdul Hossain* (for appellant).—The Judge was bound to declare the applicant an insolvent. He did nothing to bring himself within cls. (*a*) (*b*) (*c*) or (*d*) of s. 351 of the Civil Procedure Code. *Salimat Ali* v. *Minahan* (1) supports my contention. The fact that assets are in excess of the liabilities does not disentitle the applicant from seeking the protection of the Court, and s. 356 of the Code expressly provides for such cases.

Mr. *C. Gregory* (for the respondents).—The application on the face of it shows that the petitioner is not an insolvent. The creditors allowed him two years' time, but he took no steps to realize the property which is mentioned in his schedule. He was guilty of laches, and has forfeited the right to be declared an insolvent, and does not deserve any indulgence being shown him.

[694] The judgment of the Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

We are of opinion that this appeal must be allowed, and the order of the District Judge refusing to declare Jowalla Nath, the judgment-debtor, an insolvent must be set aside.

It appears that the judgment-debtor applied on the 26th of January last to be declared an insolvent; and the 28th of March was fixed for the hearing directed by s. 350 of the Code of Civil Procedure. That hearing took place, and the District Judge has refused the judgment-debtor's application on the ground that for two years he has taken no steps to realize the property set out in the schedule of assets and to make it available for the payment of the debt due by him to his creditors; and the Judge says he thinks that the applicant is not a man to whom any favour should be shown, and he points out that the amount of assets is Rs. 1,000 in excess of the liabilities.

Now the Judge was not asked to show any favour to the applicant at all. He was asked to proceed according to law, and he was bound so to

(1) 4 A. 337.

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proceed. He could not refuse to declare the applicant an insolvent unless he found affirmatively that the applicant had brought himself within what I may call the penal clauses of s. 351. The Judge has not found that. He was, therefore, bound to declare him an insolvent.

It is quite an error to suppose that a man is not entitled to be declared an insolvent because the sum total of his assets is larger than the sum total of his debts. It may well be, and is frequently the case, that a man's securities are locked up and are not available at the time he is called upon to pay his debts, but he is none the less entitled to be declared an insolvent, unless he is found guilty of dishonest conduct. The practice of leaving a man to the mercy of his creditors, who, with a view of extracing money from him, gets him locked up in jail after he has voluntarily placed the whole of his property at the disposal of his creditors, is, in my judgment, a practice which cannot be too strongly reprehended. A man is entitled to the benefit of these sections of the Code in the mofussil just as an insolvent in a Presidency town is entitled to the benefit of the Act for the relief of insolvent debtors. These sections do not relate to matters of [**695**] procedure. They are intended for the relief of nsolvent debtors in the mofussil, and must be so applied.

The order of the lower Court must be set aside, and the District Judge directed to declare the petitioner an insolvent, and appoint a Receiver of the property disclosed in the Schedule.

We shall make no order as to costs.

H. T. H. *Appeol allowed.*

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14 C. 695.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

PROBODE CHUNDER MULLICK AND OTHERS *v.* M. DOWEY.*
[1st July, 1887.]

Arrest before judgment—Security for personal appearance of defendant—Civil Procedure Code (*Act XIV of* 1882), *ss.* 477, 479—Bona fide *suit.*

A suit was instituted against the master of a vessel for repairs done to his vessel and for hire of a dock in which the vessel had been. The master being about to leave the jurisdiction of the Court with his vessel, the plaintiffs under s. 477 of the Code of Civil Procedure, applied for an order that the defendant should give security for his appearance to answer any decree that might be passed against him, and a rule was issued calling on him to show cause why such security should not be furnished. The defendant showed cause, and alleged that the amount claimed for the repairs was excessive, that the repairs were badly done, that the plaintiffs were not entitled to dock hire, and that some of the repairs charged for had not been executed. He further counterclaimed for a large sum for demurrage owing to the detention of his vessel and damages caused to it by the wrongful act of the plaintiffs.

It was contended that, as the claim was on a contested account which on the face of it was stated, but unsettled, on the principle of the English authorities, the plaintiffs were not entitled to the order asked for. It was further contended that the suit was not a *bona fide* one, but brought merely to harass the defendant, and that for this reason security should not be ordered to be given.

It was not disputed that the defendant had no domicile in this country, and that he was shortly leaving in his vessel in the ordinary course of his business. The Court found the plaintiffs were undoubtedly entitled to recover some amount on account of repairs, and that the mere fact that the plaintiffs added

* Original Civil Suit No. 296 of 1887.

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[696] on to such claim one of a disputable character did not go to show that the suit was not a *bona fide* one.

Held, that there is no authority for saying that the principles applied in England to the granting of writs *ne exeat regno* should be applied in this country; and that the Court can only look to the provisions of the Code of Civil Procedure; that when a person comes on business to this country in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed. there is an implied understanding, if the work was done on his credit, that it should be paid for before he leaves.

Held, also, that the case fell within the provisions of s. 477 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of s. 479, such security to be for the amount of the claim.

This was an application under s. 471 of the Code of Civil Procedure that security should be taken for the appearance of the defendant to answer any decree that might be passed against him in the suit.

The plaintiffs were the owners of the Hooghly Dock and the defendant the master of a barque called "Roanoke," and the claim in the suit was for work done to the vessel in the nature of repairs and for dock hire. The plaintiffs alleged that between the 23rd May and 11th June 1887, they at the request of the defendant executed certain works and repairs at rates and prices agreed on, the total value of which amounted to the sum of Rs. 5,796-14-3; and they stated that the works and repairs so executed were reasonably worth that amount; that for the purpose of executing such repairs the vessel was taken into their dock, and whilst she was there it became necessary to fill the dock to let another vessel called the "Star of Erin" in, and again to empty it; that the defendant had alleged that in the course of such operation his vessel had been strained and otherwise injured, but that such allegations were erroneous, but that for the purpose of surveys and otherwise they had at the request of the defendants executed certain other works of the value of Rupees 1,182-11-9, and they claimed to be entitled to recover that sum.

The plaintiffs further claimed the sum of Rs. 2,250 on account of dock hire at Rs. 250 a day for the use of the dock from the 12th to the 20th of June, the barque having been kept in the dock [697] for that period after reasonable notice had been given to the defendants to remove her.

They also claimed Rs. 256 survey fees rendered necessary owing to the allegations as to the injuries caused to the vessel by letting the "Star of Erin" into the dock, and a sum of Rs. 334-5-9 for repairs executed subsequent to the 16th of June at the request of the defendant.

The whole claim amounted to Rs. 9,728-9-9, for which the plaint was filed on the 25th June 1887, and on the same day a rule was obtained calling on the defendant to show cause within 24 hours after the service thereof on him why he should not furnish security to the extent of that sum for his appearance to answer any decree that might be passed in the suit.

The rule was granted on a petition of the plaintiffs and an affidavit of James Mori, the manager of the plaintiffs' dock, which set out fully the facts in connection with the plaintiffs' claim, and also stated that the defendant had no permanent residence in British India; that he had come to Calcutta in command of the "Roanoke" and was about to leave again in charge of her on a voyage to Natal; and that there was no certainty as to when he would return or if he would ever return to India. It was further alleged that the vessel was under a charter for Natal and had been on

demurrage since the 14th, and had already loaded a portion of her cargo and could complete her loading and proceed to sea in a very short time.

The defendant disputed the claim of the plaintiffs and opposed the order asked for. He disputed the rates charged for the work and repairs, denied having agreed to them, and said that they were exorbitant and that the work charged for had been done in a very slovenly, unworkmanlike manner and was altogether unseaworthy; that it was grossly overcharged for, and even that charged for had not been completed, and some of the items had never been done at all, and some of the articles charged for never supplied. He further denied that he was indebted to the plaintiffs at all on the ground that, if a proper sum was charged for the work actually done, it would be found that his claim for demurrage exceeded that amount. He stated that he had at the time objected to the admission of the "Star of Erin" to the dock as his vessel was not in a fit state to be floated, and he [**698**] alleged that in consequence of the plaintiffs insisting on admitting that vessel and doing so they had caused considerable damage to the "Roanoke" by straining her and breaking away some deck houses and portions of the rail. He claimed the sum of Rs. 2,750 as demurrage from the 12th to the 22nd June, alleging that owing to the "Star of Erin" being admitted to the dock his vessel could not be removed before the latter date, and that sum, together with surveyor's fees and the amount claimed by him for damages, towage, etc., brought up the amount he claimed from the plaintiffs to Rs. 3,556-7.

In his affidavit he stated that he never had, nor had he then, any intention whatever of removing the said vessel from the jurisdiction of the Court with the intention to obstruct or delay the execution of any decree which might be passed against him, and that the owners of the vessel were wealthy people in London and Rotterdam, and that any sum that might be required for the repairs or necessary expenses of the vessel could be obtained by him in three days.

Mr. *Pugh* and Mr. *T. A. Apcar* showed cause against the rule on behalf of the defendant.

Mr. *Hill* in support for the plaintiffs.

Mr. *Pugh*.—The case of *Harrison* v. *Dickson* (1) lays down the rules observed by the late Supreme Court in matters of this kind and the principle upon which the Court will exercise its discretion in making such an order as that asked for. In England there was the writ of *ne exeat regno*, and also the proceeding at common law by which a person was held to bail, but there must be a debt due and the amount must be ascertained (Seton on Decrees, Vol. I, Part II, p. 316, and the cases there cited). There is no doubt that the Court has a discretion to grant or refuse this application, and this is not a case, having regard to the nature of the claim and the case set up by the defendant, in which such discretion should be exercised. The defendant is not the proper person to be sued—*Mackinnon, Mackenzie & Co.* v. *Lang, Moir & Co.* (2). That the plaintiff could have sued the owners, [**699**] and that service on the captain as agent would have been sufficient is shown by the decision in *Blackwell* v. *Jones* (3).

The real question here is, should the discretion of the Court be exercised. The word used in the section is "may," and the plaintiffs will have to contend that it should be read as "must." The leading case on the subject is *Julius* v. *Lord Bishop of Oxford* (4), and "may" as used here should be read as being permissive only.

(1) Boulnois 33. (2) 5 B. 584 (3) 7 B. H. C. O. C. 144. (4) L. R. 5 App. Ca. 214.

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Mr. *Apcar* on the same side.—The Court should not exercise its discretion in the case as the suit is clearly not a *bona fide* one, as shown by the claim for Rs. 2,250 for dock hire, the vessel being kept in dock by the plaintiffs letting the "Star of Erin" in behind her and preventing her getting out. In England the application would not be granted on a stated and unsettled account which is contested—*Flack* v. *Holm* (1). The Court can only grant this application if the defendant fail to show cause against it, and what constitutes good cause is laid down in *Spence's Hotel Company* v. *Anderson* (2).

Mr. *Hill* for the plaintiffs in support of the rule.—Masters of ships form an exception to the general rule as to the liability of agents for contracts entered into on behalf of the owners (Kay, Vol. 2, p. 1148). *Spence's Hotel Company* v. *Anderson* (2) does not show that the plaintiffs in this case are not entitled to the order they asked for. See also *Agra & Masterman's Bank* v. *Minto* (3). The learned counsel then proceeded to contend that the Court here was bound to follow the provisions of the Code of Civil Procedure and that the English cases had no application, when he was stopped by the Court. He then went into the facts of the case, and contended that the suit was a *bona fide* one, and referred to the cases cited at p. 561 of Broughton's Civil Procedure Code (Act X of 1877).

The Court took time to consider and subsequently delivered the following judgment:—

JUDGMENT.

MACPHERSON, J.—This is an application under s. 477 of the [700] Civil Procedure Code to take security for the defendant's appearance to answer any decree that may be passed against him in the suit. The plaintiffs are the proprietors of the Hooghly Dock, and the defendant is the master of the "Roanoke," described as a barque of 400 tons. The claim amounting to Rs. 9,728 is principally for work done to the vessel while in the plaintiffs' dock, but it includes a charge of Rs. 2,250 for dock hire.

The defendant has no domicile in this country; he came to Calcutta in charge of the vessel, and there is no answer to the allegation that he intends to leave as soon as he possibly can, his vessel being under charter for Natal, and that there is no certainty as to whether he will ever return. There is clearly, therefore, reasonable probability that the plaintiffs will be obstructed or delayed in the execution of any decree that may be obtained. The defendant shows cause against the rule which issued, the contentions being that under the Contract Act he is not personally liable and that the suit is not a *bona fide* suit. The plaint sets out that the defendant, the master of the barque in question, entered into the contract for repairs, and that the repairs were done at his instance and under his instructions.

There is no denial of this allegation in the affidavits filed. The defendant does not say that he contracted as agent only, or that the name of his principal was disclosed, or that it was understood that the plaintiffs were to look to his principals and not to him for payment. The affidavit merely declares that the owners of the barque are gentlemen of wealth carrying on business in England and Rotterdam and well able to meet any decree that may be passed. There is not in the affidavits a single circumstance to indicate that the plaintiffs in entering into this contract were dealing with the defendant as an agent, and that they were looking not to him but to some one else for payment, and it is highly improbable that they would do

(1) 1 J. and W. 405. (2) 1 Ind. Jur. N. S. 204. (3) 1 Ind. Jur. N. S. 265.

so as regards persons living out of the jurisdiction, whose names they had never heard, and of whose existence, so far as appears, they were ignorant. The mere fact that the defendant was the master of the barque (there is nothing to show that he is not also a part owner), and that the plaintiffs might have ascertained who the owners were, does not [**701**] rebut the presumption arising under s. 230 of the Contract Act, and I must, on the materials now before me, hold that this section applies and that the defendant is personally liable.

The remaining question is as to the suit being a *bona fide* one, for, if the defendant can show that the suit is not *bona fide*, that would be good cause.

It is admitted that the vessel was in the plaintiffs' dock, from the 21st May to the 22nd June, and that certain repairs were done.

The claim may be divided into two parts—as to work done up to the 10th June or under agreements entered into before that date, and work done subsequently, including charges for dock hire. The plaintiffs' claim for the former amounts to Rs. 5,706, and the accounts filed with the defendant's affidavits show that he objects to items aggregating Rs. 2,399 for work not done or overcharged.

The parties are at issue as to whether the work was done at rates agreed to beforehand or not, and I need only say as to this that the defendant's affidavits do not directly meet the plaintiffs' allegation on this point. If all the objected items were allowed there would still remain a balance in the plaintiffs' favour of Rs. 3,400. It is said no doubt that the work was bad and would not pass a survey, but this is a matter on which I cannot on the materials before me express an opinion, though I may observe that in the correspondence which passed before suit nothing was said of bad work.

The remaining part of the claim is of a more disputable character; the defendant not only denies his liability altogether, but counterclaims for a sum of Rs. 3,556 for demurrage and expenses on account of his vessel being improperly detained in the plaintiffs' dock.

The questions which will have to be determined are, therefore, whether the vessel remained in dock under circumstances which would entitle the plaintiffs to dock hire or the defendant to demurrage, and whether the work subsequently done was done by the plaintiffs in consequence of injuries arising from their own neglect. I am not going to express any opinion on the merits of these [**702**] questions. I have only to see whether, looking to the case as a whole, it is a *bona fide* case, or whether it is a case of a speculative character, and brought with a view to harass or annoy the defendant, or to take advantage of his position and induce him to come to terms which, perhaps, he otherwise would not do. The mere fact that the claim is disputed does not deprive it of the character of *bona fides*, and if the claim were confined to the Rs. 5,729, I should have made this order without hesitation, because it is beyond doubt that the claim to that extent is an honest claim and based on a substantial foundation. As I have said, even if all the items objected to were disallowed and struck out of the plaintiffs' claim, there would still remain a balance in the plaintiffs' favour, unless the defendant could establish the set-off relied on, or show that the work done was so bad as to be almost worthless. The fact that a person adds on to a claim of that description a claim of a disputable character does not, in my opinion, go to show that the whole claim is not brought in good faith and, in the plaintiffs' estimation, with some prospect of success. If they had any

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claim at all as regards the latter sums they were bound by law to include it in the present suit or to abandon it altogether. I cannot, therefore, say that the claim is not a *bona fide* one.

It has been urged also that the Court in dealing with this section should apply the principle applicable in England to suits of *ne exeat regno*. There is no authority for this, and it seems to me that the contention is not consistent with the words of the section. I think if a person comes on business to this country, in which he has no domicile or property, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known that he intends to leave as soon as the work is completed, there is an implied understanding, assuming that the work was done on his credit, that it shall be settled or paid for before he leaves the country. It seems to me, therefore, that the case is one that falls under s. 477, and I must make an order that the defendant must furnish security for his appearance while the suit is [703] pending, and in terms of s. 479 security must be given within a week for the amount of the claim.

Application granted.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*
Attorney for defendant: Mr. *Carruthers.*

H. T. H.

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14 C. 703.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

NECKRAM DOBEY *v.* THE BANK OF BENGAL.* [22nd June, 1887.]

Practice—Interrogatories—Refusal to answer—Particulars of damage—Civil Procedure Code (Act XIV of 1882), *ss.* 125, 127.

The plaintiff alleged that the defendant Bank improperly and without notice, and in violation of an agreement, sold some Government promissory notes, which had been deposited as security for certain loans, and claimed a specified sum as damages or in the alternative a decree for an account. The defendant Bank denied the alleged agreement, and asserted that the notes had been sold after due notice and on failure of the plaintiff to comply with the terms on which the loans were made.

Interrogatories were administered for the examination of the plaintiff, and amongst them one in the followings terms:—

"State how your estimate of damages to the amount of Rs. 1,30,000 mentioned in the eighth paragraph of the plaint is arrived at?"

Upon the plaintiff declining to answer that interrogatory the defendant Bank applied on notice for an order under s. 127 of the Code of Civil Procedure requiring him to answer it fully.

Held, that the plaintiff was not bound to answer it.

If, on the one hand, it was intended to elicit the principle on which the damages were estimated by the plaintiff, the defendant was not entitled to discovery on that point. If, on the other hand, it was sought to elicit an account of the transactions between the parties, it was unnecessary, as the transactions were within the knowledge of the defendant Bank; and if it were not, then the enquiry was premature, as the question whether there had been any wrongful act committed and whether the plaintiff was entitled to any damages should be first determined.

[R., 1 L.B.R. 38 (39).]

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* Original Civil Suit No. 40 of 1887.

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In this suit the plaintiff, a dealer in Company's paper, claimed Rs. 1,30,000 damages (or in the alternative a decree for an account) on certain loan transactions between himself and the defendant, the Bank of Bengal. As a part of his case the plaintiff set up a verbal arrangement between himself and an officer of the Bank, [**704**] that the Bank was to charge him 1 per cent. less interest than the usual rate, and that it was not to call for prompt or heavy margins, and he further alleged that the Bank had improperly and without reasonable notice sold certain Government paper deposited with it for the purpose of securing loans. The Bank denied the verbal arrangement and paid Rs. 326-7-4 into Court in full satisfaction of all claims the plaintiff might have against it.

Interrogatories were administered to the plaintiff with reference to the terms of the alleged arrangement, and the time, place, and circumstances under which it was made, and also with reference to an offer of 5 lacs alleged to have been made by the plaintiff. The fifth and last interrogatory was as follows: "Fifth: State how your estimate of damages to the amount of Rs. 1,30,000 mentioned in the eighth paragraph of the plaint is arrived at?"

The plaintiff answered all the others, but declined to answer this interrogatory on the following grounds: "I am advised that the matter enquired afer is not sufficiently material at the present stage of this suit, that it is in effect calling upon me to set out accounts, and is therefore premature; and that it seeks for discovery of the evidence which I intend to produce in support of my claim." The defendant Bank accordingly now applied on notice for an order under s. 127 of the Civil Procedure Code requiring the plaintiff to answer fully the fifth interrogatory.

Mr. *Stokoe* appeared in support of the application for the defendant Bank.

Mr. *Sale*, for the plaintiff.

Mr. *Stokoe*.—The plaintiff is bound to answer this interrogatory. The case is similar to that of *Dobson* v. *Richardson* (1), where a similar interrogatory was held good. There is no procedure in this Court to obtain particulars except by filing interrogatories, and none of the objections which can be taken under s. 125 apply to the present case. We say we are entitled to have particulars of damage.

Mr. *Sale* (*contra*):—There is no precedent for this application. The interrogatory is vague, and all the necessary particulars are to be found in the plaint and schedule annexed. It is not alleged that our plaint is insufficient, but if that is contended, then the [**705**] machinery of interrogatories should not be applied to amending a deficient plaint. If the defendant Bank is dissatisfied with the plaint it has its remedy. But the object of this application is to get at our evidence. Now the plaint shows that we have a sufficient case for damages. All the circumstances are set out, and at the hearing we shall show the fact of the agreement, the fact of the breach and the fact that we have been overcharged. The measure of our damages being a question of law the defendant Bank should not be allowed to extract from the plaintiff the principle upon which he has assessed his damages. It might as well ask at this stage what authorities we shall cite in support of that principle. Nor can we be required now to inform the defendant Bank as to how the plaintiff intends to shape his case at the hearing. Some of the cases

(1) L. R. 3 Q. B. 778.

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say that, where the question is one of amount, the defendant is entitled to ask for particulars, but that is only where contract or tort is admitted. In such a case information is given to enable the defendant to settle the suit where the parties are anxious to avoid a trial and the defendant is desirous of paying a sum of money into Court to satisfy plaintiff's claim. [*See* Hare on Discovery, p. 256, 2nd.; *Wright* v. *Goodlake* (1); *Jourdain* v. *Palmer* (2); *Horne* v. *Hough* (3).] No such case has been made here, and the matter sought to be imparted is irrelevant as it refers only to our claim. *Dobson* v. *Richardson* (4) is distinguishable from the present case owing to the particular nature of the interrogatories in that case. In *Lyon* v. *Tweddell* (5) it was held that a defendant may not ask for an account of damages, if those damages are dependent upon an account, because such an application would be premature. This is a fishing application and ought to be refused.

Mr. *Stokoe* in reply.—No answer is made to our case; interrogatories in reduction of damages are clearly relevant. We ask on what principle have their damages been assessed, and we are entitled to be told. (*See* Sichel and Chance, on Interrogatories and Discovery, p. 45; Leech on Practice of Civil Courts, Ed. 1865, p. 425.)

[**706**] The following judgment was delivered by the Court:—

JUDGMENT.

MACPHERSON, J.—I think the plaintiff is not bound to answer this interrogatory.

The plaint alleges that the defendant improperly and without notice, and in violation of an agreement, sold some Government promissory notes which had been deposited as security for certain loans.

The defence is a denial of the alleged agreement and an assertion that the notes were sold after due notice and on failure of the plaintiff to comply with the terms on which the loans were made.

The parties are therefore at issue as to the plaintiff being in a position to recover any damages at all.

If the interrogatory is intended to elicit the principle on which the damages are estimated, the defendant is not entitled to discovery on the point. This is a matter relating exclusively to the plaintiff's case, and, if the wrongful acts are established, as to the way in which he intends to shape it as regards the assessment of the damages; this the plaintiff is not bound to disclose beforehand. If the interrogatory is intended to elicit an account of the transactions between the parties, it is unnecessary, as the transactions are all within the knowledge of the defendant Bank, which sold the notes which were deposited with them. But, even if it did not, the enquiry is premature, as the question whether there has been any wrongful act committed and whether the plaintiff is entitled to any damages must be first determined. The principle deducible from the English cases cited seems to be that, where the question is simply as to the amount of damages to be awarded and the defendant wishes to satisfy the demand, he is entitled by means of interrogatories to elicit all the information which will enable him to do so. If there is a contest as to the right to damages it is not very clear whether interrogatories directed to the

(1) 3 H. & C. 540. (2) L. R. 1 Ex. 102. (3) L. R. 9 C. P. 135.
(4) L. R. 3 Q. B. 778. (5) L. R. 13 Ch. Div. 375.

amount of such damages would be allowed. In the present case the points on which the claim is based are all known to the defendant Bank, and I think the defendant is not bound to furnish any other information than he has given. The application is refused with costs.

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Application refused.

Attorney for plaintiff: Mr. *H. H. Remfry.*

Attorney for defendants: Messrs. *Morgan & Co.*

H. T. H.

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14 C. 707 (F.B.)=12 Ind. Jur. 56.

[707] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris and Mr. Justice Ghose.

QUEEN-EMPRESS *v.* SHAM LALL.* [22nd, June, 1887.]

False charge—Criminal Procedure Code, Act X of 1882, s. 191—Cognisance of an offence on suspicion—Penal Code, Act XLV of 1860, s. 211—Police report—False charge, Prosecution for, without first enquiry into truth of original complaint.

A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated and his witnesses summoned. This application was refused, and the Magistrate after perusing the police report passed an order directing him to be prosecuted under s. 211 of the Penal Code.

Held, that the application to the Magistrate was "a complaint" within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired.

A Magistrate may take cognizance under s. 191 of the Criminal Procedure Code of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a Police report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made the person who made the original charge should be offered an opportunity of supporting it or abandoning it.

[5 C.W.N. 254; 7 C.P.L.R. 6; 33 C. 228=2 C.L.J. 228=10 C.W.N. 158; 15 C.L.J. 517 (519)=13 Cr.L.J. 609 (650)=16 C.W.N. 1105 (1133)=16 Ind. Cas. 257 (298); 11 Cr. L.J. 354 (355)=14 C.W.N. 765=6 Ind. Cas. 415 (416); **Affirmed.** 35 C. 141=7 C.L.J. 49 (54)=7 Cr. L.J, 10; **Appl.,** U.B.R. (1904), 1st Qr.., Cr. P. C., 4 (5); **R.,** 19 A.W.N. 90; 6 C.W.N. 295 (297); 8 C.W.N. 17 (21); 10 C.L.J. 564 (569)=4 Ind. Cas. 710=14 C.W.N. 330 (334)=11 Cr. L.J. 37 (39)=37 C. 250 (256); 10 Ind. Cas. 619 (621)=10 M.L.T. 47=(1911) 2 M.W.N. 9=12 Cr. L. J. 323 (325)=21 M.L.J. 795; **D.,** 8 Cr. L.J 349=4 N.L.R. 136.]

REFERENCE to the High Court by the Sessions Judge of Bhagulpur.

On the 15th March, 1887, one Sham Lall gave information to the police that Muni Lal and others had looted his crops. Sham Lall claimed to hold the land on which the crops stood under a registered pottah not produced. The police investigated the matter, and, after having examined six witnesses for the informant Sham Lall, and twelve witnesses on behalf of Muni [**708**] Lal and the others charged with him, came to the conclusion that the land had been sown and cultivated by Muni Lal, and that the case involved a question of title; they, therefore, returned the case in C. Form as "false owing to a question of title being involved."

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* Reference made by C. A. Wilkins, Esq., the Sessions Judge of Bhagulpur, under s. 438 of Act X of 1882, dated 10th May 1887.

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This report was forwarded to the Magistrate on the 22nd March. On the 24th March the District Magistrate after perusing the report declared the charge false, and ordered a prosecution against Sham Lall for having brought a false complaint.

On the 24th or 25th March Sham Lall appeared before the District Magistrate, and asked to have his witnesses summoned and the case tried. This application was rejected on the 31st March; on the 1st April Sham Lall made another application to the same purport, but this application was, on the 5th April, also refused.

Sham Lall then moved the Sessions Judge for an order revoking "the sanction given by the Magistrate." The Sessions Judge declined to interfere, stating that he was unable to do so, as the Magistrate's order directing the prosecution was not a "sanction" within the terms of s. 195 of the Criminal Procedure Code, inasmuch as the complaint declared to be false was made not in any Court, but before the police; and that neither was he able to direct that the complaint should be enquired into under s. 437 of the Criminal Procedure Code, as the complaint had not been "dismissed" under s. 203 of that Code, and the accused had not been "discharged." But, being of opinion that Sham Lal should not be prosecuted before he had an opportunity of proving his complaint to be a true one, the Sessions Judge referred the case to the High Court, recommending that the order of the District Magistrate, dated the 24th March, should be set aside and the original complaint heard.

The case came on for hearing before a Full Bench of the Court.

Mr. *L. M. Ghose*, for the accused:—The order of the 24th March in its inception was bad, (*a*) because the conclusion arrived at by the police, if embodied in their report, would, if true, point to an offence under ss. 182 and 499 of the Penal Code equally with one under s. 211; nor are offences under ss. 182 and 499, if judged by the punishment inflicted in respect [709] of them, of a less serious nature than an offence under s. 211. An offence, however, under s. 182, would be only cognizable "on the previous sanction and complaint of the public servant concerned, etc.," and an offence under s. 499 could only be taken cognizance of "upon a complaint made by some person aggrieved by such offence." It could not, therefore, have been the intention of the Legislature to allow a Magistrate to take cognizance of an offence of making a false charge under s. 211 except upon the fulfilment of one or other of the conditions precedent to the authority of the Magistrate to take cognizance of offences under ss. 182 and 499; and (*b*) as Sham Lall had had no opportunity of establishing the proof of the original charge made by him, the Magistrate had no jurisdiction to direct a prosecution against Sham Lall under s. 211 of the Penal Code without first affording him such an opportunity; see *Empress* v. *Karimdad* (1), which case has been followed by *Empress of India* v. *Radha Kishan* (2), and also by *Empress* v. *Jamni* (3) and *The Queen-Empress* v. *Ganga Ram* (4). There is also the case of *Ramasami* v. *Queen-Empress* (5), where the case last above mentioned was distinguished; the case of *Sheikh Erad* v. *Nusibunnissa Bibi* (6) is also in my favour. There are one or two cases against me, *viz.*, *Nusibunnissa Bibi* v. *Sheikh Erad Ali* (7); that case, however, turns on the point that a lower Court cannot interfere with a sanction granted, and there was there, moreover, a *quasi*-judicial enquiry into the original complaint. Another

(1) 6 C. 496=7 C. L. R. 467. (2) 5 A. 36. (3) 5 A. 387. (4) 8 A. 38.
(5) 7 M. 292. (6) 4 C. L. R. 535. (7) 4 C. L. R. 413=4 C. 869.

case is rather against me, *viz.*, *In re Bramanund Bhuttacharjee* (1), but the exact point was not determined as there was no complaint before the Magistrate. In the case of *Gyan Chunder Roy* v. *Protap Chunder Dass* (2) Prinsep, J., makes a distinction between a sanction given under s. 470 of the Criminal Procedure Code of 1872, and the [710] institution of proceedings by a Court of its own motion, and says that a preliminary enquiry is only necessary when the Court takes upon itself to order a prosecution. That distinction is, however, erroneous, and the sxpression of opinion is *obiter*. The police report here was not one which the Magistrate could have taken cognizance of under s. 191 of the Procedure Code; under that section he could only take cognizance of an offence of which some one had complained either before him or the police, and not on his own motion. [PETHERAM, C. J.—Sub-section (*c*) of s. 19 is against you; he can take cognizance on suspicion.] The Magistrate does not profess to have acted under that sub-section. Under s. 157 the police can send up their report to the Magistrate, and under s. 167 the Magistrate may take cognizance of the matter. The police report does not terminate the proceedings, as they have to bring up the accused on bail or in custody and the offence of which the Magistrate may take cognizance under that section, is the offence under investigation by the police.

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The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown:—According to the practice in force before the old Code of Criminal Procedure, it was considered that, in the case of heinous offences, the complainant should always inform, in the first instance, the police. After that Code the cases show that, where proceedings have been concluded before the police, the informant can complain to the Magistrate, and the Magistarate is bound to hear the complaint. The Madras High Court have held that, before a prosecution for perjury is commenced against the informant, his original case must have been determined.

The following judgments were delivered by the Court (PETHERAM, C.J., WILSON, TOTTENHAM, NORRIS and GHOSE, JJ.):—

JUDGMENTS.

PETHERAM, C.J., after stating the facts, continued:—Upon the above facts three questions arise:—

First.—Where the applications made by Sham Lall to the Magistrate on the 24th or 25th of March and the 1st of April "complaints" within the meaning of s. 191, Criminal Procedure Code, into which the Magistrate was bound to enquire?

Second.—Had the Magistrate, upon the report of the police, [711] dated 22nd March, 1887, jurisdiction to make the order of March 24th, 1887? and

Third.—If he had jurisdiction to make it, did he exercise a sound judicial discretion in doing so?

I am clearly of opinion that the first question must be answered in the affirmative.

Sham Lall, on the days in question, appeared before the Magistrate, stated that the offence had been committed, and requested that it might be investigated by calling and examining his witnesses. This, it seems to me, was the only complaint he could make, and, having made it, he was entitled, as a matter of common justice, to have it enquired into by the

(1) 8 C. L. R. 233. (2) 7 C. 208.

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Magistrate, and that gentleman could not avoid the responsibility of making the enquiry himself merely by accepting the conclusion of the police on the subject.

The second question is more difficult; but after a careful consideration of the sections of the Code, and of the cases* on [712] the subject, I have come to the conclusion that it also must be answered in the affirmative.

The facts alleged, if they are true, might constitute an offence under s. 211, and a Magistrate may take cognisance of such an offence if it is properly brought before him; and it seems to me that, where a state of facts is brought to his notice by a police report, which affords ground for supposing that the offence has been committed, he has jurisdiction under ss. 191 and 192 to enquire into or try the charge himself, or to send it for enquiry or trial to one of his subordinates.

My answer then to the second question, is in the affirmative.

The third question must, in my opinion, be answered in the negative. As before explained, I think that, under the circumstances, the Magistrate would have the jurisdiction. But, as a matter of sound judicial discretion, I also think that in all cases in which there is a suspicion—for it can be called nothing but a suspicion—arising from circumstances which have come under the Magistrate's notice on the perusal of the report of the investigation into another charge, that some offence, of which no one has complained, has been committed, the Magistrate ought not to take cognizance of such offence under s. 191, and direct that the persons suspected be tried, until some person aggrieved has complained, or until he has before him a police report on the subject, based on an investigation directed to the offence to be tried, and in cases of alleged false charges, until it is clear that the original charge has been either heard and dismissed or abandoned; and I should add that, in order to show conclusively that such a charge has been abandoned, I think that before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or adandoning it.

In the present case, in addition to these reasons which apply to all such cases, I think that the order of the Magistrate must be set aside,

* *Queen* v. *Subbanna Goundan*, 1 M. H. C., 30.
Bhokteram v. *Heero Kolita*, 5 C. 184.
Ashrof Ali v. *The Empress*, 5 C. 281.
Empress of India v. *Abul Hasan*, 1 A. 497.
Empress of India v. *Bhawani Prashad*, 4 A. 182.
Ramasami v. *Queen-Empress*, 7 M. 292.
Gyan Chunder Roy v. *Protap Chunder Das*, 7 C. 208.
Empress v. *Salik Roy*, 8 C. L. R. 255.
Bramanund Bhuttacharjee, In re, 8 C. L. R. 233.
Empress v. *Shito Behara*, 8 C. L. R. 265.
Chukradar Potti, In re, 8 C. L. R. 289.
Sakhina Bibi, In re, 8 C. L. R. 387.
Queen v. *Heera Lal Ghose*, 13 W. R. Cr. 37.
Syed Nisar Hossein v. *Ram Golam Singh*, 25 W. R. Cr. 10.
Biyogi Bhagut, In re, 4 C. L. R. 134.
Shheikh Erad Ali v. *Nusibunissa Bibi*, 4 C. L. R. 534.
Russick Lall Mullick, In re, 7 C. L. R. 383.
Empress v. *Karimdad*, 7 C. L. R. 467.
Girdhari Mondul, In re, 8 C. 435.
Empress of India v. *Baldeo*, 3 A. 322.
Empress of India v. *Radha Kishan*, 5 A. 36.
Empress v. *Jamni*, 5 A. 387.
Queen-Empress v. *Ganga Ram*, 8 A. 38.

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because the suspicion is not justified by the police report on which it is founded.

The Magistrate's order will accordingly be set aside.

Norris, J.—This case comes before us on a reference under [713] s. 438, Criminal Procedure Code, from the Sessions Judge of Bhagulpur.

The facts are as follows: On the 15th March, 1887, one Sham Lall gave information to the police that on the previous day, at about 4 A. M., three men, named Muni Lal, Ata Roy and Luchmun Roy, had stolen growing corn of the value of Rs. 100 from his field.

In his first complaint Sham Lall named four witnesses; when the police came to make enquiry into the alleged theft on the spot he stated that three of his witnesses had gone over to the side of the accused, and he named six fresh witnesses.

The police examined the one witness, out of the four first named, who had not gone over to the accused, and five out of the six subsequently named. One witness said: "On Monday, at 4 A.M., I went to the field and saw that the accused had been causing the crops of my master's field to be reaped through his labourers and coolies; upon this I went to Monghyr and gave information to my master; my master came and lodged the complaint." Another witness said: "On Tuesday I saw the accused reaping crops on the field of the complainant." The remaining witnesses deposed, from hearsay, "that in this year the complainant grew barley on the field in dispute and that the said field was the jote of Muni Lal, one of the accused." Muni Lal, in answer to the charge, said: "This field has continued in my jote since five or seven years; in this year I also made cultivation, and reaped and brought the rabi crops on Monday last; the complainant falsely alleges that in this year he made cultivation and grew crops, the reason being that I hold shikmi nukdi jote under Gokhal Kumhar, who is brother-in-law of Jhumuk Ram Kumhar, auction-purchaser, who held nukdi jote under the said Jhumuk Ram Kumhar; since two years the rent of this field has fallen due by me; Jhumuk Ram Kumhar, the zemindar, has on the part of the real jotedar, Gokhal Kumhar, caused a suit to be instituted against me for arrears of rent; owing to the annoyance caused by the said non-payment of rent Jhumuk Kumhar, the zemindar, has, by the advice of Gokhal Kumhar, the real jotedar, caused a pottah to be executed and registered in favour of Sham Lall Kumhar" (the complainant), 'his relation, [714] and a person of the same caste, in respect of jote land without my knowledge, and laid this plan to eject me from the field, and now caused this false complaint to be brought by the complainant against me for taking the crops grown by me; but in this year I cultivated and grew crops on my entire field as before and carried away the crops of the same."

Ata Roy "pleaded his absence of concern in this field and corroborated, according to Muni Lal's answer, that the field in suit was the jote of Muni Lal, accused," Lutchmun Roy does not appear to have been examined. Twelve witnesses were examined by the police on the part of Muni Lal, one of them being one of the witnesses named by the complainant in his first complaint and who was alleged by him to have gone over to the accused. The statement of Muni Lal and the evidence of his witnesses satisfied the police 'that the complainant had not cultivated the field, that the complaint was altogether false, that the plan had been laid on the part of Jhumuk Ram Kumhar, zemindar, for dispossessing the accused of his field and for taking away this year's

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crops of his field, that in reality the land was cultivated and sown with crops by Muni Lal, accused"; they, therefore, forwarded a report in Form C (false case), stating in column 7 under the heading "particulars of the enquiry with names of any persons accused or suspected but not arrested," "on enquiry the charge against Muni Lal, Ata Roy, and Luchmun Roy, accused, is not proved, for in this case the question of title is involved," and at the end of column 9, under the heading "course adopted by the police and reasons of failure," they said "the case is found false owing to question of title being involved; consequently no charge of bringing false complaint can be made. The report was sent to the Deputy Magistrate, who forwarded it to the District Magistrate, Mr. Mosley, who on 24th March made on order "that the complainant be prosecuted for bringing a false complaint, the occurrence being false." On the 24th or 25th of March, Sham Lall applied to the District Magistrate "to have his witnesses summoned and the case tried;" this application was rejected on 31st March. On the 1st April Sham Lall again applied to have his complaint tried; this application was rejected on 5th April; and on 7th April the charge [**715**] against Sham Lall of bringing a false charge was made over by the District Magistrate to a Deputy Magistrate for enquiry or trial.

Sham Lall then petitioned the Sessions Judge "to revoke the sanction given by the District Magistrate."

The Sessions Judge, as he correctly points out in his letter of reference, cannot interfere. The District Magistrate's order for the prosecution of Sham Lall is not a "sanction" within the meaning of s. 195, Code of Criminal Procedure, for the alleged offence of bringing a false charge was not "committed in, or in relation to, any proceeding in any Court," but before the police, and no sanction to prosecute was necessary; thus there is no "sanction given by an authority subordinate" to the Sessions Judge which he can revoke. Neither can the Sessions Judge, under s. 437, Code of Criminal Procedure, "himself make or direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make further enquiry into" Sham Lall's complaint against Muni Lal and the others, for it has not been dismissed under s. 203, Code of Criminal Procedure, nor have the accused persons been discharged.

Under these circumstances the Sessions Judge has referred the case to us with a recommendation that the District Magistrate's order of 24th March should be set aside, and that he be directed to hear Sham Lall's complaint.

I am of opinion that we ought to act in accordance with the Sessions Judge's recommendation. The District Magistrate in his letter of explanation to the Sessions Judge says: "There are contradictory rulings on this subject of prosecution under ss. 182 and 211 of the Indian Penal Code, but what runs through all that I have been able to consult is that, when a man has made a complaint before a Magistrate, he must have proper opportunities to prove his case before he can be prosecuted under the above sections; but there was no complaint of Sham Lall's before a Magistrate in this case, for a petition to be allowed to call his original witnesses, put in after a prosecution was instituted, was not a complaint."

[**716**] I think that the view taken by the District Magistrate of Sham Lall's application or petition is erroneous. I am clearly of opinion that it was a "complaint" within the meaning of s. 191, Code of Criminal Procedure. That section authorizes a Magistrate to "take cognizance of

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any offence upon receiving a complaint of facts which constitute such offence." This "complaint" may be by word of mouth or in writing; no prescribed form of words is necessary; all that is required is that facts, which *prima facie* constitute an offence, should be brought to the notice of the Magistrate by the complainant. It is clear that the question of the time when an application or petition is made to a Magistrate, cannot be a circumstance to be taken into consideration in arriving at a conclusion as to whether it is a "complaint" or not.

The precise form of Sham Lall's application or petition is not before us. The District Magistrate speaks of it as a "petition to be allowed to call his original witnesses." The Sessions Judge says Sham Lall "asked to have his witnesses summoned and the case tried." Even if the petition was, as the District Magistrate describes it, a bare application to be allowed to call the original witnesses, it must, of course, be read in connection with the police report which was before the Magistrate and which he says he had "carefully considered;" and so read, the petition could mean nothing less than a reiteration by Sham Lall of his charge to the police and a request that such charge should be enquired into. If, as the Sessions Judge says, Sham Lall "asked to have his witnesses summoned and the case tried," it is difficult to conceive of any element wanting to constitute "a complaint."

Sham Lall's petition being, in my opinion, a complaint, it was the duty of the Magistrate to proceed with it according to law; and it was none the less his duty so to proceed, because the charge in respect of which the complaint was made had been returned by the police as false.

I am, therefore, of opinion that Sham Lall's complaint should be enquired into and dealt with according to law.

In determining whether the District Magistrate's order for the prosecution of Sham Lall for an offence under s. 211, Indian Penal [717] Code, should be set aside or not, two questions arise: First, had the Magistrate under the circumstances of the case and upon the materials before him jurisdiction to make the order? Second, if he had jurisdiction, has he exercised it with judicial discretion?

I am of opinion that the first question should be answered in the affirmative. Section 191 of the Code of Criminal Procedure authorises a Magistrate "to take cognizance of any offence (*a*) upon receiving a complaint of facts which constitute such an offence; (*b*) upon a police report of such fact; (*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed."

It is clear that the Magistrate in this case had such materials before him that upon a consideration of them he might "suspect" the offence had been committed.

Mr. Ghose in arguing for the petitioner contended that, whereas the conclusions arrived at by the police and embodied in their report would, if true, point to the commission of an offence by Sham Lall under ss. 182 and 499, Indian Penal Code, equally with one under s. 211, Indian Penal Code, and that whereas offences under ss. 182 and 499, Indian Penal Code, were, if judged by the punishment which might be inflicted in respect of them, much less serious than an offence under s. 211, Indian Penal Code; and that whereas an offence under s. 182, Indian Penal Code, could only be taken cognizance of "with the previous sanction or on the complaint of the public servant concerned, or of some public

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servant to whom he is subordinate"; and that whereas an offence under s. 499, Indian Penal Code, could only be taken cognizance of "upon a complaint made by some person aggrieved by such offence," it could not have been the intention of the Legislature to allow a Magistrate to take cognizance of an offence of making a false charge under s. 211, Indian Penal Code, except upon the fulfilment of one or other of the conditions precedent to the authority of the Magistrate to take cognizance of offences under ss. 182 and 499, Indian Penal Code. I am unable to give effect to this argument.

The Legislature has deliberately under s. 195, cl. (*b*), Code of [718] Criminal Procedure, limited the protection of a preliminary sanction in respect of offences under s. 211, Indian Penal Code, to cases where "such offence is committed in, or in relation to, any proceeding in any Court." It is for the Legislature to decide whether the same protection should be given to persons charged under s. 211, Indian Penal Code, with making a false charge to the police, as is given to persons charged under that section, "when the offence is committed in, or in relation to, any proceeding in any Court," and to persons charged under ss. 182 and 499, Indian Penal Code.

Mr. Ghose further contended that when, as in this case, the complaint has had no opportunity of establishing the truth of his original charge, the Magistrate had no jurisdiction to take cognizance of an alleged offence under s. 211, Indian Penal Code, until the complainant has had such opportunity afforded him. I do not think this is so. I can find no provision in the Code of Criminal Procedure thus clogging the Magistrate's jurisdiction, and the reported cases do not support the argument.

The case mainly relied upon by Mr. Ghose was *Empress* v. *Karimdad* (1), where Garth, C.J., in giving judgment, is reported to have said: "Whatever opinion may have been formed by the Magistrate upon the police report as to the truth of Karimdad's complaint, when he appeared with his witnesses and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him upon his trial under s. 211 of the Penal Code." If the learned Judge by "could not" meant "was not authorized by law," I am unable to agree with him. But if he meant, as I think a perusal of the concluding paragraph of his judgment shows that he did mean, "could not with due regard to judicial discretion," the case so far from being an authority in Mr. Ghose's favour is an authority against him.

I now proceed to consider whether in this particular case the Magistrate has exercised a judicial discretion in taking cognizance of the alleged offence under s. 211, Indian Penal Code, [719] and directing a prosecution therefor. I am of opinion that he has not and that his order must be set aside.

As already pointed out the District Magistrate admits "that, although there are contradictory rulings on the subject of prosecutions under ss. 182 and 211, Indian Penal Code, yet what runs through all he has been able to consult is that, when a man has made a complaint before a Magistrate, he must have proper opportunities of proving his case before he can be prosecuted under the above sections."

If for "can be prosecuted" we read "ought to be prosecuted," the District Magistrate's interpretation of the cases is quite right.

(1) 7 C. L. R. 467=6 C. 496.

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As therefore I have already held that Sham Lall's application or petition of the 24th March was a "complaint" within the meaning of s. 191, Code of Criminal Procedure, it is clear that upon his own view of the authorities the Magistrate's order must be set aside.

It is manifest, too, that the District Magistrate has misapprehended the nature of the police report in this case. He says, in his letter of explanation to the Sessions Judge, "the real complaint was in the police report, where the police complained against Sham Lall and asked for a prosecution, and after carefully considering that complaint, and moreover studying the evidence by which it was supported, I made the case over for trial." Now the police report was not "a complaint of facts constituting an offence" within s. 191, Code of Criminal Procedure, and so far from its "asking for a prosecution," it distinctly stated, it may be on quite insufficient grounds, "that no charge of bringing a false complaint could be laid owing to a question of title being involved."

I am also of opinion that the conclusions of the police as embodied in their report were not of such a character as to reasonably warrant the Magistrate in "suspecting" that Sham Lall had committed an offence under s. 211, Indian Penal Code.

It is not in accordance with the ordinary practice in criminal cases that Magistrates should take cognizance of non-cognizable offences except upon the complaint of the aggrieved persons, though there may be exceptional cases in which they may exercise [**720**] a judicial discretion in doing so. And there is nothing in the Code of Criminal Procedure to indicate that the Legislature intended charges under s. 211, Indian Penal Code, to stand on any different footing from charges of any other non-cognizable offence.

I am also of opinion that a Magistrate should not take cognizance of an alleged offence under s. 211, Indian Penal Code, until the alleged offender has had an opportunity of substantiating the original charge, and such original charge has been disposed of in due course of law.

There is no doubt that the decided cases show that a Magistrate may take cognizance of the offence of making a false charge when the original complaint has been abandoned, but he must do so on proper materials.

The necessary ingredients to constitute a false charge under s. 211, Indian Penal Code, are three. In the first place it must be made with intent to injure; in the second place it must be false; and in the third place it must be made without just or lawful ground; in other words it must be made maliciously.

Now it does not at all follow that because a person has charged another to the police with, say, theft, and has not applied to a Magistrate to take cognizance of the charge after the police have found it false, and in that sense has abandoned it, that he thereby admits that the charge was made with intent to injure, or that it was made maliciously. He may have made the charge, as in this case, upon the information of a third person, and during the progress of the police investigation he may have satisfied himself that his informant was mistaken, and the charge, therefore, in the sense of being untrue, false. Or again, having made the charge on his own responsibility, he may be satisfied after the police investigation, that it is a case of mistaken identity, or that the person whom he has charged took the article, said to have been stolen, under a *bona fide* claim of right.

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Therefore it by no means follows from the failure of a person to apply to a Magistrate to take cognizance of a charge which has been found by the police to be false that there need be grounds for preferring a charge against him under s. 211, Indian Penal Code, of making a false charge.

[721] WILSON, J.—I concur in the judgments that have been delivered.

TOTTENHAM, J.—I too concur generally in these judgments, but I am not quite satisfied that the Magistrate should be deterred from taking cognizance of offences against public justice except on the complaint of parties actually aggrieved by them.

GHOSE, J.—I concur generally in the judgments that have been delivered by the Chief Justice and Mr. Justice Norris.

T. A. P.

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FULL BENCH

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Ghose and Mr. Justice Beverley.

QUEEN-EMPRESS *v.* KARTICK CHUNDER DAS.* [20th July, 1887.]

Evidence—Admissibility of Previous conviction for the purpose of increasing the evidence at the trial against accused—Evidence Act (I of 1872), s. 54—Criminal Procedure Code (Act X of 1882), s. 310.

Under s. 54 of the Evidence Act a previous conviction is in all cases admissible in evidence against an accused person.

[**Diss.**, 14 A. 145 (149): **F.**, 17 C. 852: **R.** L.B.R. (1872—1892) 449 (451): L.B.R. (1872—1892) 574 (575); L.B.R. (1893—1900) 93 (94); 1 C.W.N. 146 (148, 149); 28 B. 129; 19 C. 544 (568) (**F.B.**); 21 C. 732 (766, 775), 9 C.P.L.R. 65 (68).]

ON the 10th June, 1887, one Kartick Chunder Das was charged under s. 411 of the Penal Code with receiving stolen goods. During the course of the trial the prosecution tendered as evidence against the accused a previous conviction, three years old, for attempting to commit the same offence. The evidence was tendered under s. 54 of the Evidence Act as tending to show guilty knowledge. The evidence was objected to, but the objection was overruled by the Magistrate and the evidence admitted. The prisoner was subsequently convicted of the offence charged subject to a reference to the High Court on the question whether the evidence of the previous conviction was properly admitted or not.

On the reference being called on for hearing the Court (PETHERAM, C.J., and BEVERLEY, J.) considered the question to be one of great importance, and without giving any opinion on the question referred decided to call a Full Bench to hear the point argued. The case then came on before a Full Bench, [**722**] consisting of Petheram, C. J., Prinsep, J., Pigot, J., Ghose J., and Beverley, J.

The Officiating Standing Counsel (Mr. *Bonnerjce*) for the Crown.—Since the Evidence Act there are only two reported cases on s. 54, *viz.*, *Roshun Doosadh* v. *Empress* (1) and *Reg.* v. *Parbhudas Ambaram* (2). The

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* Criminal Reference No. 1 of 1887 made by C. H. Reily, Esq., the Chief Presidency Magistrate of Calcutta, under s. 432 of the Code of Criminal Procedure.

(1) 5 C. 768. (2) 11 B. H. C. 90.

Bombay case shows the difference between the two parts of s. 54. Reading ss. 2 and 5 of the Evidence Act together it appears as if evidence may be given in criminal proceedings of previous convictions of accused persons. Section 11 shows when facts not otherwise relevant become relevant. The definition of the word " evidence " is given in s. 3. A similar section to s. 54, *viz.*, s. 19 of 34 and 35 Vic., c. 112, was in force in England before the Indian Evidence Act was passed, and that section applied to special cases. In the Calcutta case cited the Judges say evidence of bad character is relevant, but they do not say the Sessions Judge was in error in admitting the evidence, but they do say, so far as it was treated as evidence of bad character, the Judge was wrong. There is a case decided before the Evidence Act in which it was decided that a previous conviction was not admissible, *viz.*, *Queen* v. *Thakoordass Chootur* (1).

[PETHERAM, C. J.—Why did the Legislature pass s. 310 of the Criminal Procedure Code? If s. 54 has the meaning you ascribe to it the whole of any facts shut out by s. 310 might be brought in under s. 54 of the Evidence Act.] Section 310 of the Code and s. 54 of the Evidence Act must be read together.

[PETHERAM, C. J.—The provisions of s. 310 of the Criminal Procedure Code are safeguards for the protection of prisoners, and as the Code was passed in 1882 it cannot be supposed that the Evidence Act passed in 1872 should override it.]

Taylor on Evidence, para. 345, p. 325, Ed. 1885, sums up the English law on the subject. Section 54 cannot be limited to any particular cases; it must be read broadly, leaving it to the judicial officers to take care that it is made use of in a proper manner. In charges under s. 413, Penal Code, a previous conviction would be admissible. You may, under s. 14 of the Evidence Act, give evidence that an accused had other stolen property in [**732**] his possession. I submit, therefore, that evidence of a previous conviction may be given at the trial in all cases, whether such previous conviction is connected or not with the offence the accused is charged with.

Mr. *Garth*, for the accused.—The question is not one of English law but of Indian law. But even in England, before 34 and 35 Vic., c. 112, previous convictions could not be given in evidence except for the purpose of enhancing punishment, and since that Statute they can only be given in certain cases and for particular purposes.

It is clear that, prior to the passing of the Indian Evidence Act, the English law as it existed before 34 and 35 Vic., c. 112, prevailed in India. See *Queen* v. *Thakoordass Chootur* (1), *Queen* v. *Gopal Thakoor* (2) and *Queen* v. *Phoolchand* (3). If the construction of s. 54 of that Act contended for by the Crown is correct, the effect of it is to admit evidence of a previous conviction of any offence, even one of a wholly different character from that charged, and at any stage of the trial. This would have been a most radical change, going far beyond the existing law in England, and opposed to all the English authorities. Surely, if this had been intended, the change would have been mentioned in the speeches of Sir Fitz James Stephen upon the bill. But the section is never alluded to. Surely also the change would have been effected by more apt and precise words. It is submitted that s. 54 was, in reality, only intended to codify the existing law, not to alter it. Evidence of previous convictions is relevant, and was so before the passing of the

(1) 7 W. R. Cr. 7. (2) 6 W. R. Cr. 72. (3) 8 W. R. Cr. 11.

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Evidence Act, in criminal proceedings, but only for the purpose of enhancing punishment, and it was for this purpose only that the Legislature intended to make it relevant by this Act. This view is supported by the authority of Mr. Norton in his treatise on the Evidence Act—see Ed. 9, p. 231.

By s. 55 character includes reputation and disposition, and evidence can only be given of general reputation and disposition, and not of particular acts. It is submitted that evidence of [724] a previous conviction could only be relevant (if at all) before conviction as a particular fact showing reputation or disposition. If so, by the express terms of the Act it is inadmissible.

The Legislature have also themselves put a construction on the section—see s. 310 of the Criminal Procedure Code. All the elaborate precautions there taken would be useless if the evidence was admissible under s. 54. It might if the argument for the Crown is correct, be first used as evidence during the trial, and after conviction be made the basis of a fresh charge against the accused for the purpose of enhancing punishment. This could never have been intended.

The construction contended for would work the grossest injustice. It is said that the Court has a discretion. But the words of the section are precise and allow of no discretion, and in any case the discretion would be a dangerous one to entrust to the subordinate tribunals of the country

OPINION.

The opinion of the Full Bench was delivered by

Pigot, J. (Petheram, C. J., Prinsep, Ghose, and Beverley, JJ., concurring):—The question referred to us by the Chief Presidency Magistrate is whether, upon the trial of a person charged with being in dishonest possession of stolen property, evidence can be given of a previous conviction of the accused for attempting to receive stolen property, knowing it to be stolen, under ss. 511 and 411 of the Indian Penal Code. There is not, in the law of this country, any such special provision as is made by 34 and 35 Vic., c. 112, s. 19, relating to the admission in evidence against a person charged with having received stolen goods knowing them to be stolen, of a previous conviction of such person, for any offence involving fraud or dishonesty. The question therefore involves the determination of the construction to be put on s. 54 of the Evidence Act.

Section 54 is one of a group of sections, 52 to 55 inclusive, placed in the Act, under the heading "character when relevant." Sections 53 and 54 relate to criminal proceedings only; 52 and 55 to Civil cases; the explanation to s. 55 relates to all four sections.

[725] Sections 53 and 54 and this explanation are as follows:—

Section 53 says: "In criminal proceedings the fact that the person accused is of a good character is relevant."

Section 54 says: "In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant."

"*Explanation.*—In ss. 52, 53, 54 and 55 the word 'character' includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown."

The Standing Counsel to Government contends that under s. 54 evidence may be given of a previous conviciton of an accused person of any

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offence whatever, whether such previous offence be connected or not in any way whatever with the offence with which he is charged; that it may be given as direct evidence upon his trial and not merely in reply to evidence of good character offered on the part of the accused; and, of course, that it may be given, whether or not the accused be charged under s. 75 of the Indian Penal Code.

Mr. *Garth* for the accused contended that the Legislature cannot possibly have contemplated so serious a change in the law of evidence in criminal cases as this construction of the section would involve; that the section was not meant to alter but to codify the existing law, and that it cannot have been intended that evidence of a previous conviction should be given, save for the purposes of punishment under s. 75, Indian Penal Code; and he urged that under the explanation to s. 55 evidence can be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

The question appeared to be not merely of great importance, but of much difficulty. The words of the section are express. On the other hand we felt great difficulty in attributing to those words a meaning which might involve the admission as evidence against an accused, of proof of a convic-[**726**]tion, the fact of which might, in many cases, have no possible bearing whatever upon the question whether he was guilty or innocent of the offence charged against him, and could, in such cases, have no effect save to produce against him a prejudice which, to use the words of an English Act to be referred to presently, would "not be consistent with a fair and impartial enquiry" as regards the subject-matter of the charge against the accused.

We doubted whether the Legislature could have omitted to advert to this danger; and we thought it our duty to consider whether some construction could not properly be given to the section such as would avoid it.

We were the more impressed with the force of this consideration because the Legislature has, in s. 310 of the Criminal Procedure Code, expressly guarded against the possibility of a jury's being prejudiced against a prisoner while on his trial upon one charge by being made aware of his being charged under s. 75 with a previous conviction.

Section 310 is as follows:—

"In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction, for any offence, the procedure laid down in ss. 271, 286, 305, 306 and 309 shall be modified as follows:—

(*a*) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence.

(*b*) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.

(*c*) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly; but, if he denies that he has been so previously convicted, or refuses to, or does [**727**] not, answer such question, the jury or the Court and the assessors (as the case may be) shall then enquire concerning such previous conviction, and in such

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case (where the trial is by jury) it shall not be necessary to swear the jurors again."

That section, it is true, relates only to a very limited class of cases. Still it appears to recognise as to such cases, at least, the principle that a prisoner on his trial ought not to be prejudiced by a statement of a previous conviction suffered by him. That provision appears to be taken from English Statute Law, and originally appeared in 6 and 7 William IV, c. III, entitled "An Act to prevent the fact of a previous conviction being given in evidence to the jury on the case before them except when evidence to character is given."

The preamble is as follows: "Whereas by an Act passed in the seventh and eighth years of the reign of King George the 4th intituled *An Act for further improving the Administration of Justice in Criminal cases*, provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony: And whereas since the passing of the said Act the practice has been on the trial of any person for any such subsequent felony to charge the jury to enquire at the same time concerning such previous conviction: And whereas doubts may be reasonably entertained whether such practice is consistent with a fair and impartial enquiry, as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued." Then comes the enacting part of the Act, which provides that evidence of a previous conviction shall not be given until after the finding for a subsequent felony except where evidence of good character is given.

We felt, as we have said, that the indiscriminate admission against an accused person of any previous convictions against him would not merely operate in many cases so as to work what we should have called an unjust and unreasoning prejudice: but also that, by the construction contended for on behalf of the prosecution, a formidable novelty must be admitted [728] into the rules of evidence applied in criminal proceedings; for in a multitude of cases the section, by this construction, renders admissible, and declares by its statutory force to be relevant—facts which, in no possible sense, save the technical statutory sense in which the word is used in the act, could be relevant. It is not necessary to dwell on many of the innumerable examples which might be suggested. A previous conviction for bigamy would, under this construction, be relevant on a charge of theft, a previous conviction for cheating, on a charge of riot, and so on. Great therefore as the difficulty is of adopting any other construction of the words of the section, when taken by themselves, we might, perhaps, aided by the indication of the intention of the Legislature as disclosed in s. 310, have adopted the construction of the section laid down by a division Bench of this Court in *Roshun Doosadh* v. *Empress* (1).

But we thought it right from the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Courts here in recent times: and in a case of such difficulty and importance as this appeared to be we felt bound to adopt it.

The Evidence Act is, as it was intended to be, a complete Code of the law of Evidence for British India. It received the assent of the

(1) 5 C. 768.

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Governor-General in Council on the 15th March 1872. It was the subject of two reports by Select Committees of that Council. In the first of these reports the subject now under consideration is dealt with. That report is published in the *Gazette of India* for June 24th, 1871, at pp. 235—242. It is signed by the then Legal Member of Council (now Mr. Justice Stephen) and by the other Members of the Committee, whose names follow:—Messrs. J. Strachey, F. S. Chapman, F. R. Cockerell, J. F. D. Inglis, and W. Robinson. It is a report by a Committee consisting of nearly one-half of the Members of the Legislative Council, and including the Legal Member in charge of the Bill, [**729**] accompanying the draft Bill as settled by them, stating at length the scope of the proposed measure, the intentions and the reasons by which they have been influenced in framing it, and so submitting both to the Council. A second report was made upon the measure in the following year by the Select Committee upon the Bill, consisting of the same gentlemen ,together with Messrs. Stewart and Bullen-Smith. It does not touch on the subject-matter of this section at all.

The first report contains at p. 239 the following unexpected paragraph: "In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications. We include under the word "character" both reputation and disposition, and we permit evidence to be given of previous conviction against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence if it is true." That is the whole paragraph. There is nothing else in the report to qualify it. It is the only passage in the report which deals with the subject now under consideration.

In the drafts of the Bill laid before the Council with the first report, the section now numbered 54 was numbered 22. It stands in the Act in exactly the same terms as in the draft referred to in the paragraph above set out.

It is impossible that we should disregard the terms of this report, when construing, in the face of the difficulties which we have adverted to, this section of the Act. We are asked to reject the most natural meaning of the words as one leading to a result manifestly unjust. We cannot disregard the fact that the Committee deputed to frame, and to advise the Legislature upon, the proposed Code, framed this section and advised its adoption to secure the result so described: and that the Legislature being so advised passed the section so framed. We think we must treat it as plainly shown, that the danger which, as we were disposed to hold, the Legislature must be supposed to have intended to avoid, was in truth the object which the Legislature sought to attain. It is stated in language plain, forcible, and concise. The Legislature lets in the evidence [**730**] "for the purpose of prejudicing" the man upon his trial. It is, as is justly stated in the report, the law of England "with some modifications." The British Legislature passes an Act for the sole purpose of shielding an accused from prejudice. The Legislature in this country enacts a provision for the express purpose of prejudicing him.

Having thus ascertained that the peremptory language of the section was meant to have the full effect which the words do, no doubt, *prima facie* bear, we are relieved from the second difficulty which also oppressed us. It is in truth of the less consequence that the fact of a previous convictions may have no possible bearing and constitute no possible guide upon the question of the truth of the charge at trial, because it is not for

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that purpose that they are admitted in evidence, but for another wholly different, and for which relevancy in the ordinary sense is immaterial.

We are constrained to answer this reference by saying that previous convictions are in every case admissible. That must be the law so long as this section remains unaltered.

We own that, could we have come to any other conclusion, we should have done so; but it is our duty to carry out the intentions of the Legislature.

T. A. P.

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14 C. 730 (F.B.).

FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

GIRWAR SINGH, AND ON HIS DEATH, SRIKISHEN SINGH, AND OTHERS (*Plaintiffs*) *v.* THAKUR NARAIN SINGH AND OTHERS (*Defendants*).* [23rd May, 1887.]

Limitation Act, 1877, *Arts,* 132 *and* 147—*Suit on a mortgage bond—English mortgage—"Mortgage" and "Charge"—Transfer of Property Act, ss.* 58, 60, 67, 83, 86, 87—89, 92, 93, 100.

A suit on a mortgage bond to enforce payment by sale of premises hypothecated is governed by art. 132 of the Limitation Act. *Brojo Lal Sing* v. *Gour Charan Sen* (1) overruled; *Shib Lal* v. *Ganga Prasad* (2) dissented from.

[731] The clear distinction drawn for the first time between "mortgage" and "charge" in the Transfer of Property Act is not observed in the Limitation Act.

Article 147 of the Limitation Act relates to a special kind of mortgage known as English mortgage, and includes only that class of suits in which the remedy is either foreclosure or sale in the alternative.

[**Diss.,** 13 B. 90 (**F.B.**); 14 B. 269 (272); 20 B. 408 (415) (**F.B.**); 14 A.W.N. 57; 25 M. 220 (**F.B.**); **F.,** 112 P.R. 1890 (**F.B.**); L.B.R. (1872-1892). Vol. 1, 555 (563); 34 C. 941 (**F.B.**)=6 C.L.J. 237=11 C.W.N. 959; **Appr.,** 21 M. 326 (**F.B.**); **R.,** 24 C. 281 (282); 25 C. 409 (411); 13 A. 28 (49); 20 C. 269 (272); 12 C.P.L.R. 26 (31); 30 M. 426 (**P.C.**)=11 C.W.N. 1005=17 M.L.J. 444=4 A.L.J. 625=6 C.L.J. 255=2 M.L.T. 333=9 Bom. L.R. 1104; 10 A.L.J. 538 (542)=15 Ind. Cas. 240 (242)]

BATESWAR NATH and others executed a bond on the 15th June, 1865, in favour of Girwar Singh for a sum of Rs. 2,695-9-2, hypothecating a 5 annas 4 pie share of mouzah Rampore Gobind. The time stipulated in the bond for the repayment of the money was five years from the date of execution, that is, the 15th June, 1870. The share was afterwards sold in execution of a certain decree and purchased at auction by Thakur Narain Singh and others. Thereupon, on the 15th June, 1885, Girwar Narain brought a suit on his bond for payment of the sum of Rs. 9,126-11-5, due as principal and interest, by sale of the premises hypothecated to him in mouzah Rampore Gobind. Thakur Narain and others, the defendants, raised *inter alia* the plea of limitation, and it was contended that, upon the authorities of *Ramdin* v. *Kalka Prasad* (3) and an unreported case, *Sheo Churn Lal* v. *Ram Churn Singh* (Appeal No. 279 of 1881) decided by Mitter and Norris, JJ., the suit came under

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* Full Bench Reference in Regular Appeal No. 488 of 1885, against the decree of Baboo Ram Pershad, Rai Bahadur, Subordinate Judge of Patna, dated the 12th of August 1885.

(1) 12 C. 111. (2) 6 A. 551. (3) 7 A. 502=12 I. A. 12.

art. 132 of the Limitation Act, and not having been brought within 12 years from the 15th June 1870 was barred. The plaintiffs' pleader relied upon *Shib Lal* v. *Ganga Prasad* (1) and claimed the benefit of art 147 of the Limitation Act.

The Subordinate Judge, dissenting from the last-named decision of the Allahabad High Court, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo Saligram Singh, for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Karuna Sindhu Mookerjee*, for the respondents.

The Court (WILSON and PORTER, JJ.) referred the case to a Full Bench with the following opinion:—

This is a suit upon a mortgage bond, the object being to obtain satisfaction of the money by sale of the lands hypothecated. [732] The bond was dated the 15th June 1865; the money was payable within five years, which expired on 15th June 1870, and the suit was instituted on the 15th May 1885. The Subordinate Judge dismissed the suit as barred by limitation, and against that decision the plaintiff has appealed. Under the Limitation Act (IX of 1871), which was in force prior to the present Act (XV of 1877), it was well settled that a suit upon a mortgage bond, if it sought a personal decree, was governed in respect of limitation by the rules relating to bonds, or as the case might be, and if it sought a decree against the land, by art. 132 of the schedule, which fixed 12 years as the period of limitation for suits "for money charged upon immoveable property." For this it is not necessary to do more than refer to the Privy Council deicsion, *Ramdin* v. *Kalka Prasad* (2). The Act of 1877 has slightly altered the language of art. 132 by speaking of suits "to enforce payment of money charged upon immoveable property" instead of "for money charged." And it has added a new art. 147, which says that, for a suit "by a mortgagee for foreclosure or sale," the period of limitation shall be 60 years from the time "when the money secured by the mortgage becomes due." It is contended for the appellant that the present suit is governed by art. 147, and that he has 60 years from the 15th June 1870 within which to bring his suit; and there is authority in support of that contention. In *Shib Lal* v. *Ganga Prasad* (1) it was held by a Full Bench of the Allahabad Court that such a suit is governed by art. 147, and that 60 years is the period of limitation. The view of the learned Judges, if we rightly follow it, seems to be that a suit for sale by a mortgagee is governed by art. 147, art 132 applying to charges not amounting to mortgages. The same view of the law was taken by Prinsep and O'Kinealy, JJ., in *Brojo Lal Singh* v. *Gour Charan Sen* (3). On the other hand, in *Lallubhai* v. *Naran* (4), it was held by three Judges of the Bombay Court that s. 132 does apply to cases of mortgage, and applies also to suits for a personal decree. The latter of these propositions was distinctly dissented from by some at least of the Judges in the Allahabad Full Bench case just [733] referred to. In *Davani Ammal* v. *Ratna Chetti* (5) a Division Bench at Madras appears to have accepted both the propositions of the Bombay Court. In *Aliba* v. *Nanu* (6) another Bench at Madras refused to follow the Allahabad Full Bench, and held that art. 132 governed a suit upon a mortgage bond to recover the mortgage money by sale of mortgaged property. In

(1) 6 A. 551. (2) 7 A. 502=12 I. A. 12. (3) 12 C. 111.
(4) 6 B. 719. (5) 6 M. 417. (6) 9 M. 218.

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an unreported case (Appeal No. 279 of 1881) on the 21st June 1882, Mitter and Norris, JJ., treated it as clear that such a case as the present is governed by art. 132, and the reasoning of the Privy Council in the case already referred to, *Ramdin* v. *Kalka Prasad* (1), though directed to the Act of 1871, seems equally applicable to the Act of 1877. We are not inclined to think that art. 147 has the wide operation attributed to it by the Allahabad Court. We are rather disposed to hold that it refers to the common form of suit upon an English mortgage in which the plaintiff is entitled to claim, and ordinarily does claim "foreclosure or sale" in the alternative. A mortgage in the English form was in 1877 the only mortgage upon which such a suit could be brought, and under s. 67 of the Transfer of Property Act it seems to be so still. In such Acts as the Limitation Act, forming a connected series, we think the presumption is strong against the intention to make a sudden and unexplained departure from the general line of policy running through the whole series; and that policy as to mortgages is to keep the right of suit within narrow limits of time. We think too that in such Acts mere changes of phrase not obviously involving changes of meaning ought not to be so treated as to alter the substance of the law. We are, therefore, inclined to think that, except so far, if at all, as s. 147 may have altered the law in the case of mortgages in the English form, the law of limitation applicable to suits to enforce mortgages remains the same as it was under the Act of 1871 and as it was explained by the Privy Council in the case above cited. We desire to refer to the Full Bench the question whether this suit is barred by limitation.

Before the Full Bench:

Baboo *Saligram Singh*, for the appellant.—The case falls under [734] art. 147. It is the case of a mortgage as defined in the Transfer of Property Act. It is a simple mortgage. Article 132 deals with charges. The provisions in parts of the Civil Procedure Code and the Limitation Act were made in anticipation of the Transfer of Property Act—see the observation of Pigot, J., in *Shurnomoyee Dasi* v. *Srinath Das* (2). At the time when the Limitation Act was under consideration the Bill relating to the Transfer of Property Act was before the Council. These articles should be construed by the light of ss. 58, 60, 67, 83, 86, 87, 88, 89, 92, 93, and 100 of the Transfer of Property Act. Article 147 has effected a change in the old law; cases against me were decided in inadvertence of the charge effected. The dicisions of all the High Courts are substantially in my favour. The Punjab Court has held in the same way—*Gujar Mull* v. *Ilaichi Ram* (3), Rivaz's Limitation Act, 276.

Baboo *Mohesh Chunder Chowdhry*, for the respondent:—It has been settled that the words used in art. 132 of the Limitation Act of 1871 include simple mortgages. There is no marked change in the corresponding article of the present Act. The effective words in both the articles, "money charged upon immoveable property," are identical. Article 132 of the present Act must include a simple mortgage unless there is anything to the contrary in any other article. Is 147 that article? The word "mortgage" in 147 does not imply all kinds of mortgages; it is not used in a generic sense. It cannot be said, for instance, that usufructuary mortgage is implied by that word, art. 147 includes only a particular class of mortgages, namely, that defined in s. 58, cl. (*e*) of the Transfer of Property Act. Article 132 is the article that

(1) 7 A 502=12 I. A. 12. (2) 12 C. 614. (3) 19 P. R. 1885.

applies to this case. All the judgments against me proceed on the ground that the term " mortgage " in art. 147 is intended to include all sorts of mortgages. 1887 MAY 23.

FULL BENCH.

14 C. 730 (F. B.)

JUDGMENT.

The judgment of the Full Bench was delivered by

MITTER, J. (PRINSEP, WILSON, TOTTENHAM, and NORRIS, JJ., concurring):—The question referred to the Full Bench is substantially this: Whether the present suit falls under art. 132 or art. 147 of the present Limitation Act. Article 132 provides that, for a suit to enforce payment of money charged [**735**] upon immoveable property, the period of limitation should be 12 years from the time when the money sued for became due. Article 147 says that, for a suit by a mortgagee for foreclosure or sale, the period of limitation shall be 60 years from the time when the money secured by the mortgage became due. The plaintiff in this suit seeks to recover money secured by simple mortgage of certain immoveable property by the sale thereof. The mortgage was created by a bond, by which the debtor also personally covenanted to repay the money but within a stipulated time. It would be useful to see what were the periods of limitation prescribed for a suit of this description in the two previous Limitation Acts. It is not disputed that under both these Acts the period of limitation was 12 years—see *Jonessur Das* v. *Mohabir Singh* (1); *Ramdin* v. *Kalka Prasad* (2). In the Limitation Act of 1871 there was no article corresponding to art. 147 of the present Act; and the art. 132 of that Act with slight modification has been re-enacted in art. 132 of the present Act. Instead of the words " *to enforce payment* of money charged upon immoveable property " it contained the words " for money charged upon immoveable property." The addition of the words " to enforce payment of money " indicates that the article would not apply to a suit for money charged upon immoveable property *when the payment of the money is not sought to be enforced upon the property hypothecated.* The modification therefore does not at all affect the question before us. The class of suits now under consideration was therefore described in the Act of 1871 as a suit for money *charged upon immoveable* property. The contention of the (plaintiff) appellant before us is that, although in art. 132 of the present Act the same expression, *viz.*, " money charged upon immoveable property," has been used, yet the Legislature intended to exclude this class of suits from it, and to include it under art. 147, which has been for the first time introduced into the Act. This contention is, in my opinion, not sound. It seems to me to be an unreasonable contention that, although the Legislature intended to exclude from art. 132 of the present Act this class of suits, yet, in [**736**] describing the nature of the suits covered by it, they did not make any material alteration in the language which they had used for that purpose in art. 132 of the Limitation Act of 1871. If the Legislature intended to alter the law, they would have expressed their intention by altering the language of art. 132, and not by simply introducing a new article which again would not include the class of suits under consideration unless the word " or " in the expression " by a mortgagee for foreclosure *or* sale " be read in the distributive sense. The contention of the appellant therefore amounts to this. The Legislature intended to modify the provisions of the law laid down in art. 132 of the Act of 1871. They have carried out their intention, not by making any change in

(1) 3 I. A. 1=1 C. 163. (2) 7 A. 502=12 I. A. 12.

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the corresponding article of the present Act, but by introducing into it a new article couched in language which, unless the word "or" be read in the distributive sense, would not indicate the change at all. It is hardly necessary to say that such a contention as this cannot be accepted as sound unless supported by the most convincing reasons. The contention also involves another equally unreasonable conclusion. Under the Acts of 1859 and 1871 the law of limitation governing suits by mortgagees under *kut-kobala* or bill of conditional-sale was as follows: Where a *kut-kobala* gave to the mortgagee the right to recover possession on default of payment, the period of limitation for a suit based upon this stipulation was 12 years—see *Brojonath Koondoo Chowdhry* v. *Khelut Chunder Ghose* (1); art. 135 of the Act of 1871. In Courts not established by Royal Charter in the Presidency of Bengal the period of limiation for a suit for possession of the mortgaged property, upon the conditional-sale becoming absolute under the provisions of Regulation XVII of 1806, was 12 years from the date when the sale became absolute—*Chinaram Dobey* v. *Ram Monaruth Dobey* (2); *Modun Mohun Chowdhry* v. *Ashad Ally Beparee* (3). But in cases where the right of the mortgagee has been extinguished by the law of limitation the proceedings under Regulation XVII of 1806 did not give a fresh start—see *Mdun Mohun Chowdhry* v. *Ashad Ally Beparee* (3). Now in the year 1877, when the present Act was [737] passed, foreclosure suits were not known in the Courts not established by Royal Charter in the Bengal Presidency. In the year 1877 therefore suits under *kut-kobalas* or conditional bills-of-sale for possession of mortgaged property were not covered by art. 147. The period of limitation for such suits, which was 12 years under the Act of 1871, was consequently not altered under the new Act. The contention of the appellant therefore involves this unreasonable conclusion, that the Legislature kept up the shorter period of limitation, *viz.*, 12 years for *kut-kobalas*, a higher class of mortgage, and extended the period of limitation from 12 to 60 years for an inferior kind of mortgage, namely, hypothecation of immoveable property in a bond. But, as already stated, if the word "or" be not read distributively, these unreasonable conclusions are avoided. The article would then include only that class of suits in which the mortgagee would be entitled to either of the remedies, *viz.*, foreclosure or sale in the alternative, *i.e.*, suits based upon what is usually called an "English mortgage." I have carefully considered the reasons given in support of the appellant's contention in the decisions cited before us, and with deference to the opinion of the learned Judges who decided them I am unable to concur in their conclusion.

The most important case in support of this contention is a Full Bench decision of the Allahabad High Court, *Shib Lal* v. *Ganga Prasad* (4). The first ground upon which this decision proceeds is that, as under art. 147 the Legislature has allowed 60 years to a mortgagor to redeem a simple mortgage, it would be reasonable to suppose that they have allowed the same period to the mortgagee to bring a suit for sale. It seems to me that in the year 1877, when the new Act was passed, a suit for redemption by a mortgagor under a simple mortgage was wholly unnecessary, and therefore unknown. It cannot, therefore, be said that under art. 147 the period of limitation of 60 years was allowed to a suit for redemption by a mortgagor under a simple mortgage who did not stand in need of such remedy

(1) 14 M. I. A. 144=8 B. L. R. 104.
(2) 7 C. L. R. 580.
(3) 10 C. 68.
(4) 6 A. 551.

at all. Suits for redemption were necessary only when the possession of the mortgaged premises was to be recovered from the [738] mortgagee, or when it was necessary to obtain a reconveyance of the mortgaged property, it having been previously conveyed to the mortgagee. Moreover, under the Acts of 1859 and 1871, the policy of the Legislature was to give to the mortgagor a period of limitation for redemption longer than that allowed to the mortgagee for enforcing his remedy. There is no valid reason suggested to show that there was any necessity for a departure from this policy.

The second reason assigned in the judgment is expressed as follows: "When art. 147 of the Limitation Act speaks of a suit by a mortgagee for sale, why should we go out of our way to hold that it does not cover a case in which the plaintiff in his relation towards the defendant legally and to all intents and purposes stands in the position of a mortgagee." I have already stated the grounds upon which it seems to me that the present suit does not fall under this Article. They are substantially two, *viz.*, (*a*) there is no material alteration in the language of art. 132; (*b*) certain unreasonable consequences follow if we bring this class of cases within art. 147.

The third reason upon which the judgment of the Allahad Court proceeds is that, as the Bill, which subsequently became the "Transfer of Property Act," was pending before the Legislature in the year in which the present Limitation Act was passed, it would be reasonable to infer that the Legislature used the word "charge" in art. 132 in the same sense in which it is used in the "Transfer of Property Act." The learned Officiating Chief Justice who delivered the main judgment was further of opinion that probably the distinction which has been drawn in the "Transfer of Property Act" between a "charge" and a "mortgage" is nothing more than a crystallization of the principle enunciated in the many decisions of the Courts delivered upon the subject. It seems to me to be more probable that the Legislature in arts. 132 and 147 used these expressions in the sense in which they were then ordinarily used than in the sense in which they were used in a Bill which was then pending before them, and which Bill might or might not become law thereafter. The distinction between "mortgage" and "charge" was for the first time drawn by a clear line of demarcation in [739] the "Transfer of Property Act." For example, speaking of the class of mortgage now under our consideration, Sir Barnes Peacock, C.J., in delivering his judgment in the Full Bench decision in *Surwar Hossein Khan* v. *Gholam Mahomed* (1), characterised it as a "charge" upon immoveable property. In *Ramdin* v. *Kalka Prasad* (2), their Lordships of the Judicial Committee assumed that the word "charge" included a simple mortgage. There are several cases under art. 132 of the Limitation Act, 1871, in which a simple mortgage has been described as a *charge* upon immoveable property. I am of opinion that, instead of referring to a Bill as to which it was uncertain whether it would be passed into law or not, it would be quite legitimate to refer to the forms of plaint given in the Procedure Code of 1877, which was passed in the same Session of the Legislature. No. 109 of the fourth schedule of the Code is a form of a plaint in a suit for foreclosure or sale, and it would appear from the contents of that form that it would apply only to a suit brought upon what is called an English mortgage Mr. Justice Oldfield referred to this form in

(1) B. L. R. Sup. Vol. 879=9 W. R. 170. (2) 7 A. 502=12 I. A. 12.

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his judgment, but it seems to me that the form in question does not apply to a suit to be brought by a simple mortgagee for the sale of the mortgaged premises.

The last ground upon which the Allahabad Full Bench decision is based is that, as in the year 1877 suits by mortgagees for foreclosure or for sale were unknown to the Courts, it would not be unreasonable to refer to ss. 87 and 88 of the Transfer of Property Act for their explanation. But a suit for foreclosure or sale was not altogether unknown in 1877. A suit of this description was not uncommon in Courts in this country which administered the English law of mortgage, that is, the Courts exercising the original jurisdiction in the Presidency towns. It was a defect in the Limitation Act of 1871 that there was no Article in express language applicable to a suit of this description. Consequently in a case of *Ganpat Pandurang* v. *Adarji Dadabhai* (1), it was contended that the period of limitation applicable to a suit of this description was six years under the sweeping clause of the Limitation Act. It seems to me that in [**740**] order to remedy this defect the art. 147 was for the first time introduced into the present Limitation Act. The other cases cited by the learned pleader for the appellant merely follow the Allahabad Full Bench decision. I am of opinion that the present suit is governed by art. 132 of the present Limitation Act, and is consequently barred. The result will be that the appeal will be dismissed with costs.

K. M. C. *Appeal dismissed.*

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14 C. 740 (P.C.)=14 I.A. 101=11 Ind. Jur. 350=5 Sar. P.C.J. 45.

PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Fitzgerald, and Sir B. Peacock.
[*On appeal from the High Court at Calcutta.*]

ANANGAMANJARI CHOWDHRANI AND OTHERS (*Plaintiffs*) *v.* TRIPURA SUNDARI CHOWDHRANI AND OTHERS (*Defendants*).
[10th and 11th March, 1887.]

Title, Evidence of—Presumption arising from Possession—Issue as to identity of land re-formed on a site formerly submerged.

In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favour of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than 12 years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the chur—a title denied by the defendant; and remanded the suit for judgment on this issue, whereupon the appellate Court maintained the judgment of the first Court in favour of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs.

Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held,* that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro.*

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(1) 3 B. 312.

[F., 18 C. 23 (30) (P.C.); Appl., 29 B. 1 (P.C.)=6 Bom.L.R. 770=1 A.L.J. 637 (640)=8 C.W.N. 865; R., 14 B. 392; 5 Bom.L.R. 186 (193); 2 C.W.N. 649; 25 B. 202 (206); 4 C.L.J. 198; 10 Bom. L.R. 571 (573); 7 M.L.T. 139=20 M.L.J. 74=5 Ind. Cas. 118=33 M. 362 (365).]

1887 MARCH 11.

PRIVY COUNCIL.

14 C. 740 (P.C.) = 14 I.A 101 = 11 Ind. Jur. 350 = 5 Sar. P.C. J. 45.

APPEAL from a decree (3rd April 1882) of a Divisional Bench of the High Court, reversing a decree (12th April 1881) of the District Judge of Pubna.

[741] The parties to this appeal were at one time entitled, as joint owners, to villages Nalchongi and Nalchongi Silpatta in Rajshahye, which were partitioned between them in two lots: one consisting of a 13½ annas share which fell to the plaintiffs, appellants; and the other lot, consisting of a 2½ annas share, which went to the defendants, respondents.

The subject of the present suit was some chur land which had re-formed, after having been carried away by the river Ichamutti, on a site which was part of one or other of the above shares. The plaintiffs alleged that the chur had re-formed within the boundaries of the 13½ annas share. The defendants alleged that it had re-formed within the 2½.

The District Magistrate, when disputes arose about the year 1872, the chur having re-appeared many years before, proceeded under s. 530 of the Code of Criminal Procedure of 1872 then in force; and by an order of 24th February, 1873, maintained the possession of the appellants. But the respondents, on the 30th April of the same year, obtained a judgment, under Act XIV of 1859, for possession, under which the appellants were dispossessed on the 15th Jeyt 1280, corresponding to 27th May, 1873.

The present suit (5th September, 1876) was instituted by the appellants in the Court of the Subordinate Judge of Rajshahye, and an issue raising the above question having been fixed, and a report made by an Amin, it was found that the chur was covered by the 13½ annas share; and judgment was given, accordingly, for the plaintiffs.

This judgment the District Judge, on appeal, considered himself bound to accept (with only a slight variation as to a portion, which he found to belong to a third and different village), as it had not been shown to be erroneous, but he placed his decision of the case on a title by adverse possession accrued to the plaintiffs who had, as he found, been in possession for upwards of twelve years.

The High Court (MORRIS and PRINSEP, JJ.) on an appeal against the above decision, observed that the plaintiffs had not claimed the land upon the latter title, but as forming part of their original estate, and as having been taken out of their possession in 1873. They pointed out that it was not the case made out [742] by the plaintiffs, but one found by the lower Appellate Court, that they had occupied the chur in suit for a sufficient time to confer title upon them, even supposing that, before its diluviation, the land was part of the 2½ annas allotment, and not part of the 13½. It was also, in their opinion, apparent that the Judge had no definite opinion, of his own, as to whether the chur originally belonged to one or the other. And what he, in effect, decided was, that whether it fell within either the one or the other, it had, as a re-formation upon its old site, been so long in the possession of the plaintiffs as to confer upon them a title by prescription. This, however, was not the issue raised between the parties, and the Judges felt bound to adhere to the principle laid down in *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1) that no title can be claimed by prescription unless it has been put in issue against an adversary. The Judges were also dissatisfied with the mode in which the

(1) 2 C. 418.

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District Court had dealt with the evidence, remarking that "it was incumbent on the Appellate Court to form an independent judgment on the evidence, and not to give a decree in favour of the plaintiffs, unless they had, in its opinion, established their case."

The High Court, for these reasons, remanded the suit to the lower Appellate Court for judgment.

On this remand, the District Judge decided that the Subordinate Judge's finding was correct, the chur having been formed upon the land covered by the 13½ annas share.

There was again an appeal to the High Court on behalf of the principal defendants. A Division Bench (WHITE and MACPHERSON, JJ.) reversed the decree of the lower Appellate Court, and dismissed the suit. After referring to the remand order, and its grounds, the High Court said that, although this had been correctly understood by the lower Appellate Court, it appeared in Mr. Peterson's judgment that there was not a particle of evidence offered to prove when the chur lands re-formed, nor where they re-formed, much less evidence which showed that they re-formed upon the site of the 13½ annas share which originally belonged to the respondents. "Such remarks," continued the judgment, "as the District Judge has made upon the evidence, are [743] limited to the proof which was given by the respondents of the long and continuous possession which they enjoyed previous to their ouster by the appellants.

"Such being the case, the decree of the lower Court cannot be sustained. It is not suggested that there is any evidence on the record showing when the re-formation took place, or that it was a re-formation on the 13½ annas share, nor does the remand order allow of further evidence being given. After reading the various judgments of the three Courts below, which have had possession of this case for so long a time, and hearing what the pleaders for the parties have to say, it becomes plain that there is no evidence in this case on the above points, and that when the remand order was made which tried the respondents' case up to the third issue, their suit was virtually decided against them.

"As there is no evidence in the case as to the date or site of the reformation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court, and we have no alternative but to reverse the decree of the lower Appellate Court, and dismiss the suit of the plaintiffs, which we do with costs in all Courts."

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon*, for the appellants contended that the judgment of the High Court was erroneous. Upon a second appeal, the Courts below having concurred, the High Court had not to decide upon the weight of the evidence as to the site of the chur. That there was some evidence was apparent, whether weighty or not and whether sufficient or not. They referred to *Shiro Kumary Debi* v. *Gobind Shaw Tanti* (1).

Mr. *T. H. Cowie*, and Mr. *J.H.A. Branson*, for the respondents, argued that the judgment of the High Court was correct. The issue was as to the re-formation of the chur in question having taken place on a particular site, within a certain period. The fact of possession, inasmuch as the right to that possession had been all along disputed, was not relevant evidence upon the point raised, which was that the chur had been

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re-formed, *in situ*, under such circumstances (see *Lopez* v. *Mudden Mohun* [**744**] *Thakoor* (1) that the original owner had a right to have possession of that which remained his property, the right of property never having been lost. 1887 MARCH. 11.

Counsel for the appellants were not called upon to reply. PRIVY COUNCIL.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD WATSON:—In this case the parties are the respective owners of two divided shares of mouzahs Nalchongi and Silpatta. The plaintiffs are interested in the larger of those shares, extending to 13 annas 10 gundahs. The defendants are proprietors of the smaller share, extending to 2 annas 10 gundahs. The area of land which is in dispute in this action is situated on the bank and close to the alveus of the Ichamutti river. It is subject to the action of the stream; and it appears that from time to time the soil on the surface of the area has been washed away, and new soil has been subsequently deposited capable of cultivation. The exact date when the surface was last denuded does not appear; but it seems to be admitted on all hands that for many years past a new deposit has been growing up, and that in point of fact such deposit, since some time after the year 1850, has become culturable. In the end of 1872, or the beginning of 1873, disputes arose between the appellants and respondents as to the right to the disputed ground. The Magistrate intervened in February 1873, and, after inquiry, he adjudged that the plaintiffs were in possession, and had a right to retain possession of it. The defendants then instituted a possessory suit, and on the 13th of April 1873, they obtained a decree affirming their right to possess. That led to the institution of the present action, in which the plaintiffs, who were ousted under the decree of April 1873, claimed the property of the disputed area as having been all along in their possession as part of their 13 annas 10 gundahs share of the two mouzahs in question. The defendants resist the action on the ground that they had been in possession, and that the land in dispute was an integral part of their smaller share of these mouzahs—the 2 annas 10 gundahs share. Throughout these proceedings, at least since proof was closed, it is admitted on both sides that the area in dispute belongs to one or other of these two demarcated shares. 14 C. 740 (P.C.)=14 I.A. 101=11 Ind. Jur. 350=5 Sar. P.C. J. 45.

[**745**] Issues were adjusted by the Subordinate Judge. It is only necessary to deal with the third of them: because it is conceded now that, if the plaintiffs shall be held to have a right to the land, as part of their 13 annas 10 gundahs share, they are not barred by limitation from prosecuting the present suit. The third issue adjusted was in these terms: "Is the land in claim a re-formation on the site of the original diluviated land of the 13 annas 10 gundahs share of Kismat Nalchongi and Silpatti, held by the plaintiffs and *pro forma* defendants, or of the 2 annas 10 gundahs share held by the substantive defendants?" The Subordinate Judge, after an elaborate review of the evidence before him, came to the conclusion, which is embodied in this finding: "The allegation made by the plaintiffs that the land in claim is a re-formation on the site of the original land of Nalchongi and Silpatti covered by their 13 annas 10 gundahs share, and that they have from before been in possession of it is found true." In other words his finding amounts to an

(1) 13 M. I. A. 467=5 B. L. R. 521.

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express affirmation of the first alternative branch of the third issue, which exhausts the issue.

Upon appeal by the defendants to the District Judge, he came to the conclusion that the judgment of the Subordinate Judge ought to be maintained. He concurs to a great extent in the view taken by the Judge of that evidence, but he differs from him in his estimate of that evidence in many respects. The conclusion which he came to upon the part of the case which we are now dealing with was this, that the plaintiffs "held, occupied, and enjoyed the lands in suit by the title above set forth as part and parcel of the lands appertaining to the 13½ annas demarcation for much more than 12 years before ousted by the defendants." That was not a simple affirmation of the conclusion at which the Subordinate Judge had arrived. It pointed to a very different kind of case from that to try which issue No. 3 had been adjusted. It affirms a title, at least it is sufficient to affirm a title by adverse possession, which is a title in derogation of the defendant's right, even assuming it to be proved that at an earlier period the land in dispute formed part of the smaller share, and not of the 13 annas 10 gundahs share belonging to the plaintiffs. Accordingly when the case was carried by appeal before the High Court of Calcutta, the learned Judges [746] came to the conclusion that the decree of the District Judge ought to be set aside, and the case remanded for re-trial. The High Court were of opinion that the District Judge had not disposed of issue No. 3, that his finding No. 2 was not an answer to that issue, but the affirmance of a title which would prevail over the title which would have arisen to the defendants by the negation of the first branch of issue No. 3, and the affirmance of the second branch; and they were also of opinion, although their Lordships are not altogether disposed to concur with them in that respect, that the District Judge had not applied his judicial mind to the consideration of the somewhat intricate evidence before him.

On remand the case was heard and disposed of before the successor of the District Judge, who had first disposed of the case. He, in the main, agrees with the Subordinate Judge in his estimate of the evidence, and he affirms the judgment of the Subordinate Judge. The conclusion which he came to on the evidence is very concisely expressed in these words: "On the whole then I come to the conclusion that the Subordinate Judge's decision is correct, and that the plaintiffs have proved that the lands claimed by them belong to their 13½ annas share of mouzahs Bil Nalchongi and Bil Silpatta."

Again the defendants appealed to the High Court, and the cause there was heard and determined before two fresh Judges, who came to the conclusion that the decree of the lower appellate Court ought to be reversed, and the suit dismissed, and accordingly they gave effect to that opinion in their judgment.

The grounds upon which the learned Judges of the High Court came to that conclusion are very distinctly expressed in their judgment. They are twofold; and, in the opinion of their Lordships, neither of these grounds is sufficient to sustain the judgment which was pronounced. They came, in the first place, to the conclusion that Mr. Peterson, who last disposed of the case, had fallen into the same error as his predecessor, and, instead of dealing with the identity of this disputed parcel with one or other of the two shares of the mouzahs in question, had disposed of the case on the footing that the plaintiffs had enjoyed prescriptive possession which vested them with a good [747] title as against the defendants.

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The learned Judges say: " The judgment now before us contains a finding by the Court that, piror to the ouster by the appellants, the plaintiffs had a sufficiently long and continuous possession of the chur lands to confer upon them a title to it." Their Lordships are of opinion that the learned Judges erred in supposing that the judgment of Mr. Peterson contains any finding to that effect.

Then having come to the conclusion that Mr. Peterson had erred in the same way as his predecessor, and not dealt with the proper issue in the case, they proceed to consider whether they ought to remand the cause for the purpose of having that third issue tried. They came to the conclusion that it was unnecessary to do so for these reasons: " As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court." They came to a conclusion the very reverse of that at which their predecessors, who remanded the case, arrived; they were of opinion that there was evidence in the case bearing upon the subject-matter of the third issue, which ought to be disposed of by the Judge in the Court below. The High Court, on this last occasion, came to the opposite conclusion—that there was no evidence whatever which was fit for the consideration of the Judge, or had any bearing on that issue.

It must be borne in mind that the decree appealed from to the High Court on this occasion being a decree after remand, on a second or special appeal, the learned Judges had not, and accordingly they did not profess to have, jurisdiction to deal with it on its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.

Their Lordships are very clearly of opinion that the reasons assigned by the learned Judges cannot be sustained. They are of opinion, with the judges who made the remand, not [748] only that there was an issue proper to be tried, but that there was evidence in support of that issue, or bearing upon that issue which was proper to be considered and disposed of by the District Judge. The theory upon which the learned Judges who last disposed of the case proceeded, so far as one can gather from their observations, appears to have been this: that evidence of possession is not receivable as evidence of the identity of a piece of ground; that, in other words, as evidence of possession is not material or good evidence in a question of parcel or no parcel. Perhaps they do not go quite so far as that, but they ceráiniy go the length of indicating their opinion that evidence of subsequent possession is not good evidence upon the question of parcel or no parcel at a previous date. To countenance that proposition would be to introduce an entirely new rule into the law, and their Lordships do not think that a judgment resting upon such a ground can be upheld. When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*. In the present case there is evidence tending to prove possession by the plaintiffs for a considerable period antecedent to February 1873. Whether it is sufficient to establish the plaintiffs' possession, and whether, if established, that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the Judge below as a Court of appeal,

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after careful consideration, and upon the merits his judgment was final in the High Court, which was sitting upon a second appeal, and is final and binding upon this Board.

Their Lordships will accordingly humbly advise Her Majesty that the last judgment of the High Court ought to be reversed, the judgment of Mr. Peterson, the District Judge, affirmed, and the appeal dismissed with costs in the High Court. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents: Messrs. *Watkins & Lattey.*
C. B.

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14 C. 749.

[749] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

BUNWARI LAL CHOWDHRY AND OTHERS (*Defendants*) v. BURNOMOYI DASI (*Plaintiff*).* [19th May, 1887.]

Land Acquisition Act (X of 1870)—Apportionment of compensation between zemindar and putnidar, Principle of.

The apportionment between zemindar and putnidar of the amount awarded as compensation for land taken by Government under the Land Acquisition Act will depend partly on the sum paid as bonus for the putni, and the relation that it bears to the probable value of the property, and partly on the amount of rent payable to the zemindar, and also the actual proceeds from the cultivating tenants or under-tenants.

THIS case arose under the Land Acquisition Act. The Government took up 2 bighas $2\frac{3}{4}$ cottahs of land for the purposes of a railway in the sub-division of Goalund in Furreedpore. The Collector awarded Rs. 64-3-3 pie as compensation, and, there being a dispute between the zemindar and the putnidars as to the apportionment of the amount awarded, referred the matter to the District Judge under s. 38 of the Land Acquisition Act. The zemindar claimed half the amount; but the putnidars claimed the whole of the compensation on the ground, among others that there was no condition in the putni pottah that they should get an abatement in the *jumma* from the proprietor (zemindar) in the event of any land being taken by the Government. The District Judge, upon the general principle laid down in *Godador Das* v. *Dhunput Singh* (1), ordered and decreed that the compensation should be divided equally between the zemindar and the putnidars.

The putnidars appealed to the High Court, and it was contended on their behalf *inter alia* (*a*) that they were entitled to the whole of the compensation unless the zemindar offered to grant a proportionate abatement of the putni rent; (*b*) that *Godadhar Das* v. *Dhunput Singh* (1) did not apply to the case.

Baboo *Kishori Lal Sircar*, for the appellants.

[750] Baboo *Girija Sunkur Mozoomdar*, for the respondent.

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* Appeal from Original Decree No. 216 of 1886 against the decree of H. Gillon, Esq., Judge of Furreedpore, dated the 16th of July 1886.

(1) 7 C. 585.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:— 1887 MAY 19.

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14 C. 749.

JUDGMENT.

The dispute in this case is between the zemindar and the putnidar for a sum of money due to the two parties as representing their rights to land taken under the Land Acquisition Act for public purposes. No ryots have appeared to make any claim. The District Judge, on the authority of the case of *Godadhar Das* v. *Dhunput Singh* (1), has held that the compensation should be divided equally between the zemindar and the putnidar, and that no reason for departing from this rule has been shown in the present case. The putnidar appeals, and contends that, inasmuch as he has received no abatement of the amount of rent payable by him to the zemindar, he is entitled to the full amount awarded. The amount in this case is only Rs. 64-3-3 pie, but it is said that this is only a test suit and has been brought up to this Court to determine the principle on which other and similar cases should be decided. We accept the authority quoted by the District Judge and also the authority of the case of *Raikishory Dasi* v. *Neelcant Dey* (2), decided by the late Chief Justice Sir Richard Couch and Mr. Justice McDonell. It seems to us that no general principle can be laid down applicable to every case as between zemindar and putnidar. In the present case we must take it that the putnidar is the person to whom the ryots directly paid their rents. The apportionment between the zemindar and putnidar will depend partly on the sum paid as bonus for the putni, and the relation that it bore to the probable value of the property, and partly on the amount of rent payable to the zemindar, and also the actual proceeds from the cultivating tenants or under-tenants. It may occasionally happen that the zemindar receives an extremely high bonus and is content with charging the property with the receipt of a very low rate of rent, or it may be that the bonus is almost nominal and the rent is excessively high, and the zemindar depends not on the bonus and the interest of the amount so paid and invested in some other way, but on the amount paid periodically as rent, and consequently as between [**751**] parties standing in these relations it is necessary to consider all these matters before any conclusion can be arrived at as to their rights to any particular compensation. We therefore think that the case should be returned to the District Judge in order that the parties may be given an opportunity of adducing evidence on these points so that the Court may deliver a proper decision having regard to all these circumstances. We make no order as to costs.

K. M. C. *Case remanded.*

(1) 7 C. 585. (2) 20 W. R. 370.

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14 C. 751.

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

OBHOYA CHARAN BHOOIA AND ANOTHER (*Defendants*) *v.* KOILASH CHUNDER DEY (*Plaintiff*), AND OBHOYA CHARAN BHOOIA AND ANOTHER (*Defendants*) *v.* GOPINATH DEY AND OTHERS (*Plaintiffs.*)* [3rd June, 1887.]

Landlord and Tenant—Occupancy tenant—Non-payment of rent—Abandonment of tenancy.

Mere non-payment of rent by an occupancy ryot does not extinguish or constitute an abandonment of the tenancy. *Hem Chandra Chowdhari* v. *Chand Akund* (1) distinguished; *Hemnath Dutt* v. *Ashgar Sindar* (2); *Golam Ali Mundul* v. *Golap Sundery Dasi* (3); *Manirullah* v. *Ramzan Ali* (4) explained.

[**Rel.** on, 15 Ind. Cas. 711 (714)=23 M.L.J. 119 (125)=12 M.L.T. 124; **R.,** 24 C. 296 (304); 6 C.L.J. 149 (152).]

KOILASH CHUNDER DEY brought a suit against his zemindar Obhoya Charan Bhooia and another for the recovery of his *jote* land, alleging wrongful dispossession of his occupancy tenure. The defendant admitted the *jote*, but added that, as the tenant did not pay any rent for a period of five years, he had taken possession of the land. A similar case was brought by Gopinath Dey against the same zemindar. The Munsif, on the authority of *Hem Chandra Chowdhari* v. *Chand Akund* (1), dismissed the suits. On appeal the Subordinate Judge distinguished the case of *Hem Chandra Chowdhari* and reversed the Munsif's judgment.

[752] Obhoya Charan Bhooia appealed to the High Court.

Baboo *Trailuckyanath Mitter*, for the appellant.

Baboo *Joy Gobind Shome*, for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

In these two cases the tenant claiming rights of occupancy sue, within one year from the date of dispossession, to recover possession from their landlords and others to whom their landlords have let the land.

It has been found by the lower Court that the tenant in one case has not paid rent for three years previous to the date of dispossession, while the tenant in the other case has not paid rent for upwards of five years. It is therefore contended before us that the tenants are not entitled, as tenants having right of occupancy, to recover possession of the lands, because such rights continued only so long as they paid the rent payable for the lands, and that, inasmuch as they have ceased to pay such rent, their rights have gone. As an authority for this contention, four cases have been cited. It seems to us, however, that none of these cases goes so far as the argument of the learned pleader for the appellant. The cases, generally speaking, go to this extent, that, where there has been an abandonment of the tenure of a ryot having a right of occupancy by

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* Appeals from Appellate Decrees Nos. 2588 and 2589 of 1886, against the decrees of Baboo Ram Coomar Pal Chowdhry, Rai Bahadur, Subordinate Judge of Sylhet, dated the 22nd of September, 1886, reversing the decrees of Baboo Rojoni Nath Mitter, Munsif of Habigunge, dated the 21st of May, 1886.

(1) 12 C. 115. (2) 4 C. 894. (3) 8 C. 612. (4) 1 C. L. R. 293.

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cessation in the payment of rent or otherwise, he cannot object to a re-occupation by the landlord as an ejectment. In the first case quoted, *viz.*, that of *Hemnath Dutt* v. *Ashgar Sindar* (1), it was held that, where the lands had been washed away by the action of water, and the ryot had ceased to assert any right thereto by payment of rent, he could not, when the lands re-appeared, claim to be regarded as a tenant still holding the rights that he previously had. In the next case, *Golam Ali Mundul* v. *Golappe Sundary Dasi* (2), the tenant did not pay the rent to the landlord for about five years. The learned Judges held that he was not entitled to sue to recover possession, apparently because he had abondoned the tenure and had ceased to pay rent therefor simultaneously. [**753**] They say that "distinct abandonment and cessation to pay rent disentitle the tenant from enforcing the rights which he may formerly have enjoyed." In the case of *Manirullah* v. *Ramzan Ali* (3) the suit was dismissed because the tenant had abandoned his holding by allowing another person to occupy the lands and also to transfer his rights to a third party. It was accordingly held that this constituted an abandonment of the tenure on his part. In *Hem Chandra Chowdhari* v. *Chand Akund* (4) the suit was dismissed, because the plaintiff (tenant) had failed to prove his title as an occupant ryot. It was pointed out by the learned Judges that, inasmuch as the suit had been brought more than one year after the date of dispossession, he could claim to be restored only on proof of his title, and it was held on the facts that he had abondoned his holding by ceasing to occupy the lands, not only by nonpayment of rent, but by being absent in jail during that period. These cases therefore are, in our opinion, distinguishable from the case now under consideration. The argument of the learned pleader for the appellant would, if conceded, enable a landlord, to whom arrears of rent were due, to re-occupy the lands for which this rent was payable, and so to eject the tenant without any recourse to the Courts. This would altogether nullify the effect of s. 22, Beng. Act VIII of 1869, which declares that no ryot having a right of occupancy shall be ejected otherwise than in execution of a decree or order under the provisions of the Act. If a tenant has abandoned the lands occupied by him, the landlord can of course re-enter, but that is not the case before us. It has been found that the plaintiff's tenants have held these lands as before up to a very short time of bringing these suits, when they were turned out by their landlord. The mere non-payment of rent under such circumstances would not amount to any forfeiture of the tenure, or in itself constitute any presumption of abandonment of any of their rights. It is rather for the landlord, if he seeks to eject occupancy tenants on such grounds, to sue them for the rents due and to obtain a decree in terms of s. 52. The appeals are accordingly dismissed with costs.

K. M. C. *Appeals dismissed.*

(1) 4 C. 894. (2) 8 C. 612. (3) 1 C. L. R. 293. (4) 12 C. 115.

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APPELLATE CIVIL.

14 C. 754.

14 C. 754.

[754] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

GANGA PROSAD CHOWDHRY (*Plaintiff*) *v.* UMBICA CHURN COONDOO AND OTHERS (*Defendants*).* [17th June, 1887.]

Minor, Suit against—Misdescription in title of the plaint and in decree, Effect of.

In a suit brought against a minor widow as the heir of her deceased husband, she was described in the cause title of the plaint as "the deceased debtor Ramnath Acharjee's heir and minor widow Benodini Dabea's mother and guardian Anundomoyee Dassee." The plaintiff obtained no order for the appointment of a guardian *ad litem.* He, however, obtained a decree, and the minor defendant was described therein in the same manner. *Held,* that the minor was neither a party to the original suit nor to the decree, and that no property of the minor passed upon a sale in execution of such decree. *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (1) distinguished.

[R., 11 M. 309 (315) (F.B.); 13 M. 480 (484).]

THIS suit was brought by the plaintiff to recover possession of certain property purchased by him in execution of a decree obtained by himself the sale having taken place in 1879. He alleged that he was put in possession by the Court in 1881, and was shortly after dispossessed by the defendant. In 1878 he had sued upon a mortgage bond executed by one Ramnath Acharjee then deceased. Ramnath had left a minor widow named Benodini Dabea. That suit was brought against Anundomoyee, described as the mother and guardian of Benodini Dabea, the minor widow of the late Ramnath Archarjee, the precise description in the cause title being as follows: "The deceased debtor Ramnath Acharjee's heir and minor widow Benodini Dabea's mother and guardian Anundomoyee Dassee, caste Acharjee, profession cultivation, inhabitant of Deoli *alias* Johurpur, Division Munglekote, Chowkee Cutwa, Zillah Burdwan, defendant." The decree was obtained against the same person described in the same manner, and the sale certificate set out the parties to the decree in the same terms. The plaintiff's case was that by the sale the property of the widow Benodini, [755] as heiress of her late husband, who was the original debtor, passed to him, that is, not only the interest of Benodini as widow, but the mortgaged property itself was sold for the debt of the deceased husband.

The defendants alleged that the decree under which the sale was held was fraudulently obtained. They denied that Ramnath had executed the bond, and also that Benodini Dabea, the minor widow, was represented in the suit at all, not having been properly made a party.

The Munsif held that Ramnath had executed the bond, and the decree obtained by the plaintiff on the said bond was not invalid. He, therefore, decreed the plaintiff's suit for khas possession of the property purchased by him at the sale in execution of the decree.

The lower Appellate Court dismissed the suit upon the ground that the minor widow of Ramnath was no party to the original suit, and that, therefore, the sale held in execution of the decree did not pass the property that vested in her as the widow of Ramnath.

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* Appeal from Appellate Decree, No. 2467 of 1886, against the decree of Baboo Mohendro Nath Mitter, Subordinate Judge of Burdwan, dated the 27th of August 1886, reversing the decree of Baboo Raj Krishna Banerji, Munsif of Cutwa, dated the 29th of June 1885.

(1) 14 C. 204.

The plaintiff then preferred this second appeal to the High Court. 1887 June 17.

Baboo *Ashotosh Dhur*, for the appellant.

Baboo *Nilmadhub Bose* (with him Baboo *Sharoda Churn Mitter*), for the respondents.

The following cases were cited and relied on at the hearing of the appeal: *Alim Buksh Fakir* v. *Jhalo Bibi* (1); *Newaj* v. *Muksud Ali* (2); *Guru Churn Cuckerbutty* v. *Kali Kissen Tagore* (3); *Hurdey Narain Sahu* v. *Rooder Perkash Misser* (4); *Durga Churn Shaha* v. *Nilmoney Dass* (5); *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder* (6). Appellate Civil. 14 C. 754.

JUDGMENT.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.), after stating the facts, proceeded as follows:—

[**756**] Baboo Ashotosh Dhur for the appellant before us admits the informality of the plaint in that suit. He admits that technically the widow was no party to it, but asks us to hold that substantially she was a party and was bound by the decree, and that consequently the sale held in execution of that decree did pass the property to the plaintiff. He appears to rely to some extent on the hardship of the case in the event of the lower Appellate Court's decree being affirmed, because the mortgage debt was found to be true so far back as 1878, and it is now too late for the plaintiff to bring a fresh suit against the proper party.

We are unable to take any notice of the alleged hardship. The only question we have to decide is whether the lower Appellate Court was wrong in law. It appears upon the facts found that it is impossible to say that the Subordinate Judge committed any error. He found not only that the plaint as framed did not make the widow a defendant, but also that the mother Anundomoyee was not shown to have been ever appointed a guardian *ad litem* on behalf of the minor widow, or to have had permission to defend the suit on her behalf. Various cases were cited by Baboo Ashotosh Dhur in support of his contention. He referred us to *Alim Buksh Fakir* v. *Jhalo Bibi* (1); *Newaj* v. *Muksud Ali* (2); *Guru Churn Chuckerbutty* v. *Kali Kissen Tagore* (3); *Hurdey Narain Sahu* v. *Rooder Perkash Misser* (4); *Durga Churn Shaha* v. *Nilmoney Dass* (5); and lastly *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder* (6). Most of these cases appear to us to be not in point. They do not deal with the special case before us. *Guru Churn Chuckerbutty* v. *Kali Kissen Tagore* (3) is against the appellant's contention. It was there held that a decree in a suit where minors were defendants, and were not specifically named as defendants, would not bind the minors. The Full Bench decision cited by the appellant's pleader does to some extent seem to support the appellant's case, but there too the case is different. One of the defendants there was described as "Nitro Bashini Chowdhrani, guardian on behalf of her minor son, [**757**] Suresh Chunder Wum Chowdhry." It appears that the lower Court in that case required the plaintiff to put in an affidavit to the effect that Nitro Bashini really was the mother and guardian of the minor Suresh Chunder, and after that the suit was registered and summons issued. It was held in that case "that, having regard to the orders of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description

(1) 12 C. 48. (2) 12 C. 131. (3) 11 C. 402.
(4) 11 I. A. 26=10 C. 626. (5) 10 C. 134. (6) 14 C. 204.

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in the plaint being one of mere form, could not, without proof of prejudice, invalidate a decree against him in the suit." In the present case there were no such orders of the Court. The plaintiff of his own mere motion brought the suit against Anundomoyee, describing her as the mother and guardian of the late Ramnath Acharjee. Upon the findings come to by the lower Appellate Court we are compelled to hold that the decree of the Subordinate Judge dismissing the present suit, upon the ground that the minor widow was not affected by the previous decree, was correct.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 757.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

LALJI SAHOY (*one of the sureties*) *v.* ODOYA SUNDERI MITRA AND OTHERS (*Decree-holders*) AND ANOTHER (*Judgment-debtor*).*
[12th July, 1887.]

Civil Procedure Code (Act XIV of 1882), *s.* 336—*Surety Liability of—Execution proceedings.*

The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end.

D, a judgment-debtor, was committed to jail on the 8th of August 1884, and he applied under s. 336 of the Civil Procedure Code to be released. On the 16th of November 1884, *B* and *C* stood security for him under the provisions of s. 336 of the Civil Procedure Code, that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and *D* was thereupon released. Instead of applying under s. 344 to be declared an insolvent he applied to have the decree, which [758] had been obtained *ex parte,* set aside. This application was disallowed, and the decree-holder was directed to take further steps. On the 21st of February 1885 the application for execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court.

Held, that the power reserved to the Court, under s. 336 of the Civil Procedure Code, to realize the security in execution of the decree, could not be exercised when the execution proceeding wherein the security was furnished was no longer in existence.

[**F.**, 21 Ind. Cas. 612 (613); **R.**, 12 C.L.J. 419 (422)=7 Ind. Cas. 917; **D.**, 19 B. 694 (696).]

THE appellant in this case became surety, in the Court of the Munsif of Gya, under s. 336 of the Code of Civil Procedure, for Jugdeep Narain, a judgment-debtor, under the following circumstances:—

Jugdeep Narain was committed to jail on the 8th of August 1884, and he applied under s. 336 of the Code to be released on furnishing security. One Imdad Hosein tendered security, but the Nazir reported that the property tendered was not of the value represented by the proposed surety. The Munsif directed that further security for Rs. 100 should be furnished; and on the 12th of November 1884 the present appellant tendered this further security. This having been approved, the two

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* Appeals from Orders Nos. 4 and 5 of 1887, against the order of T. Smith, Esq., Judge of Gya, dated the 23rd of September 1886, affirming the orders of Baboo Debendro Chunder Mukerji, Munsif of Gya, dated the 5th of February 1886

sureties on the 16th November jointly executed a security bond for Rs. 526-5-2, being the amount of the judgment debt. The debtor was thereupon released. 1887 JULY 12.

Instead, however, of applying under Chap. XX of the Code to be declared an insolvent, he applied to have the decree, which was *ex parte*, set aside. This application was disallowed early in 1885, and the Munsif directed that the decree-holder should take further steps. On the 21st of February 1885, no further steps having been taken, the Munsif dismissed the application for execution under which the debtor had been arrested and imprisoned. Nothing more was done until the 20th of July, when the decree-holder made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court. APPELLATE CIVIL. 14 C. 757.

The Munsif allowed the decree to be executed against the sureties to the extent for which they jointly and severally had made themselves liable.

[759] The lower Appellate Court confirmed the order of the Munsif, directing the decree to be executed against the sureties.

Lalji Sahoy (one of the sureties) preferred this second appeal to the High Court.

Baboo *Nil Kant Sahai*, for the appellant.

Baboo *Rajendro Nath Bose* (with him Baboo *Atul Krishto Ghose*), for the respondent.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

JUDGMENT.

The appellant in this case became surety in the Court of the Munsif of Gya, under s. 336 of the Code of Civil Procedure, for a judgment-debtor who had been arrested in execution of a decree, and who expressed his intention under that section to apply under Chapter XX of the Code to be declared an insolvent.

The debtor was released on the security of the present appellant, and of another person who joined in executing the security bond. But he made no application to be declared an insolvent, and the appellant failed to produce him, when called upon to do so, some six months after the transaction.

The persent appeal is against the order of the Munsif, made with reference to the last clause of s. 336 and to s. 253, and confirmed by the District Judge in appeal, directing that the decree be executed against the sureties. One only of them appealed against this order. He relies upon the following facts as justifying his appeal: (After stating the facts as above the judgment proceeded).

The contentions urged on behalf of the appellant were that, so far as he was concerned, the security bond created a liability for no more than Rs. 100; that the obligation had been sufficiently discharged by the appearance of the judgment-debtor in support of his application to set aside the *ex parte* decree; that the decree could not be executed against a surety who had assumed that character after the decree had been passed; and that the dismissal of the decree-holder's case on the 21st of February 1885, had the effect of discharging the security taken in pursuance of that application.

[760] None of these contentions except the last appear to us to possess any force. The security bond on the face of it clearly binds both the sureties, jointly and severally, to make good the whole amount therein

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14 C. 757.

recited; and the terms of this bond cannot be modified by any precedent negotiation or petition. Again, it cannot seriously be urged that the obligation to produce the debtor when called upon is discharged by the voluntary appearance of the latter, not in obedience to such call or for the purpose of satisfying the decree, but for the purpose of trying to get rid of that decree, and followed as it was by the debtor's disappearance on the failure of this attempt. And it is noteworthy that the production of the debtor does not terminate the liability of a surety under s. 336, for if the former fails to apply to be declared an insolvent, it is in the discretion of the Court either to realize the security or commit the debtor to jail in execution of the decree. The contention that a decree cannot be executed against a surety who becomes one after the passing of the decree is negatived by the express provisions of the Code; for the last clause of s. 336 enacts that in the case of a surety such security may be realized in manner provided by s. 253. And the manner therein provided is as follows: "The decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant, provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

These objections, therefore, do not avail the appellant, and we have no doubt that upon the judgment-debtor's failure to apply within one month of his release to be declared an insolvent, the sureties became liable for the amount recited in their bond to be realized from them in execution of the decree. But we are not prepared to hold that the liability continued to exist after the decree-holder's application for execution had been dismissed. It seems to us that the security bond has reference only to the proceeding actually before the Court; and that the power reserved to the Court under s. 336 to realize the security in execution of the decree cannot be exercised when the execution proceeding, having been dismissed, is no longer in existence. The dismissal of the application would undoubtedly [761] result in the discharge of the debtor if in custody, and in the release of any property attached under the decree; and we cannot see that the property of a surety is more stringently bound than that of the debtor himself, unless it be expressly so provided in the bond. We think, therefore, that the dismissal of the decree-holder's application on the 21st of February 1885, operated as a discharge of the surety.

The Munsif speaks of this proceeding as if it had merely temporarily "struck off" the execution proceeding, keeping it *in statu quo* and by no means disposing of it; but the order in the order sheet is a distinct dismissal of the case, and it necessitated an entirely fresh application for execution. That fresh application could not, we think, for the reasons above stated, be enforced against the surety in the previous case.

We, therefore, set aside the order of the lower Appellate Court, and so far as the appellant is concerned we reverse the order of the Munsif with costs in all the Courts.

H. T. H. *Appeal allowed.*

14 C. 761=12 Ind. Jur. 94.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1887 July 2.

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14 C. 761=12 Ind. Jur. 94.

DIGAMBUR MISSER AND OTHERS (*Defendants, Nos.* 1 & 2) *v.* RAM LAL ROY (*Plaintiff*).* [2nd July, 1887.]

Mahomedan law—Pre-emption—Conditional sale—Right of pre-emption among coparceners—Private partition of puttidari estate—Limitation Act (XV of 1877), sch. II, arts. 10, 120.

A and *B* had certain proprietary rights in an 8 annas putti of a certain mehal. *C* and *D* had no rights in that putti, but *D* had a small share in the remaining 8 annas putti. A private partition between the puttis having taken place, *C* and *D*'s brother lent to *B* two sums of Rs. 200 and Rs. 199 by deeds of *bai-bil-wufa,* dated the 12th and 21st June 1876. *C* and *D* subsequently instituted forclosure proceedings, and on the 5th May 1884, were put into possession of *B*'s share in the first mentioned putti in execution of a decree which they had obtained. On the 18th April 1885, *A* sued *C* and *D* to enforce his right of pre-emption.

[762] *Held,* that though the coparcenary could not be said to have ceased to exist, or those who were co-parceners be said to have become strangers to one another, yet, there being a finding that the puttis were separate, it was not necessary in order to establish *A*'s preferential right, that a partition by metes and bounds should be shown to have taken place; but that a private partition, if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that *A*'s claim must, therefore, succeed.

Held, also, that the suit was not barred by limitation, it being governed by either art. 10, sch. II of the Limitation Act (Act XV of 1877), which gave the plaintiff a year from the 5th May 1884, the date on which the mortgagee obtained possession, or by art. 120, under which his right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time.

[R., 3 O.C. 184 (187); 1 N.L.R. 6 (8); 4 Ind. Cas. 878 (880)=12 O.C. 405.]

THE plaintiff in this case alleged that there was a certain mehal called Keotolia, consisting of four mouzahs, in an 8 annas putti, of which he held a 15-krant share; that the defendant No. 3 had a 6-pie share on the same 8 annas putti; that the 8 annas putti was held jointly by all the co-sharers therein, the zerait lands only have been privately partitioned, and being held separately by each co-sharer; that defendants Nos. 1 and 2 had no interest in the 8 annas putti in which he and defendant No. 3 were co-sharers; that defendant No. 2 had a small share in the other 8 annas putti; that the two puttis had been separated for a long time; that on 25th Bysack 1291, corresponding to the 5th May 1884, he first learned that defendants Nos. 1 and 2 had got possession of the 6-pie share of defendant No. 3 in the 8 annas putti in which he, plaintiff, and defendant No. 3 were co-sharers; that this possession had been obtained through the Court in execution of a decree which defendant No. 1 and one Ram Pergash Roy, the brother of defendant No. 2, had obtained against defendant No. 3 in a suit brought by them against him on two deeds of *bai-bil-wufa*, one for Rs. 199 dated 12th June 1876, and one for Rs. 200 dated 21st June 1876, executed by him in their favour; that he, plaintiff, was a co-sharer in the property sold, and had a right of pre-emption in respect thereof; that as against him

* Appeal form Appellate Decree No. 2382 of 1886, against the decree of Baboo Amrito Lall Chatterji, Subordinate Judge of Sarun, dated the 20th of August, 1886, reversing the decree of Moulvie Muzharul Anwar, Munsif of Sewan, dated the 25th of January 1886.

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the defendants Nos. 1 and 2 had no right to purchase the property sold; that immediately on learning the facts he performed the [763] preliminary ceremonies of *talub-i-mawasibut* and *talab-i-istishhad*, and subsequently tendered the amount of the two deeds of *bai-bil-wufa* to the defendants Nos. 1 and 2 who declined to acept it.

The defendants Nos. 1 and 2 alleged that the whole 16 annas of mehal Keotolia were held ijmali; that the defendant No. 2 was a co-sharer in the mehal, and, therefore, the plaintiff had no right of pre-emption as against him; that plaintiff knew all about the deeds of *bai-bil-wufa* and the proceedings had thereupon, and that he had wrongly stated the date of his cause of action; that his claim was barred by limitation; and that he had not performed the necessary preliminary ceremonies.

The first Court framed the following issues:—

1*st*.—Whether the village is still ijmali or divided? Has defendant No. 2 any share in it? Can a pre-emption suit lie against him?

2*nd*.—When does plaintiff's cause of action arise? Is the suit barred by limitation?

3*rd*.—Has the plaintiff properly observed the ceremonies of *talab-i-mawasibut* and *istishhad*?

4*th*.—Can the plaintiff afford to purchase the share?

The Munsif held that the case was governed by art. 10, sch. 11 of the Limitation Act; he found as a fact that defendants Nos. 1 and 2 were put into possession of the disputed property on 25th Bysack 1291=5th May 1884; and as the suit was commenced on 18th April 1885, he held that it was not barred. On the third issue he found against the plaintiff and, therefore, dismissed his suit. The first and fourth issues were not tried.

The plaintiff appealed. On the hearing of the appeal the question of limitation was not pressed, but the Subordinate Judge held that he must consider it. He held that the Munsif was in error in applying art. 10 of sch. 11 of the Limitation Act, that art. 120 applied, and that the suit was not barred. The Subordinate Judge then considered the two following questions namely:—

1*st*.—Whether the preliminary ceremonies were duly performed by the plaintiff? and

2*nd*.—Whether he has a right of pre-emption against defendants Nos. 1 and 2?

[764] Upon the first question he came to the conclusion "that the preliminary ceremonies were duly performed by the plaintiff, and that the plaintiff was not aware of the sale before he was informed of it in Bysack 1291." Upon the second question he found "that the share of the defendant No. 2 is in a separate putti from that within which the disputed share and the plaintiff's share are included, and that the two puttis are separate." He, therefore, reversed the Munsif's decision and decreed the plaintiff's suit.

Against that decree the defendants now preferred this second appeal to the High Court.

Mr. *Amir Ali*, Mr. *Caspersz*, and Baboo *Karuna Sindhu Mukerji*, for the appellants.

Baboo *Mohesh Chunder Chowdhry*, for the respondent.

Mr. *Caspersz*.—We have priority of purchase, and, this being a case of a competitive pre-emption," there is no preferential title among co-pareeners. The fact that our share is in a different putti does not make us strangers. "Shaffa" is "but a feeble right, being the disseizing of another of his property merely in order to prevent apprehended

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inconveniences" (Hamilton's Hedaya, Vol. III, pp. 566-8), and may be defeated by various legal devices. We submit the true test is whether the inconvenience to which we are subjected by being deprived of our right of property which we have acquired after delay and expense, and which is a fair compensation for the money we lent eight years before, is not far greater than the pre-emptor's supposed hardship. This is not the case of a stranger being introduced, because we are already a coparcener. We submit that limitation runs from the date of the conditional sale, of which the plaintiff must be taken to have been aware. Article 120 of sch. 11 will then apply, which gives six years. The pre-emptor's cause of action arose when the sale took place and not when it became absolute. This being a case among Hindus, we submit the plaintiff's right should be strictly construed by the light of "justice, equity, and good conscience," and not so as to strengthen an antiquated and unreasonable custom. We are, at least, entitled to interest on the sums advanced. The following authorities were referred to—*Farzand Ali* v. [**765**] *Alimullah* (1); *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (2); *Kudratulla* v. *Mahini Mohan Shaha* (3); *Tara Kunwar* v. *Mangri Meea* (4); Macnaghten's Principles, p. 49; Macpherson on Mortgages, pp. 15-20; *Nath Prasad* v. *Ram Paltan Ram* (5); *Lachman Prosad* v. *Bahadur Singh* (6).

Baboo *Mohesh Chunder Chowdhry*, for the respondent.—*Gopal Sahai* v. *Ojoodheapershad* (7) is identical with the present case. The fact of the appellants' share being in a different putti removes their only defence.

Mr. *Caspersz* in reply.—The partition should be by metes and bounds in order to make us strangers. For purposes of revenue there has been no partition at all. We are still a member of the co-parcenary, and the general rule will therefore apply.

JUDGMENT.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) after stating the facts set out above, proceeded as follows:—

On second appeal the defendants Nos. 1 and 2 urged that the parties to the suit being all Hindus the Court below ought to have held that the present suit to enforce the right of pre-emption is not maintainable. As to this it is sufficient to say that the point was not raised in either of the lower Courts, and is not such an one as we can allow to be raised now for the first time.

Another point urged by the Counsel for the appellants was that, as there had been no actual partition of the disputed properties by metes and bounds, the lower appellate Court ought not to have held that there was such a separation as to entitle the plaintiff to maintain the suit. In support of this contention two cases were relied upon, *viz.*, *Farzand Ali* v. *Alimullah* (1); and *Lalla Nowbut Khan* v. *Lalla Jewan Lall* (2). In the first case the facts were these: The plaintiff brought his suit for a declaration of right to, and to obtain possession of, a certain share in a puttidari estate; he had purchased the share at a sale held in execution of a decree; he was a co-sharer in the estate but not in the putti in which the share in suit was situated. The defendant, who was a co-sharer in that putti, had claimed to take the share sold

(1) 1 A. 272. (2) 4 C. 831. (3) 4 B. L. R. (F) B. 134.
(4) 6 B. L. R. Ap. 114. (5) 4 A. 218. (6) 2 A. 884. (7) 2 W. R. 47.

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[766] under the provisions of s. 14, Act XXIII of 1861 (which gave a co-sharer in a puttidari estate, paying revenue to Government as defined in Act II of 1841, not being the judgment-debtor, a right of pre-emption, and enable him to come in after the property had been knocked down to a stranger and claim it at the price he bid, provided he made the claim on the day of the sale and fulfilled the conditions of the sale). The officer conducting the sale had allowed the defendant's claim, and the Court executing the decree had confirmed the sale in his favour. The Court of first instance held that the plaintiff was a "stranger" within the meaning of the section, and that defendant was, therefore, entitled to take the share, and dismissed the suit. The lower appellate Court reversed this decision, and holding that plaintiff was not a "stranger" gave him a decree. On second appeal the High Court held that plaintiff was not a "stranger." Oldfield, J., says: "The plaintiff is himself a member of the co-parcenary, being a sharer in another putti of the estate. The right of pre-emption can only be asserted against a stranger, *i.e.*, one who is not a sharer or member of the coparcenary. A sharer in one of the puttis in a puttidari estate cannot be said to be a stranger, with reference to the co-sharers in another putti, and the section gives no preferential rights of pre-emption among themselves between co-sharers in the same putti and sharers in other puttis, who come under the denomination of members of the coparcenary." This case does not afford us much assistance, for there was no finding, as in this case, "that the two puttis are separate." The second case cited does not carry the matter further; it simply held "that by the Mahomedan law one coparcener has no right of pre-emption against another coparcener." The question we have to decide is whether before a coparcenary can be said to have ceased to exist, and those who were coparceners have become "strangers" to one another, something more than a private partition, *viz.*, partition by metes and bounds, is necessary.

We are of opinion that no partition by metes and bounds is necessary. Lord Westbury, in the case of *Appovier* v. *Rama Subba Aiyan* (1), says: "When the members of an undivided [767] family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." And at page 92 his Lordship says: "Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may; at any time, be claimed by virtue of the separate right."

In *Gopal Saha* v. *Ojoodheapershad* (2) it was held that a private partition, though not sanctioned by official authority, if full and final, as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption. We think these two cases establish the view we hold.

The next point raised by counsel for the appellants was that plaintiff's claim was barred by limitation. It was urged that the District Judge was

(1) 11 M. I. A. 75. (2) 2 W. R. 47.

right in holding on the authority of *Nath Parsad* v. *Ram Paltan Ram* (1) that art. 120 of sch. II of the Limitation Act, and not article 10, governed the case; but it was argued that the District Judge had erred in fixing the time from which the period of limitation allowed by art. 120 began to run; it was contended that it began to run from the date of the conditional sale, and in support of this view the case of *Lachman Prasad* v. *Bahadur Singh* (2) was relied upon.

We are of opinion that the suit is not barred, and that it is immaterial whether art. 10 or art. 120 be applied to it, for the deeds of conditional sale of 1876 did not operate to transfer the property from the owner to the mortgagee. The [**768**] latter did not become owner of the property until after he had obtained a decree for foreclosure, and until the right of redemption in the vendor had been extinguished. On the 5th of May 1884, the mortgagee obtained possession, and under art. 10 the plaintiff would have a year from that date to bring his suit. We do not see why art. 10 should not govern it, for the sale became absolute by the foreclosure proceedings, and possession was subsequently obtained.

On the other hand, if art. 120 applies, we think that plaintiff's right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time.

Thus we come to the conclusion that the plaintiff was entitled to succeed in his suit, and that the appeal fails on each point.

It was also contended that, at any rate, the defendants are entitled to interest upon Rs. 399, the amount covered by two deeds of *bai-bil-wufa*. We think that that contention must prevail, and it was admitted by Baboo Mohesh Chunder Chowdhry for the respondent to be a good one.

The decree of the lower appellate Court, therefore, will be modified to the extent of directing interest to be paid upon the Rs. 399, at the rate of 6 per cent. per annum from the date of foreclosure till possession.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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14 C. 768=12 Ind. Jur. 97.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

DHAPI (*Defendant*) *v.* RAM PERSHAD, MINOR, REPRESENTED BY HIS UNCLE AND GUARDIAN AD LITEM DUNGUR MULL (*Plaintiff*).*

[2nd July 1887.]

Practice—Production of Documents—Discovery—Revision of interlocutory order when appeal lies from final decree—Civil Procedure Code (Act XIV of 1882), *ss.* 131—136 *and* 662.

If a notice under s. 131 of the Civil Procedure Code be not answered as provided by s. 132, the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136 unless the provisions of s. 134 are strictly complied with.

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* Civil Rule No. 794 of 1887, made against the order of Baboo Upendro Chunder Mullick, Subordinate Judge of Monghyr, dated the 13th of May 1887.

(1) 4 A. 218. (2) 2 A. 884.

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[**769**] There is nothing in s. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction.

The word "case" in that section is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order. *Omrao Mirza* v. *Jones* (1); *Harsaran Singh* v. *Muhammad Raza* (2); *Chattan Singh* v. *Lekhraj Singh* (3); *Farid Ahmad* v. *Dulari Bibi* (4), dissented from.

[**F.**, 2 O.C. 67 (70); **R.**, 18 B. 35 (37); 7 N.L.R. 130=12 Ind. Cas. 357 (359); 10 C.L.J. 407=14 C.W.N. 147=4 Ind. Cas. 364; 4 Ind. Cas. 878 (884)=12 O.C. 405; 10 Ind. Cas. 308 (309)=15 C.W.N. 682; 11 O.C. 238; **D.**, 31 P.R. 1902=8 P.L.R. 1902.]

THE facts of the case were as follows: One Mool Chand Ram died many years ago, leaving two sons, Mohun Ram and Lutchmun Dass. The two brothers remained joint for some time after their father's death, but subsequently separated. Lutchmun Dass married three wives successively; by his first wife, Mussamut Bindoo, he had a son, Chundi Pershad, born 2nd Assin 1905 Sumbut (15th September 1848); by his second wife, Mussamut Junga, he had a son, Dungur Mull, born 29th Magh 1918 Sumbut (14th February 1862); by his third wife, Mussamut Dhapi, he had no male issue, only a daughter. Mohun Ram died in Aughran 1927 Sumbut (November 1870), without issue, male or female, but having adpoted his nephew (brother's son) Dungur Mull, who, on Mohun Ram's death, entered into the possession of his property. Lutchmun Dass died in Assin 1927 Sumbut (September 1870), and on his death his son Chundi Pershad entered into possession of his property. Chundi Pershad married Mussamut Parbati and died 9th Pous 1934 Sumbut (28th December 1877). Before his death, *viz.*, on 17th August 1877, he made a will, whereof he appointed his wife Mussamut Parbati and his step-mother Mussamut Dhapi executrixes; and by this will he gave Mussamut Parbati authority to adopt a son. On 2nd Aughran 1935 Sumbut (12th November 1878), a son Ram Pershad was born to Dungur Mull, and this boy was adopted by Mussamut Parbati on 16th Aughran 1935 (25th November 1878). Mussamut Parbati died on 22nd Magh 1293 Fusli (11th February 1886), and after her death Chundi Pershad's property came into the hands of Mussamut Dhapi, who subsequently denied Ram Pershad's adoption. Dungur Mull on 28th January 1887, executed a deed of disclaimer of any interest he might have in the property of [**770**] Chundi-Pershad in favour of Ram Pershad. Ram Pershad claiming to be entitled to Chundi Pershad's property, either as the adopted son of Mussamut Parbati or under the deed of disclaimer, brought a suit on 1st February 1887 against Mussamut Dhapi to obtain possession of Chundi Pershad's estate, which he valued at Rs. 3,36,795. He did not ask for an account. The suit purported to be brought by " Baboo Ram Pershad, minor, adopted son of Baboo Chundi Pershad Marwari, deceased, under the guardianship of Baboo Dungur Mull, the uncle and next friend of the minor." No certificate under Act XL of 1858 was produced at the time of filing the plaint, nor was any order recorded at that time permitting Dungur Mull to file the plaint on behalf of Ram Pershad. On 8th February the following order was made by the Subordinate Judge: " Through the oversight and carelessness of the Amla my order for granting this plaintiff, upon his application supported by affidavit " (leave?) " to sue as a next friend of the minor, he being the natural father of the minor, and uncle on the other side, was not recorded

(1) 12 C. L. R. 148. (2) 4 A. 91. (3) 5 A. 293. (4) 6 A. 233.

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on the day; but as the law on the subject is not very clear, I think it may be recorded now, subject to a further discussion during the trial." The 4th March was fixed for the appearance of the defendant and for settlement of issues. On the 5th February the plaintiff, under s. 131 of the Civil Procedure Code, gave notice through the Court to the defendant to produce for inspection certain account books for the Sumbut years 1933 to 1943 (1876—1887). The notice was served on 10th February. On 7th February defendant applied for a transfer of the suit to the file of the District Judge of Bhagulpore, who, on that day, directed a notice to issue calling on the plaintiffs to show cause on 25th February why the suit should not be transferred, and stayed all proceedings in the meantime. Defendant's application for transfer was refused on 3rd March. On 4th March the settlement of issues was postponed to 21st April. On 8th March plaintiff applied under s. 133 for an order for inspection of the books, on the ground that the defendant, having been served on 10th February with notice under s. 131 of the Civil Procedure Code had omitted to give notice under s. 132 of the Civil Procedure Code. That application was directed to be heard [771] on 15th March. On 16th March the defendant put in a petition, alleging that the books were required for the preparation of the written statement, and asking that she might be permitted not to produce them for inspection until the day fixed for the settlement of issues. On 16th March an order was made on the defendant's application, granting her ten days further time to put in the documents.

On 25th March the defendant put in a petition in which she claimed under s. 135 of the Civil Procedure Code to withhold inspection of the books until the plaintiff established his adoption, or his right, under the deed of relinquishment. On the same day the plaintiff put in a petition alleging that the defendant had not produced the books for inspection, and asking that the procedure, under s. 136 of the Civil Procedure Code, should be followed, and the suit decided *ex parte*. Defendant's written statement was filed on 25th April. She denied that Ram Pershad was adopted by Mussamut Parbati; she contended that, if as a matter of fact he was adopted, the adoption was invalid; she denied Dungur Mull's title; she claimed to be entitled to Chundi Pershad's property under his will and she contended that the suit could not proceed until a certificate had been granted under Act XL of 1858.

On 6th May issues were settled, eleven in number. The first was "whether the plaintiff is entitled to maintain this suit without a certificate under Act XL of of 1858;" the second was "whether Dungur Mull acquired any right to the estate o fChundi Pershad, and whether plaintiff is entitled to any such right by virtue of assignment, as alleged in the plaint, by Dungur Mull;" the fifth was "whether Mussamut Parbati adopted plaintiff as an adopted son of Chundi Pershad according to the provisions of the Hindu law in force in this part of the country? Has it been a valid adoption?" No order was made on the petitions of 25th March until 13th May, when the following order was made:—

"As regards the question of inspection of certain documents, under s. 131 of the Civil Procedure Code, it appears that the plaintiff applied for and obtained an order under the said section of the law quoted on the 5th February 1887, and the defendant did not [772] comply with the provisions of s. 132 of the Civil Procedure Code, within the fixed time, *viz.*, ten days or even on or before the 13th March last. On the 16th March the defendant, without complying with the request of the plaintiff, simply applied

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for an adjournment of the hearing without sufficient legal excuse; her right, therefore, under s. 135 of the Civil Procedure Code was lost. It has been argued by the plaintiff's pleader that the books of accounts the inspection whereof has been applied for by him, would afford materials for the purpose of proving the adoption, and also the last issue raised in the case. I think defendant has failed to make out a good and sufficient cause or excuse for non-compliance with the plaintiff's request. These books of accounts are not title-deeds or such documents as that their production would expose and injure the defendant, hence it cannot be held that she has good ground for withholding their production, or appointing a place convenient to her, for the purpose of inspection.

"I accordingly reject the defendant's application of objection, and she must abide by the consequences of the law. At the suggestion of the plaintiff's pleader I grant defendant ten days time more to comply with the plaintiff's request of inspection."

On the 21st May Mr. *Woodroffe* obtained this rule calling upon Baboo Ram Pershad to show cause why the last-mentioned order of the Sub-Judge of Monghyr should not be set aside under s. 622 of the Code of Civil Procedure.

The rule now came on to be heard on the 17th June 1887.

Mr. *Evans* (Mr. *Ameer Ali* and Baboo *Bolye Chand Dutt* with him) showed cause:—The Sub-Judge had jurisdiction to pass the order, and the order was properly made—*Saull* v. *Browne* (1); *Sanders* v. *Jones* (2); *Attorney-General* v. *Gaskill* (3). The plaintiff is entitled to inspect the *khatas* which are in the possession of the defendant.

The order of the 13th May 1887 is an interlocutory order, and there is an appeal from the final decree with which the High Court cannot interfere under s. 622 of the Civil Procedure Code—[773] *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (4); *Sheo Bux Bogla* v. *Shib Chunder Sen* (5); *Badami Koer* v. *Dina Rai* (6); *Omrao Mirza* v. *Jones* (7); *Harsaran Singh* v. *Muhammad Raza* (8); *Chattar Singh* v. *Lekhraj Singh* (9); *Farid Ahmad* v. *Dulari Bibi* (10).

The Advocate-General Mr. *G. C. Paul* (with him Mr. *Woodroffe* and Baboo *Jogesh Chunder Roy*) in support of the rule.—The plaintiff is not entitled to inspect the documents unless he proves the adoption, and that he is a reversioner. The Sub-Judge had no jurisdiction to pass the order under s. 136. All applications under s. 134 for inspection of documents must specify the documents, and the Court under s. 135 is bound to decide whether the party applying for inspection is entitled to do so. There is no affidavit to show that the account-books contain items of expenses of adoption.—*Attorney-General* v. *Thompson* (11); *Rowcliffe* v. *Leigh* (12).

Section 622 of the Code does not take away the power of the High Court to set aside an interlocutory order if made without jurisdiction.

The following judgments were delivered by the Court (Tottenham and Norris, JJ.)

JUDGMENTS.

Norris, J. (after setting out the facts as above) proceeded:—

On 21st May, upon the application of Mr. Woodroffe, we granted a rule calling upon the plaintiff to show cause why the order of 13th May

(1) L. R. 9 Ch. App. 364. (2) 7 Ch. D. 435. (3) 20 Ch. D. 519.
(4) 11 I. A. 237=11 C. 6. (5) 13 C. 225. (6) 8 A. 111.
(7) 12 C. L. R. 148. (8) 4 A. 91. (9) 5 A. 243.
(10) 6 A. 233. (11) 8 Hare, 106 and 115. (12) 6 Ch. D. 256.

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should not be set aside. The rule was argued on 17th ultimo, Mr. Evans showing cause and Mr. Advocate-General supporting it.

Any difficulty that exists in disposing of this rule arises from the fact that neither the Subordinate Judge nor the pleaders of the respective parties seem to have understood the procedure regarding inspection.

Chapter X of the Civil Procedure Code contains the provisions [774] with regard to "discovery, and the admission, inspection, production, impounding and return of documents."

Section 121 of the Civil Procedure Code authorizes a plaintiff, at any time by leave of the Court, to deliver through the Court interrogatories in writing for the examination of the defendant, and authorizes a defendant, at any time after his written statement has been tendered, received, and placed on the record, to deliver through the Court interrogatories in writing for the examination of the plaintiff. Section 122 prescribes the method of service of interrogatories. Section 125 authorizes any party interrogated "to refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bona fide* for the purposes of the suit, or that the matter enquired after is not sufficiently material at that stage of the suit or on any other like ground." Under s. 127, "if any person interrogated omits or refuses to answer or answers insufficiently any interrogatory, the party interrogating may apply to the Court for an order requiring him to answer or to answer further, as the case may be." The penalty upon a plaintiff for not obeying an order served upon him "to answer or to answer further, as the case may be," is that he is liable to have his suit dismissed for want of prosecution and to be prosecuted for an offence under s. 188 of the Penal Code; the penalty upon a defendant for not obeying an order, served upon him "to answer or to answer further, as the case may be," is that he is liable to have his defence struck out and to be placed in the same position as if he had not appeared and answered, and to be prosecuted for an offence under s. 188 of the Penal Code. An order of the Court is necessary before the plaintiff's suit can be dismissed, or the defendant's defence struck out.

Up to this point the chapter has dealt with the first branch of discovery, that by interrogatories. It then proceeds to deal with discovery as it affects documents.

The question of discovery as it affects documents obviously embraces two heads: first, discovery simply, that is to say, the power of compelling your opponent to disclose what documents he has in his possession; secondly, the power of compelling their production. The subject of discovery simply [775] is dealt with by s. 129, which says that "the Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may at any time before the first hearing apply to the Court for a like order." If the party served with the order objects to produce any of the documents disclosed in his affidavit, he must specify them, together with the grounds of his objection. The penalties for non-compliance with an order under s. 129 are the same as those provided by s. 136 for non-complaiance with an order under s. 127 to answer interrogatories.

Section 130, which says that "the Court may at any time during the pendency therein of any suit order the production by any party thereto of such of the documents in his possession or power relating to any matter in question in such suit as the Court thinks right; and the Court

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may deal with such documents when produced in such manner as appears just," deals as well with the power of compelling your opponent to disclose what documents he has in his possession, as with the power of compelling their production. The penalty for non-compliance with an order under s. 130 is the same as that provided by s. 136 for non-compliance with an order under s. 127 or s. 129. The Chapter then proceeds to deal with the voluntary inspection of documents. Section 131 enacts "that any party to a suit may at any time before or at the hearing thereof give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice, or of his pleader, and to permit such party or pleader to take copies thereof."

Section 132 provides that "the party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time, within three days from such delivery, at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office, or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds." The notice to be given through the [776] Court under s. 131 should require the party from whom inspection is sought to deliver the notice under s. 132 within ten days from the receipt of the notice, and under s. 131 the time cannot be curtailed. The penalty for not delivering through the Court the notice required by s. 132 is that the party not so giving it shall not afterwards "be at liberty to put in any such document in evidence unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause."

The chapter next proceeds to deal with inspection by order of the Court.

Section 133 enacts that, "if any party served with notice under s. 131 omits to give notice under s. 132 of the time of inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection."

Section 134 provides that, "except in the case of documents referred to in the plaint, written statement or affidavit of the party against whom the application is made or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing (*a*) of what documents inspection is sought, (*b*) that the party applying is entitled to inspect them, and (*c*) that they are in the possession or power of the party against whom the application is made." Section 135 provides that, "if the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first and reserve the question as to the discovery or inspection." That the provisions of this section were not intended to come into operation until after an application has been made under s. 133 is plain from a consideration of the fact that s. 136 enacts the same penalties for non-compliance with an order under s. 133 as for non-compliance with orders under ss. 127, 129 and 130, and no order could be made [777] under s. 133 until the questions raised under s. 135 had been determined. If this view of the Chapter be correct, it follows that almost all the proceedings in this case are irregular.

In the first place the plaintiff's application of the 8th March was premature, for the notice under s. 131 was served on the defendant on 10th February, three days after all proceedings in the suit were stayed. The application for transfer was refused on 3rd March, and it was not till then that the ten days' time within which to deliver the notice under s. 132 began to run against the defendant. The application was also bad, for it was not supported by an affidavit as required by s. 134.

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In the second place the defendant's application of 16th March was unnecessary. If she did not want to produce the books for inspection, all she had to do was to refrain from delivering the notice under s. 132 and wait for the plaintiff to apply for an order under s. 133, supported by an affidavit under s. 134.

In the third place the defendant's application of 25th March was premature, for there had been no proper application for an order under s. 133.

In the fourth place the plaintiff's application of 25th March was irregular, for no order for inspection had been made on the defendant under s. 133.

In the fifth place the order of the Judge of 13th May, purporting to be made under s. 136, is bad, being made without jurisdiction.

The present position of the parties is this: If the defendant does not wish to give inspection of the books she need not do so at present, and the only penalty she will be subject to is that she will not be allowed, at the trial, to put in the books on her own behalf unless she satisfies the Court that they relate only to her own title, or that she had some other and sufficient cause for not complying with the notice served upon her on 10th February. If the plaintiff still wants to have inspection of the books he may apply for an order for inspection under s. 133 founded upon an affidavit under s. 134. The defendant may then claim the benefit of the provisions of s. 135. If she does, the Subordinate Judge will then have "to satisfy himself whether right to such discovery or inspection as the plaintiff seeks [778] depends upon the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any such issue or question should be determined before deciding upon the right to inspection;" if he is so satisfied, he ought to order the issue or issues, question or questions, to be determined first and reserve the question as to inspection. In this view of the case it is unnecessary and undesirable to discuss the cases cited to us bearing upon the question of plaintiff's right to inspection under the circumstances of this case.

Only one more point remains to be considered. Mr. Evans contended that, as the order of 13th May was an interlocutory order, and there was an appeal from the final decree, we could not interfere under s. 622 of the Civil Procedure Code. In support of the contention the learned Counsel referred to the cases cited at page 573 of the second edition of Mr. Justice O' Kinealy's Code of Civil Procedure in the learned author's notes to s. 622 of the Civil Procedure Code; to *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), *Sew Bux Bogla* v. *Shib Chunder Sen* (2), and *Badami Kuar* v. *Dinu Rai* (3). In the case of *Omrao Mirza* v. Jones (4), one of the cases cited by O'Kinealy, J., the facts were these. The plaintiff brought a suit, alleging divers breaches of trust, asking for an account and for the appointment of a new trustee. The value of the trust property was five

(1) 11 I. A. 237=11 C. 6. (2) 13 C. 225. (3) 8 A. 111. (4) 12 C. L. R. 148.

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lacs of rupees. The suit was instituted on a 10-rupee Court-fee stamp as being the proper stamp under art. 17, sch. II of the Court Fees Act. The Court in which the suit was instituted was of opinion that the Court-fee ought to have been calculated on the full value of the trust property, and made an order that the deficiency, Rs. 2,990, should be made good within a certain time. Before the time expired the plaintiff applied for a rule to show cause why the order should not be set aside. In showing cause against the rule it was argued that, if the plaintiff had waited until the expiration of the time allowed for making good the deficiency, the Court of first instance must have proceeded to deal with the case [779] under s. 54 of the Civil Procedure Code, and that the order rejecting the plaint which would have been made in due course under that section, on the ground that the relief was not properly valued, would have been an appealable order; and this being so, it was further contended that the applicant ought not to be allowed to come in under s. 622 of the Civil Procedure Code, when he could by law have an appeal in the case upon the very point he sought to raise under the rule. McDonell and Field, JJ., yielded to this argument; and holding that the case was not, with reference to the language of s. 622 of the Civil Procedure Code "a case in which no appeal lies to the High Court," and that the matter under dispute ought to be determined on appeal, discharged the rule.

In *Harsaran Singh v. Muhammad Raza* (1), another of the cases cited by O'Kinealy, J., the plaintiff applied by his pleader to a District Judge for leave to appeal as a pauper against a decree of a Subordinate Judge; the District Judge refused the application on the ground that it ought to have made personally and not by a pleader. The plaintiff applied to the High Court to revise the District Judge's order under s. 662 of the Civil Procedure Code. Straight, J., in giving the judgment of the Court said: "We are clearly of opinion that this application was inadmissible and cannot be entertained. Section 622 of the Civil Procedure Code does not, in our judgment, apply to a proceeding of so purely an interlocutory character as that mentioned in s. 592."

In *Chattar Singh v. Lekhraj Singh* (2), another of the cases cited by O'Kinealy, J., the facts were these: "There had been a reference to arbitration under the provisions contained in Ch. XXXVII of the Civil Procedure Code; the arbitrator had made his award in favour of the defendant; the award was set aside upon the application of the plaintiff on the ground of the arbitrator's misconduct. The defendant impugned the propriety of the decision of the Court of first instance that the arbitrator had been guilty of misconduct," and applied to the High Court to revise the order under s. 662 of the Civil Procedure Code. Oldfield, J., in giving judgment, said at [780] page 294: "We are of opinion that we have no power of revision under s. 622. The contention that the proceeding for arbitration is a decided case in which no appeal lies within the meaning of the section, and therefore open to revision under s. 622, is not tenable. The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow of revision of interlocutory proceedings, in the course of a suit, which do not determine it. The order, which is the subject of this application, will be open to revision by appeal from the

(1) 4 A. 91. (2) 5 A. 293.

final decree in the suit, and even if s. 622 allowed of it, it would be highly inexpedient for us to interfere at this stage of the case." 1887 July 2.

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In *Farid Ahmad* v. *Dulari Bibi* (1), the last of the cases cited by O Kinealy, J., a District Judge had transferred to his own file a suit pending in the Court of an Additional Subordinate Judge without notice to the defendants and when the trial of the suit was nearly completed. The defendants moved the High Court under s. 622 of he Civil Procedure Code to revise the order of transfer. The application was refused, the Court holding that the order of transfer was not one which they could revise under s. 622 of the Civil Procedure Code, as it was an order made in a suit, and there was an appeal in the case from the final decree.

These cases no doubt decide in so many words that s. 622 of the Civil Procedure Code does not apply to interlocutory orders when there is an appeal from the final decree. I confess that, after a careful consideration of the judgments, I am unable to concur in the interpretation placed on s. 622 of the Civil Procedure Code. I think that the word " case " in s. 622 of the Civil Procedure Code is wide enough to include an interlocutory order, and that the words " record of any case " include so much of the proceedings in any suit as relate to the interlocutory order. It is easy to imagine cases where irremediable injury may be done to a party by an interlocutory order made without jurisdiction, and unless the words of the section are clear beyond all doubt to the contrary, I cannot believe that the Legislature intended such injury to remain without a remedy.

[**781**] The other cases cited by Mr. Evans do not, as far I can see, throw any light upon the subject. I am of opinion that the rule should be made absolute with costs.

Tottenham, J.—Uuder the circumstances I concur in making this rule absolute but I think that, even if we entertained doubt as to the power of this Court to interfere under s. 622 of the Civil Procedure Code, it would be our duty to express such an opinion upon the manifest irregularities set out in Mr. Justice Norris's judgment as would induce the Court below of its own accord to desist from enforcing the order against which the rule has been obtained.

The rule will be made absolute with costs.

H. T. H. *Rule made absolute.*

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14 C. 781.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

Nobin Chunder Bannerjee (*Plaintiff*) v. Romesh Chunder Ghose and others (*Defendants*).* [31st March, 1887.]

Hindu Law, Contract—Interest recoverable at any one time, Amount of—Damdupat, Rule of—Act XXVIII of 1855—High Court, Ordinary Original Civil Juridiction.

The rule of Hindu law, known in Bombay as the rule of *Damdupat,* that no greater arrear of interest can be recovered *at any one time* than what will amount to the principal sum, is neither a mere moral precept nor limited in its application to other than stipulated interest, and as a part of the Hindu law of

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*Original Civil Appeal No. 26 of 1886, against the judgment of Mr. Justice Trevelyan dated the 21st of July 1886.

(1) 6 A. 233.

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contract is, in the absence of any legislative enactment to the contrary, the law as between Hindus in the High Court in its Ordinary Original Civil Jurisdiction.

Act XXVIII of 1855 deals exclusively with the rate of interest which may be allowed, and there is nothing in that Act inconsistent with the rule of *Damdupat*.

Nathubhai Panachand v. *Mulchand Hirachand* (1) distinguished.

[R., 21 C. 840 (843); 23 C. 899 (906); 1 C.L.J 182 (187).]

Nobin Chunder Bannerjee as purchaser under a deed of sale, dated the 2nd day of July, 1883, brought a suit for possession of an undivided third part or share of a house and premises, [782] numbered 57, Baugbazar Street, in the town of Calcutta, and for redemption of the other undivided two-thirds thereof. The plaint alleged that the principal defendants were, like their predecessor, in wrongful possession of the house, and, although the plaintiff had, since the date of his purchase, been ready and willing to redeem the mortgage, the defendants had refused to give up possession. The plaintiff deposited in Court the sum of Rs. 600 as the amount which he believed would be enough to satisfy the mortgage debt. Hurro Moni Bewa and another, the principal defendants, whilst admitting that their predecessor in title had originally held the house under two morgages, one an equitable mortgage for Rs. 100, and the other an ordinary mortgage for Rs. 200 with interest at 18 per cent. per annum, disputed, the title of the plaintiff's vendor, stating that whatever interest was left in the mortgagors had all been abandoned in favour of the defendants' predecessor, who had been in peaceful possession of the house and treated it in all respects as his own for a period of 16 years.

The cause came on for final disposal before Cunningham, J., who gave the plaintiff a decree and directed the Registrar to take the following accounts: (*a*) an account of what was due to the defendants for principal on the equitable and legal mortgages, mentioned in the plaint, and for interest only on the said legal mortgage at the rate of 18 per cent. per annum up to the date of tender by the plaintiff of the sum of Rs. 600 in Court; (*b*) an account of the rents and profits of the house and premises numbered 57, Baugbazar Street, since the date of the plaintiff's purchase. The Registrar was further directed to deduct from the first head the account found to be due under the second. That officer accordingly took the accounts as directed, and, in conformity with the rule of *Damdupat*, allowed only Rs. 200 out of Rs. 528-12, which was found to be actually due as interest on the morgatge sum. Exception was taken to his finding, and the case came upon further directions before Trevelyan, J., who, although of opinion that the Hindu law of *Damdupat* was the law in Calcutta as between Hindus [*Ram Connoy Audicarry* v. *Johur Lall Dutt* (2)], allowed, in view of the wording of the [783] decree of Cunningham, J., the full amount of interest actually found due on the legal mortgage. "The question in the case," observed the learned Judge, "is whether by applying that law I shall not be varying the decree of the 23rd February 1885; I must give to that decree every possible effect, and must give some meaning to every portion of it. * * * * The decree provides for the contingency of the amount to be found due for principal and interest exceeding the sum of Rs. 600. If the law of *Damdupat* applied the amount could not by any process of calculation exceed the sum of Rs. 500. I must therefore take it that, for some reason or

(1) 5 B. H. C. R. A. C. 196. (2) 5 C. 867.

other, the learned Judge (Cunningham, J.) has excluded from this case the operation of the law of *Damdupat* and has held that the interest recoverable is not limited by that law." 1887 March 31.

Against this decree of Trevelyan, J., the plaintiff appealed.

Mr. *Bonnerjee* (with him Mr. *Mullick*) for the appellant.—The construction placed upon the decree of the 23rd February is not correct. The Registrar was not precluded by the terms of that decree from giving effect to the rule of *Damdupat*. Appeal from Original Civil.

Mr. *O'Kinealy* for the respondents.—The Registrar was bound to take the accounts according to the strict terms of the decree. The decree excludes the rule of *Damdupat*. Had that rule been in contemplation the form in which the accounts were directed to be taken would have been different from what it is now. The law of *Damdupat* does not apply to this case. This is a case of mortgage where the mortgagee had to account for the rents and profits. It was broadly laid down in *Narayan bin Babaji* v. *Gangaram bin Krishnaji* (1) that the rule of *Damdupat* did not apply to mortgage transactions. In this case the mortgagees were in possession, and under the authority of *Nathubhai* v. *Mulchand* (2) the rule is excluded. [Wilson, J.— The substance of that decision is that the rule does not apply to usufructuary mortgages.] *Ganpat Pandurang* v. *Adariji Dadabhai* (3) limits the rule to a case of mortgage where no accounts of rents and profits have to be taken. Where a party has contracted to pay a certain interest [**784**] he is bound to pay that interest, and even if morally wrong the Court is bound to allow the stipulated amount of interest under the Hindu law. The authorities with respect to the rule are limited to one case in this Court—*Ram Connoy Audicarry v. Johur Lall Dutt* (4). There is no such law in the Mofussil—*Het Narain Singh* v. *Ram Dein Singh* (5). The Statute 21, Geo. III., c. 70, has been repealed, so far as it relates to Hindu contracts, by the Indian Contract Act—*Madhub Chunder Poramanick* v. *Raj Coomar Dass* (6). It is in *Mia Khan* v. *Bibi Bibijan* (7) that approval is for the first time given in Bengal to the rule of *Damdupat*. In *Ram Lall Mookerjee* v. *Haran Chandra Dhar* (8) Peacock, C.J., held that the restriction imposed by Hindu law on the rate of interest had not been abolished by Act XXVIII of 1855. In *Mia Khan* v. *Bibi Bibijan*, Phear, J., dissented from that decision. *Damdupat* is a rule of moral and not one of legal obligation under the Hindu law. There is nothing in Hindu Law to prevent a party from contracting himself out of the rule. According to Katyayana stipulated interest must always be paid. It is clear from the ancient authorities that so long as the interest is received at stated periods the creditor may take any amount. The restriction as to interest is one of moral, not legal, efficacy. The text of Vrihaspati is explicit upon the point. Manu allows an exorbitant rate of interest in certain cases, for instance when the borrower happens to be a sea-goer. Compare *kalika*, *kharita* and *kayika* forms of interest. There is very small difference between *kayika* and *kalika*, which deal with interest laid down by the law. These differ entirely from *kharita* or stipulated interest. (Colebrooke's Digest, Book I, c. 1, s. 1, para 2; Book I, c. 2, s. 1, paras. 2 and 30; Book I, c. 2, s. 37, para. 35.) If the interest allowed by law is allowed to run on, it is stopped when it becomes equal to the principal; but stipulated interest is always recoverable. [Mr. *Bonnerjee*:—I do not wish to interrupt;

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(1) 5 B. H. C. R. A. C. 157. (2) 5, B. H. C. R. A. C. 196. (3) 3 B. 312.
(4) 5 C. 867. (5) 9 C. 871. (6) 14 B. L. R. 76.
(7) 5 B. L. R. 500. (8) 3 B. L. R. O. C. 130.

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but all this applies to the rate of interest.] There is no doubt that the law of *Damdupat* is a part of the Hindu law of usury. [785] If there is any law here which cuts down the law of usury it cuts down the law of *Damdupat* with it—that law is Act XXVIII of 1855. *Damdupat* is not a rule of limitation different from the law of limitation as a part of the law of usury. It would be a strange thing in the case of promissory notes if *Damdupat* was the law.

Mr. *Mullick* in reply.—*Ram Lall Mookerjee* v. *Haran Chundra Dhar* (1) lays down how far the Hindu law governs the Hindus of Calcutta—*Mia Khan* v. *Bibi Bibijan* (2); *Deen Dyal Paramanick* v. *Koylash Chunder Pal Chowdhry* (3). The rule of *Damdupat* is clearly a rule of Hindu law—*Dhondu Jagannath* v. *Narain Ramchandra* (4); *Khushal Chand Lall Chand* v. *Ibrahim Fakir* (5). The true reason of the rule is that it prohibits the accumulation of interest. You may take almost any amount as interest if you take it by degrees; but you cannot recover at *any one time* more interest than what is equal to the principal. The scheme upon which the subject is treated in the Digest is this: Chapter I deals with loans; Chapter II with interest, and its sub-divisions deal with (*a*) interest in general, (*b*) special forms of interest, (*c*) interest specially authorised, (*d*) limits of interest, (*e*) debts bearing no interest. There runs through the various texts the doctrine that the interest recoverable *at any one time* must not exceed the principal. The text of Vachaspati Misra explains the meaning of "stipulated interest," and is quoted with approval in *Dhondu Jagannath* v. *Narain Ramachandra* (6). In the Digest the article devoted to limits of interest is thus described: "The principal can in general only be doubled, &c.," and the subject of "rate of interest" is treated as entirely distinct from that of the "limit of interest."

JUDGMENT.

The judgment of the Court (Prinsep, Wilson and Norris, JJ.) was delivered by.

Wilson, J.—The plaintiff in this case purchased the property to which the suit relates on the 2nd July 1883, the property being [786] then subject to two mortgages, one an equitable mortgage for Rs. 100 without interest, the other a legal mortgage for Rs. 200 with interest at 18 per cent. The plaintiff brought this suit to redeem the mortgages and recover possession of the property. He paid into Court Rs. 600 as sufficient to cover all that could be due upon the mortgages to the defendants or any of them. He alleged that the defendants or some of them had wrongfully obtained and held possession from a time long before his own purchase, and for this he claimed mesne profits.

The case was heard before Cunningham, J., who made his decree, dated the 23rd February 1885, by which he ordered certain accounts to be taken—(*a*) "an account of what is due to the defendants for principal on the equitable and legal mortgages . . . . . and for interest only on the legal mortgage at the rate of 18 per cent. per annum up to the date of tender by the plaintiff of the sum of Rs. 600;" (*b*) "an account of the rents and profits of the house and premises" since the date of the plaintiff's purchase. It was ordered that the amount found on taking the second account should be deducted from that found on the first; and provision was made, first, for the case of the sum found after such deduction not exceeding the

(1) 3 B. L. R. O. C. 130. (2) 5 B. L. R. 500. (3) 1 C. 92.
(4) 1 B. H. C. R. 47. (5) 3 B. H. C. R. A. C. 23. (6) 1 B. H. C. R. 47 (49).

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Rs. 600 paid in, and, secondly, for the case of its exceeding that sum. The other provisions in the decree were those that are usual in a decree for redemption.

The Registrar took the accounts as directed and made his report The material passage in that report is this: "There is due to the defendants upon and by virtue of the equitable and legal mortgages the sums of Rs. 100 and 200 for principal and the sum of Rs. 528 for interest on the principal sum due on the said legal mortgage. Out of the sum of Rs. 528-12, I have allowed only Rs. 200, and have disallowed the rest under the rule of *Damdupat.*" This finding of the Registrar was excepted to, and the case came upon further directions before Trevelyan, J. The learned Judge agreed with the Registrar in thinking that the rule of *Damdupat*, by which the amount of interest recoverable at one time cannot exceed the principal, was properly applicable to the case, but he thought he was precluded by the terms of the decree of Cunningham, J., from applying it. He, therefore, allowed the [787] exception, and varied the report accordingly. Against that decision the plaintiff has now appealed.

We are unable to agree with the view which the learned Judge has taken of the construction of the former decree. The governing passage in the decree is that in which the accounts to be taken are defined. The first account is of "what is due" for principal and interest upon the mortgages, and it would, we think, require very strong ground to justify us in extending those words so as to include anything not legally due. The fact that a subsequent passage contemplated a result of the account which the rule of *Damdupat* would render impossible is not, in our judgment, sufficient. The most that that can show is that the question of *Damdupat* was not present to the mind of the learned Judge who made the decree, not that he considered and excluded the rule.

But it was contended on behalf of the respondent that, on the merits and apart from any question arising upon the construction of the original decree, there is no rule applicable to this case limiting the interest recoverable to a sum equal to the principal. This involves two questions; first, whether the rule of *Damdupat*, whatever it be, does or does not apply in this Court to contracts between Hindus; secondly, if it does, whether it has the effect of limiting the amount of interest recoverable in this case.

It is well settled that in this province, outside the Presidency town no rule limiting the amount of interest to a sum equal to the principal prevails. This has been held in *Deen Dyal Paramanick* v. *Koylash Chunder Pal Chowdhry* (1); *Surjya Narain Singh* v. *Sirdhary Lall* (2); *Het Narain Singh* v. *Ram Dein Singh* (3) and in other cases, and it is no doubt an anomaly that there should be one rule in Calcutta on such a point and another outside it. But a comparison of the history of the law of Contracts in the Presidency town with that in other parts shows, we think, that the difference does exist. The Statute 21, George III, c. 70, s. 17, required the Supreme Court of Fort William to determine "all [788] matters of contract and dealing between party and party in the case of Gentus by the laws and usages of Gentus." There was never any such legislative provision in force in the rest of the province. The result was that, as between Hindus, the Supreme Court was expressly bound to give effect to the Hindu law of contracts, and the Hindu law of contracts included the law of *Damdupat*. The High Court by its first charter was required

(1) 1 C. 92. (2) 9 C. 825. (3) 9 C. 871.

1887 MARCH 31. — APPEAL FROM ORIGINAL CIVIL. — 14 C. 781.

to administer the same law as the Supreme Court, and the second charter continues the same law as was in force under the first. It appears to follow of necessity that the law of *Damdupat* is in force in this Court between Hindus, unless there has been some legislative enactment inconsistent with it.

The only Act cited said to be inconsistent with it, and therefore to overrule it, is the Act for the repeal of the Usury Laws (XXVIII of 1858). But we think there is nothing in that Act (which deals exclusively with the rate of interest which may be allowed) inconsistent with the rule now in question. And the authorities are unanimous in favour of that view. To this effect are the decisions of Sausse, C.J., and Forbes and Newton, JJ., in *Dhondu Jagannath* v. *Narain Ramchandra* (1); of Couch, C.J., and Newton, J., in *Khusal Chand Lall Chand* v. *Ibrahim Fakir* (2); of the learned Judges in *Nathubhai Panachand* v. *Mulchand Hirachand* (3); of Couch, C.J., and Westropp, J., in *Hakima Manji* v. *Maman Ayab Haji* (4). The same law was laid down by Westropp, C.J., and Nanabhai Haridas, J., in *Pava Nagaji* v. *Govind Ramji* (5), and re-affirmed by Westropp, C.J., and Melv'll, J., in *Ram Chandra Mankeshwar* v. *Bhimrav Ravji* (6), and by Westropp, C.J., and Green, J., in *Ganpat Pandurang* v. *Adarji Dadabahi* (7). In this Court the authorities lead to the same result. In *Ram Lall Mookerjee* v. *Haran Chandra Dhar* (8), Peacock, C.J., went even further, and held that Act XXVIII of 1855 did not effect the rules of the Hindu law relating directly to the rate of interest. The correctness of this view carried to its full extent was questioned by Phear, J., in [**789**] *Mia Khan* v. *Bibi Bibijan* (9), but that learned Judge fully approved of the Bombay decisions; and the same rule was followed in *Ram Connoy Audicarry* v. *Johur Lall Dutt* (10). The result is that, in our opinion, the rule in question does in this Court apply to contracts between Hindus.

The question remains whether the effect of the rule is to preclude the defendants from claiming the full amount of interest in this case. The statement of the rule in the first of the Bombay cases already referred to has generally been accepted as correct. "The rule of Hindu law is simply this, that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum." But on behalf of the respondent it was argued that the nature of the doctrine has been totally misunderstood, the main contentions being, first, that the rule of *Damdupat* was only a moral precept and not a rule of law at all, and, secondly, that it applied only to interest prescribed by law in the absence of agreement and not to stipulated interest. The primary source of our knowledge on the subject is, of course, the text of Manu and the other original authorities. The texts are collected in Colebrooke's Digest, Book I, c. 2; and the works from which they are taken are now for the most part easily accessible to English readers. It was not contended that these texts taken by themselves suggest any restriction or qualification such as that proposed. But it was contended that the opinions of the commentators collected by Jagannatha and the views expressed by that learned writer himself throw an entirely different light upon the matter. The main question under consideration in the passages referred to is the rate of interest which might lawfully be charged, and whether there was any restriction in the case of

(1) 1 B. H. C. R. 47. (2) 3 B. H. C. R. A. C. 23 (3) 5 B. H. C. R. A. C. 196.
(4) 7 B. H. C. R. O. C. 19. (5) 10 B. H. C. R. 382 (385).
(6) 1 B. 577. (7) 3 B. 312. (8) 3 B. L. R. O. C. 130.
(9) 5 B. L. R. 500 (505). (10) 5 C. 867.

stipulated interest; in connection with this the rule as to interest not exceeding the principal is also discussed. Mr. O'Kinealy showed very clearly that some at least of the commentators were disposed to restrict that rule or get rid of it altogether as a rule of law; but it is equally clear that they are far from being agreed as to the principle upon which, or the extent to which, it could be limited, some leaning to the view of a mere moral precept, others to confine it [**790**] to legal as distinguished from stipulated interest. And though Jagannatha does, if we rightly understand him, express his own opinion upon the main question under discussion whether there was any restriction of rate in the case of stipulated interest, we cannot find that he does so with regard to *Damdupat*. Harington (Analysis, Part I, s. 3, p. 181) says with reference to this discussion: "A considerable difference of construction has been given by the commentators upon the Hindu law of contracts to the texts which respect the limitation of interest and the invalidity or immorality only of usurious loans and engagements." And Sir Thomas Strange (Hindu Law, Vol. I, p. 298) says: "Involved in apparent contradiction the subject is considered by Jagannatha to be intricate, nor has his Commentary always the effect of elucidating what is obscure or disentangling what is perplexed." We agree with these remarks and cannot gather any distinct rule from this source. All the later authorities agree in understanding the rule of *Damdupat* as it has been laid down by the Bombay Court. Thus Sir Thomas Strange, in the place already referred to, so states it; and in the Appendix to Chapter XII he gives a case (p. 473, Edit. of 1830) to which are appended remarks by Colebrooke and Ellis, both of whom independently and without hesitation state the law to the same effect. Lastly, there is the long series of decisions in the Bombay High Court and this Court, from the whole of which we must dissent if we were to hold either that the rule of *Damdupat* is a mere moral precept or that it does not apply to stipulated interest. And that we are not prepared to do. The anomaly of the present state of the law, if it is to be removed, can only be removed by the Legislature.

One other agreement it is necessary to notice. It was contended, on the authority of *Nathubhai Panachand* v. *Mulchand Hirachand* (1), that the rule in question cannot equitably be applied in the case of a mortgagee in possession when the account is taken on both sides, the mortgagee being as such debited with the rents and profits. And it was said that this case fell within the rule there laid down. But the facts here are very different. The account of rents and profits was [**791**] not asked or ordered against the defendants as mortgagees in possession, but by way of mesne profits against wrong-doers; and accordingly they were limited to the time since the plaintiff's purchase, which could not properly have been done if the account was on the other footing.

The result is that, in our opinion, the order of the learned Judge, so far as it allowed the plaintiff's exception and varied the report of the Registrar, was wrong, and that the report should have been and should now be confirmed in its entirety.

K. M. C. *Appeal decreed.*

Attorney for the appellant: Baboo *N. C. Bural.*

Attorney for the respondents: Baboo *N. C. Bose.*

(1) 5 B. H. C. R. A. C. 196.

1887
April 1.

Appellate Civil.

14 C. 791.

14 C. 791.

APPELLATE CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

Ramdoyal (*Plaintiff*) *v.* Junmenjoy Coondoo (*Defendant*).*
[1st April, 1887.]

Limitation—Suit for partnership accounts—Joint contract—Necessary parties, Omission of—Addition of new defendant—Time of joinder, how material.

A suit was brought for partnership accounts. Upon the objection of the defendant it was found that a necessary party defendant had been omitted, and such party was afterwards added as a defendant at a time when the suit as against him was barred:

Held, that the whole suit was rightly dismissed.

[F., 7 C.L.J. 266 (267); 21 B. 154 (158); **Rel. on,** 19 Ind. Cas. 963; **Cited,** 69 P.R. 1902; **R.,** 25 C. 285 (288); 5 C.W.N. 304 (306): **D.,** 33 C. 613=3 C.L.J. 576 (582)=10 C.W.N. 551; 12 C.W.N 84=6 C.L.J. 558.]

Ram doyal brought a suit against Junmenjoy Coondoo on the 11th September, 1885, for the accounts of a partnership which had been dissolved on the 17th September 1882. The plaintiff alleged that he and the defendant had been carrying on business as gunny-bag merchants at Burra Bazaar in the town of Calcutta in co-partnership under the name and style of Junmenjoy Coondoo; that the defendant was a partner with capital and he (Ram Doyal) was the working or managing partner without capital, and in consideration of his service as such it was agreed that he should have a three annas share in the profits of the partnership business and get besides a certain *khoraki* or boarding allowance out of the said business. [792] Junmenjoy, while admitting in his written statement that a business of the kind described in the plaint had been carried on, denied partnership, and stated that under a written agreement (a translation of which was filed in Court) entered into between himself Ramdoyal and one Nittyanund Hazrah, since residing in the district of Burdwan, it was arranged that the plaintiff and Nittyanund should act as gomastahs, and in lieu of salary receive respectively a certain specified share of the profits. Upon this statement the defendant submitted that Nittyanund Hazrah was a necessary party, in whose absence the suit could not proceed. The case came on for disposal before Norris, J., on the 13th April 1886, when, on the application of the plaintiff's advocate, Nittyanund Hazrah was added as a defendant. At the final hearing before Trevelyan, J., on the 22nd July 1887, it was contended on behalf of the original defendant (Junmenjoy) that, as under art. 106 of sch. II of the Limitation Act three years from the date of dissloution of partnership was the time within which the suit had to be brought, the suit was barred against Nittyanund, and inasmuch as Nittyanund was a necessary party, the suit was also barred against the other defendant. The Court relying upon the authority of *Ramsebuk* v. *Ram Lall Coondoo* (1) dismissed the suit.

The plaintiff appealed.

Mr. *T. Apcar* (with him Mr. *Avetoom*) for the appellant:—Ramdoyal was not a partner. The agreement entered into between the parties shows that he was a gomastah or servant—Contract Act, s. 242. There

* Original Civil Appeal No. 6 of 1887, against the decree of Mr. Justice Trevelyan, dated the 22nd of February 1887.

(1) 6 C. 815.

is nothing, under the circumstances, to prevent the suit from going on in the absence of Nittyanund.

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Mr. *R. Mittra*, for the respondent, was not called upon.

JUDGMENT.

The judgment of the Court (PRINSEP, WILSON and NORRIS, JJ.) was delivered by

WILSON, J.—We think the view taken of this case by the learned Judge who heard it is correct. The plaint alleged a partnership entered into between the plaintiff and the original defendant, under which that defendant was to be the monied partner, the plaintiff was to be the managing partner, and the plaintiff was [793] to have a certain share in the profits; and the plaint went on to pray relief upon the footing of the partnership and in the manner usual in a partnership suit. The defendant denied the partnership, and said that the real relation between the parties was not that of partner and partner but of master and servant, that the plaintiff was a gomastah paid by a share of the profits, and that according to the long understood practice in this country (now embodied in the Contract Act) he was not a partner. The defendant also raised another objection: He said that there were three of them concerned in the matter, that the plaintiff was to have a share in the profits as remuneration for his service as gomastah, and another man, Nittyanund Hazrah, was to have a share also under the same agreement, the original defendant being proprietor of the business. The case came on for hearing, and the plaintiff applied to have that man, Nittyanund Hazrah, joined as a defendant in the suit, which was done. There was some discussion before us as to whether the plaintiff under the circumstances was bound by his suit as a partnership suit. It would certainly be an unusual thing to allow a plaintiff, who has alleged one state of facts, as against the defendant who has denied that case and alleged another state of facts, to turn round and ask to be allowed to carry on the suit and claim relief on the ground that the defendant's statement of facts was true and his own false. But supposing that the plaintiff in this suit could be allowed to do that and to maintain this suit on the footing that he was a gomastah entitled to remuneration for his services by receiving a portion of the profits, still it is clear that his suit, as originally framed, was defective. This is not a case of one contract between the original defendant and the plaintiff, one hiring of the plaintiff as gomastah upon the terms of his receiving a share in the profits, and another contract with Nittyanund Hazrah, made separately, by which he was hired as a gomastah on the terms of his receiving a share of the profits. It is a case of three persons who in one document entered into an agreement, by which the business was to be carried on, the original defendant was to be the proprietor and the plaintiff and Nittyanund Hazrah were to be employed as gomastahs and by which, as between these three persons, it was agreed that the principal defendant as [794] proprietor was to have an 11½ annas share, the plaintiff a 3-anna share, and Nittyanund Hazrah a 1½ anna share. That being the state of things, the suit, as originally framed, was clearly defective, because, when there are three persons who, under one and the same agreement amongst themselves, are entitled to share in the proceeds of a fund which they hope will be brought into existence, it is obvious that all these three persons must be necessary parties to a suit, the object of which is to take an account necessary for the purpose of ascertaining the assets of the fund and dividing them. Then it appears that, by the time Nittyanund Hazrah was made a party to the suit, the suit, as against him, was barred.

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Now it has been held more than once that, if a suit is brought by certain persons as plaintiffs, and they omit in the first instance to join with them as co-plaintiffs persons who are necessary parties, and these parties are afterwards added as plaintiffs at a time when for them the claim is time-barred, the whole suit must be dismissed. That was so held in the case of *Ramsebuk* v. *Ram Lall Coondoo* (1) and also *Kali Das Keval Das* v. *Nattin Bhagvan* (2). And we can see no distinction in principle between the case of one who ought to have been originally a plaintiff and the case of one who ought to have been originally a defendant. We think therefore that the view taken by the learned Judge who heard the case is correct, and that this appeal should be dismissed with costs.

K. M. C. *Appeal dismissed.*

Attorney for appellant: Baboo *Preonath Bose.*

Attorneys for respondent: Messrs. *Mitter & Mookerjee.*

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14 C. 795 (F.B.).

[795] FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

Abdul Aziz Khan (*Plaintiff*) v. Ahmed Ali (*Defendant.*)*
[15th April, 1887.]

Enhancement of rent, Suit for—Transferable tenure—Mutation of names—Tenant who has transferred his holding, Liability of.

The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent re-adjusted.

In a suit for enhancement it was found that the defendant had, prior to institution, sold his holding, which by custom was transferable without the consent of the landlord to a third party. There had been no mutation of names, or payment of a *nazar,* or execution of a fresh lease; but the landlord had received rent from the third party and was fully aware of the transfer.

Held, that the connection of the defendant with the holding had come to an end, and the suit against him did not lie.

Abdul Aziz and others brought a suit against Ahmed Ali for recovery of rent in respect of a holding at an enhanced rate after service of notice. The Munsif, finding that the defendant had long before the institution of the suit sold the holding to one Abdul Karim, a third party, who had since paid the rent and was known by the plaintiff and his tahsildars to be the real tenant, held that Ahmed Ali was no longer liable for rent in respect of the holding, and dismissed the suit, but without costs, as the defendant had neglected to cause the transfer to be registered in the zemindar's *serishta.* On appeal the District Judge remanded the case under s. 566 of the Civil Procedure Code for the trial of this issue, namely, " whether by the custom of the locality where this land is situated, such holdings as defendant's, are transferable, and whether the landlord's consent is necessary to the validity of such transfers." The Munsif found that the ryoti holding, like that of the defendant, was transferable without the

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* Full Bench Reference in Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice McDonell, dated the 26th March, 1886, in Appeal No. 2364 of 1885, against the decree of the Judge of Noakhali, dated the 11th of August, 1885, affirming the decree of the Munsif of Shudaram, dated the 19th of April, 1884.

(1) 6 C. 815. (2) 7 B. 217.

previous sanction of the zemindar; but the *dakhilas* were issued in the vendor's name until mutation of names was effected in the landlord's [796] *serishta* by payment of *nazar* and execution of a fresh lease. The lower appellate Court accepted the finding of the Munsif, and, being satisfied that the plaintiff had recognized " the transfer of the defendant's ryoti to the purchaser," dismissed the appeal.

1887 APRIL 15.

FULL BENCH.

14 C. 795 (F.B.)

The plaintiff preferred an appeal to the High Court, which was dismissed by McDonell, J. On appeal against that decision under s. 15 of the Letters Patent, Petheram, C.J., and Cunningham, J., referred to a Full Bench the following question: " Having regard to the facts found in this case, we refer the question to a Full Bench, whether in the case of a holding held under the custom found by the Munsif under the order of remand (by the District Judge), the vendor is released from liability for the rent before mutation of names has been effected, the *nazar* paid and a fresh lease executed, or before any or either of these things has been done."

The case then came up before the Full Bench.

Baboo *Rajendra Nath Bose*, for the appellants.

Baboo *Aukhil Chunder Sen*, for the respondent.

The judgment of the Court (MITTER, PRINSEP, WILSON, TOTTENHAM AND NORRIS, JJ.) was as follows:—

JUDGMENT.

This is a suit for recovery of rent at an enhanced rate after service of notice. The finding of the lower Courts is that the holding, in respect of which the enhanced rent is claimed had, before the institution of the present suit, been transferred by the defendant to a third party who is not a party to it, and that such transfer without the previous sanction of the plaintiff, the landlord, is valid.

The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent re-adjusted. The law allows this re-adjustment in certain cases. In this case the plaintiff, as found by the lower Courts, was fully aware that the holding is now the property of a third party and not of the defendant. That being so, a suit for enhancement of rent will not lie against the defendant who has now no connection with the holding. We, therefore, dismiss the appeal with costs of both hearings.

K. M. C. *Appeal dismissed.*

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14 C. 797.

[797] APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

BOLYE CHUNDER SEN (*Defendant*) v. LALMONI DASI (*Plaintiff*).* [2nd May, 1887.]

Partition—Family dwelling-house—Partition wall—Open space of ground—Easement.

Upon partition of joint property in Calcutta by mutual conveyances, whether under the direction of a Court of law or otherwise, it is implied that the parties take their respective shares with easements of light and air as between themselves in accordance with the existing state of the premises.

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* Original Civil Appeal No. 27 of 1886, against the decree of Mr. Justice Trevelyan, dated the 5th of April, 1886.

1887
MAY 2.

APPEAL FROM ORIGINAL CIVIL.

14 C. 797.

In a suit for the partition of a family dwelling-house, it was directed that the parties should take their respective shares by *mutual conveyances* with liberty to the plaintiff *to raise a partition wall*. The shares were allotted but no conveyances executed.

Held, that in equity the parties must be deemed to have taken as if under mutual conveyances, in so far as concerned easements of light and air.

[R., 26 C. 516 (521)=3 C.W.N. 409.]

LALMONI DASI brought a suit for the declaration of her right to the access and use of light and air through the openings, courtyards and verandahs on the east side of her house and premises No. 8/1, Gopikishen Pal's Lane, in the town of Calcutta, and to have certain walls, which had been erected by Bolye Chunder Sen in his premises No. 8, Gopikishen Pal's Lane, pulled down by reason of such walls blocking up the said openings, courtyards and verandahs. Various objections were raised by the defendant, Bolye Chunder Sen. It appeared on the trial that the premises Nos. 8/1 and 8 originally formed one family dwelling-house; that, upon a suit for partition by one Soshimukhi Dasi against Brojo Nath Pal, it was, among other things, ordered on the 14th March, 1871, that "the plaintiff and defendant do, at the request of either party and at the expense of the party requiring the same, execute mutual conveyances to each other of their respective shares, such conveyances to be settled by one of the Judges or the Registrar of this Court in case the parties differ about the same, and after the Commissioners shall have made such partition and returned the same;" and it was further ordered on the 19th of December, 1872, that "the plaintiff be at liberty to take exclusive [798] possession of such portions of the properties as have been allotted to her by the said Commissioners, and to raise partition walls." Lalmoni Dasi and Bolye Chunder Sen derived their title respectively from Brojo Nath Pal and Soshimukhi Dasi. The judgment of the Court of first instance (Trevelyan, J.) was materially as follows: " * * As I said in the beginning of my judgment, the whole question turns upon the meaning of the order of the 19th day of December, 1872. There is, I think, no doubt that, apart from any special provision, the owners of a joint family dwelling house would, after partition, be entitled to so much light and air as would be necessary for the reasonable use and enjoyment of the premises allotted to them respectively. The question then is * * to what extent has the liberty given to Soshimukhi to erect a partition wall affected the plaintiff's rights. It seems to me the liberty to erect a partition wall must be viewed differently in the case where the line of partition cuts a room in two, and where that line merely divides a courtyard or open space. In the former case I think that a partition wall means a wall from floor to ceiling; a partition wall between two rooms means a wall which separates the one room from the other completely, and secures its privacy to each, thus making two rooms of the one room. Where the line of partition divides a courtyard or open space, it is not, I think, so easy to determine what a partition wall means. On the best consideration I can give to it, I think that a partition wall, under these circumstances, means a wall not only high enough to demarcate the partitioned property, but high enough to secure either side from intrusion or annoyance. In fact such a wall as a man would build round his compound. * * * * * The result of these observations is, that I think that the defendant is entitled to retain the wall built by him over against those portions of the plaintiff's rooms which were exposed at the time that No. 8 was pulled down. The wall which runs along the line which

cuts the courtyards must be reduced to a height of six feet. The plaintiff must also be restrained from building the wall beyond six feet from the floor of that portion of the third story which was in existence at the time of the partition." **1887** MAY 2. — APPEAL FROM ORIGINAL CIVIL. — **14 C. 797.**

From this decision Bolye Chunder Sen appealed, and a memorandum of objections was put in on behalf of the plaintiff.

[**799**] Mr. *Kennedy* (with him Mr. *Bonnerjee*) for the appellant.—

There is no prescriptive right to light and air with regard to a family dwelling house; no such easement where property is joint. Here the partition took place under the direction of the Court. There can be no presumption as to a grant of easement. The case of a partition by act of parties is distinguishable. No conveyances were ever executed.

The following authorities were discussed: *Wheeldon* v. *Burrows* (1); *Allen* v. *Taylor* (2); *Blanchard* v. *Bridges* (3) *Holland* v. *Worley* (4); *Scott* v. *Pope* (5).

Mr. *Pugh* (with him Mr. *O'Kinealy*), for the respondent, was not called upon.

The judgment of the Court (PRINSEP, WILSON and NORRIS, JJ.), so far as it is material to this report, was as follows:—

JUDGMENT.

WILSON, J.—In this case the plaintiff, as owner of the house No. 8/1, Gopikishen Pal's Lane, sued the defendant, the owner of adjoining premises, in respect of infringements, actual and threatened, of her alleged right to the free access of light and air, by the erection of a wall. The plaintiff claimed damages and an injunction. Of the written statement it is enough to say that, amongst other things, it denied the right of the plaintiff to the light and air claimed. The plaintiff's house and the defendant's were formerly one property, forming a family dwelling-house, No. 8, Gopikishen Pal's Lane. In 1871 the defendant's predecessor in title, who was entitled to a three-fourths share of the property, sued the plaintiff's predecessor in title, (he is also her husband), the owner of the other one fourth, in this Court for partition. On the 14th March 1871, a decree was made by which the shares were declared, partition was ordered, and a commission issued, with the other directions usual in partition decrees. The decree contains these words: "It is ordered that the plaintiff and defendant do, at the request of either party, and at the expense of the party requiring the same, execute mutual conveyances to each other of their respective shares, such conveyances to be settled by one of the Judges or the Registrar [**800**] of this Court in case the parties differ about the same. The Commissioners effected a partition and made their return. On the 19th December, 1872, an order was made by which the certificate of the Commissioners was confirmed, and it was "further ordered that the plaintiff be at liberty to take exclusive possession of such portions of the properties as have been allotted to her by the said Commissioners, and to raise partition walls." The parties took possession of their respective shares, and they and their successors in interest have so continued down to the date of the suit. No conveyances have been executed. The share allotted to the plaintiff's predecessor formed the western portion of the premises partitioned, and was covered with buildings. The share allotted to the defendant's predecessor, where it adjoined the other share,

(1) 12 Ch. Div. 31. (2) 6 Ch. Div. 355. (3) 1 Ad. & E. 176.
(4) 26 Ch. Div. 578. (5) 31 Ch. Div. 554.

1887 May 2. — Appeal from Original Civil. — 14 C. 797.

consisted partly of buildings in immediate contact with and forming one block with the buildings on the share of the plaintiff's predecessor, and partly of open courtyards. These old buildings have been pulled down; and the defendant was proceeding to erect a wall along the whole western edge of this land, the effect of which was, it has been found, to interfere materially with the access of light and air to the plaintiff's house. The case was heard before Trevelyan, J. The learned Judge refused to give the plaintiff any relief in respect of those portions of his premises, which were exposed by the demolition of the buildings on the defendant's land, in other words, he has left the defendant free to build on the old sites and to the old height; and so far there can, we think, be no doubt that he was right. With this exception he has enjoined the defendant from erecting anything to obstruct the plaintiff's light save by a wall of not more than six feet in height. Against this decree the defendant has appealed. No serious exception was taken to the details of the injunction ordered, if an injunction ought to issue at all, but two questions were raised: First, it was contended that, on the evidence in the case as it stands, the plaintiff had shown no title to the access of light and air as against the defendant; and, secondly, that the learned Judge had rejected evidence which ought to have been admitted. As to the first question it was contended that, although in the case of a sale or other transfer *inter partes* a **[801]** grant of the easement claimed by the plaintiff would be properly implied, no such right can be implied in the case of a partition by the Act of a Court of law. The question so suggested appears to us one of considerable difficulty; but it is not, we think, necessary to decide it in the present case. The defendant's predecessor in title entered upon the share allotted to her, on the strength of the original partition decree of the 14th March 1871, and the order of the 19th December, 1872. By the decree either party could insist upon mutual conveyances; she was, therefore, bound to execute a conveyance whenever required, and she could not in equity be allowed to deal with the land in such a way as would defeat any conveyance called for. And the present defendant who takes through her, and from the very nature of the case with full notice, is in no better position, so that, for the present purpose, the case is the same as if there had been conveyances. And the terms of the subsequent order very much strengthen the case. It expressly authorized the then plaintiff, the now defendant's predecessor, to "raise partition walls." That goes far to negative the right to raise any other obstruction; and we agree with the learned Judge in thinking that, when open spaces are spoken off, "partition walls" do not mean blocks of building, but such walls as are used for partitioning open spaces. The first objection to the decree therefore fails.

[The other contention as to the rejection of evidence was also decided against the appellant.]

Attorney for the appellant: Baboo *Bolie Chunder Dutt*.

Attorney for the respondent: Mr. *M. Dover*.

Appeal dismissed.

14 C. 801 (P.C.)=14 I.A. 168=11 Ind. Jur. 397=5 Sar. P.C.J. 50.

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Privy Council.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir R. Baggallay, and Sir R. Couch.
[On appeal from the Court of the Recorder of Rangoon.]

MYLAPORE IYASAWAMY VYAPOORY MOODLIAR (*Plaintiff*) *v.* YEO KAY AND OTHERS (*Defendants*). [14th June, 1887.]

Limitation Act, 1877, s. 19 and art, 140—Claim to share in immoveable property under will—Acknowledgment of liability—Basis of decision of case.

The right to property left by will (assuming that the testator had power to dispose of it) falls into possession by Hindu law, immediately upon the [802] death of the testator; and, therefore, a claim, making title to shares in immoveable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under art. 140 of Act XV of 1877. sch. II.

Acknowledgment of liability, in order to be within the meaning of s. 19 of the same Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims.

The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eshen Chunder* v. *Shama Churn Bhutto,* (1), referred to.

[**N.F.**, A.W.N. (1908) 226; **F.**, 33 C. 613=3 C.L.J. 576=10 C.W.N. 551; 5 L.B.R. 76=3 Ind. Cas. 719; **Appl.**, 5 N.L.R. 67 (69)=2 Ind. Cas. 241; **R.**, 27 B. 162 (178); 2 L.B.R. 4 (6); 16 M. 220; 25 M. 220 (223) (**F.B.**); 6 C.L.J. 141 (142); 14 Bur. L.R. 65; 4 Ind. Cas. 579; 35 A. 437 (439)=11 A.L.J. 638 (641)=20 Ind. Cas. 27; U.B.R. (1912) 2nd. Qr., 141=18 Ind. Cas. 568 (569); 1 Ind. Cas. 510; 12 C.L.J. 423=8 Ind. Cas. 788 (790); **D.**, 27 B. 162 (178); 19 M. 425 (432); 16 M. 366; 11 A.L.J. 86 (87) Ind. Cas. 95.]

APPEAL from a decree (24th June 1884) of the Recorder of Rangoon.

The suit of which this appeal arose was brought by the present appellant against the respondents to obtain a declaration that the appellant in his own right, also as executor of the will of M. I. Mooroogasum Moodliar, deceased, and as administrator of the estate of M. I. Krishnasami Moodliar, deceased, was entitled to the possession of two-fifths of one half of five separate lots of land and buildings situate in Rangoon, formerly belonging to Mooroogasum.

The question now raised was whether the suit was not barred by the law of limitation, Act XV of 1877, sch. II, art. 140. Mooroogasum died at Madras on the 19th September 1864, having by his will, dated the same day, appointed his five brothers, who all survived him, his executors, and having bequeathed to them, equally, his residuary estate in these words: "I will and bequeath that all the rest, residue, and remainder of all my property, moveable and immoveable, of which I may die possessed (all being my sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike."

The five brothers of the testator were respectively named Coomarasami, Ramasami, Kristnasami, Soobroy, and Vyapoory, the last named being the present appellant.

Soobroy on the 25th August 1865, and Ramasami on the 7th June 1866, obtained probate of the will from the High Court of Madras; and

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(1) 11 M. I. A. 7.

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on the 21st October 1870, the Recorder of Rangoon [803] granted to Ramasami letters of administration with the will annexed. On the 4th January 1873, Ramasami died in Madras. In 1882 administration, with the will annexed, of the property and credits of Mooroogasum was granted by the Recorder of Rangoon to Vyapoory, the present appellant. None of the other brothers ever took out administration in Rangoon to the estate of Mooroogasum, and no distribution of the respective shares given to the brothers under the will was made. In fact, the whole of the five lots of land and buildings had been, along with other lands, in the year 1869, mortgaged by Ramasami to Mr. Cephas Bennet, a resident in Rangoon, in pursuance of a prior equitable mortgage by deposit of title deeds, in favour of the latter, made by Ramasami,. To this it was said that Mooroogasum had consented, he having been surety for the mortgage debt.

Bennet also in 1870 obtained a decree (19th December, 1870) against Ramasami for the mortgage debt, amounting to Rs. 35,283; and in execution brought to sale the right, title, and interest of Ramasami in the lots above mentioned, purchasing the same himself at the auction, having obtained leave to bid. Afterwards (2nd April 1874) Bennet, as the duly empowered agent of Soobroy and Coomarasami, sold and conveyed the half share in the same lots to Bee Moh Chan and Company, and others, who afterwards assigned to certain of the defendants in this suit.

Kristnasami died at Madras on 21st September 1882, Vyapoory (also called Mylapore) the plaintiff in this suit, obtaining administration of his estate. The plaint which was filed on 12th September, 1883, admitted that the shares of Ramasami, of Soobroy, and of Coomarasami, might have been validly transferred, but claimed the remaining two-fifths. The defence was the transfer above stated, with the assignments from the firms, which had purchased, to some of the defendants who had transferred part of the purchased lots to others of the defendants; all of whom, however, relied, on the law of limitation in Act XV of 1877, sch. II, art. 140.

Issues were settled, of which the principal raised the question of limitation, and of the validity of the defendants' title, either absolutely, or as purchasers for value, without notice. The [804] Recorder of Rangoon (Mr. W. F. Agnew) dismissed the suit, with costs, as barred under art. 140, sch. II, Act XV of 1877, stating his reasons as follows:—

"It is not necessary for me to trace the steps by which the property "sought to be recovered came into the hands of the defendants; the "first question is whether the suit is not barred by limitation. For the "defendants it is argued that the case is governed either by art. 140 "or art. 144 of the second Schedule to the Limitation Act, and that, "whichever may be held to apply, the suit is barred. Article 140 pre-"scribes a period of twelve years for a suit by a devisee for possession "of immoveable property, to be computed from the time 'when his estate "falls into possession.' That must begin from the time when the "devisee became entitled to possession of the property, which would be not "later than one year after the death of the testator. Article 144 "prescribes a period of twelve years for a suit 'for possession of immo-"veable property or any interest therein not hereby otherwise specially "provided' to be computed from the time 'when the possession of the "defendant becomes adverse to the plaintiff.' The possession of Mr. Bennet "became adverse to the plaintiff at all events on the 24th of April 1871, "when he obtained his certificate of purchase from this Court.

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" The plaintiff has not shown any reason for his delay, and it is " proved that he was in Rangoon from January 1870 to August 1872, and " he must have been cognizant of the execution proceedings, for he says " that he lived with his brothers, but whether he was cognizant or not is, " in my opinion, immaterial, for I consider that his suit is barred under " art. 140 of the second schedule to the Limitation Act.

" Mr. Porter has argued that s. 10 of the Act applies, and that the " plaintiff's co-executors were trustees for him. The devise was to the " testator's five brothers, to be divided equally between them, share and " share alike. These words created a tenancy in common between the " brothers (Jarman, 4th edition, 257). I am not aware of any " authority for holding that tenants in common are trustees for each " other. The fact that the tesatator's brothers were also appointed his " [805] executors does not, in my opinion, make them trustees for a " specific purpose within the meaning of s. 10 of the Limitation Act. The " suit must therefore be dismissed with costs."

On this appeal Mr. J. D. *Mayne* and Mr. *Laing*, appeared for the appellant.

Mr. *J. Rigby*, Q.C., and Mr. *A. Young*, for the respondents.

For the appellant it was argued that the claim was not barred by limitation. Bennet's possession from February, 1871, till April, 1874, was not adverse to any one except perhaps Ramasami, through whom no title could be made except in respect of his own share by those who relied on the transfer from Bennet. Ramasami may have had possession; but, if so, it was, as regards the four brothers, only as agent in respect of their interests as tenants in common, and as distinguished from his own one-fifth. Only the interests of the brothers who assented to the sale could pass to Bennet, who was aware of other persons having interets in the property, and, on behalf of such others, he became only agent, holding the property. Both the conveyances of 1874 were acknowledgments that Bennet's only right, or title, was as agent of Soobroy, who could not dispose of the whole estate. Reference was made to *Umr-un-nissa* v. *Mahammad Yar Khan* (1).

Counsel for the respondent were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

Sir B. Peacock.—The learned judge in this case has decided that the suit was barred by limitation under the 140th or the 144th article of the second Schedule of the Limitation Act, XV of 1877. He stated that, in his opinion, it is barred by art. 140. Their Lordships are of opinion that the learned Judge was right in the conclusion that the suit was barred by art. 140 of that Act.

In order to ascertain whether the suit was so barred or not, we must look to what was the nature of the case which the plaintiff made.

By the Act of 1882, which was the Civil Procedure Code in force when the suit was commenced, the paintiff must show [806] the grounds, &c., the cause of action, and when that cause of action accrued.

In the case of *Eshen Chunder* v. *Shama Churn Bhutto* (2), Lord Westbury, who delivered the judgment, said: " This case is one of considerable importance, and their Lordships desire to take advantage of it for

(1) 3 A. 24. (2) 11 M. I. A. 7.

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the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case, either to be found in the pleadings, or, involved in, or consistent with, the case thereby made."

Now what is the case made out by the pleadings, or what is involved in, or consistent with, the claim which is thereby made ? The plaintiff alleges in the plaint that Mooroogasum died on the 19th September 1864, having made a will, the 6th paragraph of which was in the words following:—" All the rest, residue, and remainder of all my property, moveable and immoveable, of which I may die possessed (all being my own sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike." The five brothers included Vyapoory, the present plaintiff, and Kristnasami, another brother, to whose interest in the estate Vyapoory, the plaintiff, claims to have succeeded; he therefore claims to have two of the five shares devised by Mooroogasum. He rests his title upon Mooroogasum's will, and claims that the will gave him a right to recover possession, and to have a declaration of his right to possession of two-fifths of the estate, and also to have a partition. He does not allege in distinct terms that Mooroogasum had an estate in this property, but it is to be implied from, or rather is involved in, the statement which he made in the plaint. At paragraph 16 of the plaint he says: " Coomarasami and Soobroy "—those are two of the other brothers—" had no right, power, or authority to sell more than their respective one-fifth shares in the land, set out in paragraph 7 of this plaint." But when he says that they had no right to sell more than their two shares, it implies that they had the right to sell those two. Then he says, in paragraph 18, " that there remains undivided the respective one-fifth shares or interests of Vyapoory "—that is the plaintiff [807] himself—and Kristnasami, deceased, in each of the several pieces or parcels of land set out in paragraph 7 of this plaint." He could not have been entitled, nor could his brother have been entitled, to one-fifth, unless the testator had the property to dispose of; and then, having made out, or professed to make out, a title under the will, he declares that he is entitled to possession of those two-fifths, and he asks to have it declared that he is entitled to them, and to have a partition of the estate.

Now when did his title arise, assuming that the testator had the estate, and had the power to devise it? It arose on the death of Mooroogasum on 19th of September, 1864. The Judge in his judgment puts it one year later, and says he must at least have had a title at the expiration of one year from the death of the testator. It appears to their Lordships that according to the Hindu law he became entitled to his one-fifth on the death of the testator.

The words of art. 140 are: " Suit by a remainder man, or a reversioner (other than a landlord), or devisee for possession of immoveable property"—which this is: he is claiming as a devisee of immoveable property. Then it says the suit is to be brought within 12 years from the time when his estate falls into possession. Now, from 1864, he was entitled to possession, but Mr. Bennet had the possession; and it is said now that Mr. Bennet had not an adverse possession, because he was holding as in the nature of a mortgagee, and that the testator was not absolutely entitled to the estate. There is nothing, however, in the plaint from which anything of that kind can be inferred. It is to be inferred that the case rests upon the title of the testator to devise the estate, and upon that title only.

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The issues are: "(1) Does the plaint disclose a good or sufficient cause against the defendants, or any or either of them?" It does not strictly show a good cause of action, for there is no allegation that the testator was entitled; but whatever cause of action it does show is a cause of action derived from the will of the testator and from the death of the testator, and the title accrued at that time. Then comes the [808] issue No. 2: "Is the plaintiff's claim, or any portion thereof, barred by limitation?" Now, if his title accrued in 1864, then it is clear that the judgment of the learned Judge was correct, and that the suit, which was not brought till the 12th September 1883, is barred.

Then it was contended that by virtue of s. 19 of the Limitation Act an admission had been made which gave a further period from which the right of bringing the action was to be dated. Section 19 is this: "If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." But what liability does this mean? It must mean a liability to the person who is seeking to recover possession, or some person through whom he claims. Was there any admission made in this case by Mr. Bennet at any time, or by any of the defendants? The admission is said to have been made by Mr. Bennet in the conveyance which was executed in 1874. It is contended that in that conveyance Mr. Bennet admitted that he was liable in respect of the property. The only admission is that he was acting as agent for one of the executors in selling the estate. He was selling the estate for the purpose of getting paid out of the proceeds of the sale. He does not admit that he was liable to be turned out of possession, or that any one had a right of possession as against him, nor does he make any admission at all to the plaintiff or to any one though whom he claims. Under those circumstances the clause does not apply. No liability has been admitted to take the case out of the statute of limitations; and under those circumstances art. 140 must prevail, and the decision of the learned Judge was correct upon that point.

Under these circumstances their Lordships will humbly advise [809] Her Majesty to affirm the decision of the Court below, and to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *Frank Richardson & Sadler.*
Solicitors for the respondents: Messrs. *Sanderson & Holand.*

C. B.

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14 C. 809 (F.B.)

FULL BENCH.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Norris.

IN NO. 1443.

KINU RAM DAS (*one of the Defendants*) *v.* MOZAFFER HOSAIN SHAHA (*Plaintiff*) AND OTHERS (*Defendants*).

IN NO. 1535.

KINU RAM DAS (*one of the Defendants*). *v.* HUJJATULLA SHAHA (*Plaintiff*) AND OTHERS (*Defendants*).

IN NO. 1536.

KINU RAM DAS (*one of the Defendants*) *v.* KAMARUDDIN SHAHA AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).*

[23rd May, 1887.]

Co-sharers—Payment of arrears of revenue by one co-sharer, Effect of—Charge—Act XI of 1859, *s.* 9, *Construction of—Lien.*

Held (MITTER and NORRIS, JJ., dissenting).—There is no general rule of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer.

Enayet Hossein v. *Muddunmoonee Shahoon* (1), overruled; *Nagenderchunder Ghose* v. *Kamini Dasi* (2), explained and distinguished: *Kristo Mohini Dasi* v. *Kaliprosono Ghose* (3), approved; *In re Leslie* (4), relied on.

[**Diss.**, 11 M. 452; 26 M. 686 (**F.B.**); **F.**, 15 C. 542 (545); 7 C.P.L.R. 42 (43); 22 C. 800 (802); 11 C.P.L.R. 111 (112); **Appr.**, 14 A. 273 (**F.B.**); 26 B. 437 (442): **Expl.**, 30 C. 794=7 C.W.N. 609 (611); **R.**, 15 C. 656 (661); 13 A. 195 (198)= 10 A.W. N. 228; 25 C. 565 (569); 26 A. 407 (**F.B.**)=A.W.N. (1904) 74; **D.**, 4 C. L.J. 79 (84); 21 Ind. Cas. 397 (401)=18 C.W.N. 129 (135)=19 C.L.J. 19 (27).

MOZAFFER HOSAIN SHAHA, Hujjatulla Shaha and Kamaruddin Shaha were co-proprietors of Kismut Pargana Jahangirpur with [**810**] Madhusudan Chowdhry, Hara Chunder Chowdhry, Shibendro Chowdhry, and a number of others. The Chowdhrys having failed to pay into the Collectorate the Government revenue in respect of the said mahal on account of the kists or instalments falling due on the 28th June and 6th October 1884, and 12th January 1885, Mozaffer Hosain, Hujjatulla, and Kamaruddin, in order to protect their own rights in the estate, deposited the same in certain proportions by separate chalans, and thereby saved the mahal from sale. On the 4th May 1885, the shares of Madhusudan, Hara Chunder, and Shibendro were sold by auction in satisfaction of a decree for money contributed towards the payment of previous instalments, and purchased by Kinu Ram Das. Mozaffer Hosain, Hujjatulla, and Kamaruddin thereupon brought a suit, each of them separately, against the three Chowdhrys, Madhusudan, Hara Chunder, and Shibendro, and Kinu Ram, the auction-purchaser, for a declaration that the

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* Full Bench Reference in Appeals Nos., 1443, 1535 and 1536, against the decrees of C. A. Kelly, Esq., Judge of Dinajpur, dated the 31st of May, 1886, affirming the decrees of Baboo Jugobondhu Ganguli, Subordinate Judge of that district, dated the 30th November, 1885.

(1) 14 B. L. R. 155.
(2) 11 M. I. A. 258.
(3) 8 C. 402.
(4) L. R. 23 Ch. Div. 552.

shares of the defendants (Chowdhrys) in the mahal were liable, as if under a mortgage lien, for the satisfaction of the amount contributed towards the Government revenue, and prayed that the debt might be realized by the sale of the said shares. Of the defendants, Kinu Ram Das alone entered appearance. The two issues of law raised in the case were: (1) Whether fractional contribution of Government revenue can create any charge on the shares for which revenue was paid? (2) Whether such charge, if created, is extinguished by Kinu Ram's purchasing the shares in satisfaction of a prior charge of revenue; and whether Kinu Ram purchased such shares void of all encumbrances? On the first issue, it was argued on behalf of Kinu Ram that "the fractional payment made by each of the plaintiffs did not save the estate from sale, and in order to create a charge on the estate it must be shown that the payment saved and benefited the estate—*Nobin Chunder Roy v. Rup Lall Das* (1)." It was further argued that, if the charge was declared at all, the Court should first pass a personal decree against the Chowdhry defendants, subject to the condition that, if the money decreed could not be levied from them personally, then it must be levied from their shares of the estate for which the revenue was contributed. [**811**] The Subordinate Judge, however, found that the fractional payment made by each of the plaintiffs went to save the estate as much as the aggregate amount, and was of opinion that *Nobin Chunder Roy* v. *Rup Lall Das* (1) rather supported the case of the plaintiffs and entitled them to look for the recovery of the contribution money from the estate, even if such estate had passed into the hands of a third party after payment of the contribution money. He also relied upon the provision of ss. 88, 89 and 100 of the Transfer of Property Act. It was argued on the second issue that, when the shares were once sold to Kinu Ram Das in satisfaction of a prior charge, *that is*, a charge created by payment of Government revenue which fell due prior to the disputed kists of the present case, they could not be re-sold on account of any subsequent charge that might have been created by the plaintiffs. The Subordinate Judge was substantially of opinion that "Government revenue is always a first or paramount charge on the property for which revenue is payable, whether it be paid for the first kist, second kist or third kist of revenue, * * * Revenue, whether for first, second or third kist, is always a first or paramount charge. * * * * It is an equitable principle the case-law has decided that, if by the payment of Government revenue the estate is saved and protected from sale, the person who is the owner of the estate, or who afterwards becomes the owner of the estate, and is benefited by the protection, cannot plead that the money paid to effect that protection ought not to be a charge on the things protected." The Subordinate Judge decreed the suits. On appeal, the decrees were affirmed by the District Judge.

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Kinu Ram Das appealed to the High Court.

The Advocate-General (with him Baboo *Jasoda Nund Pramanick*), for the appellant.

Baboo *Srinath Doss* and Baboo *Gurudas Banerjee*, for the respondents.

The Court (WILSON and O'KINEALY, JJ.) referred the cases to a Full Bench with the following observations:—

(1) 9 C. 377.

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The question raised in these appeals may be shortly stated thus: [812] Where one of two co-sharers in a revenue-paying estate pays the whole revenue in order to save, and so does save the estate, is he entitled to a charge upon the share of his co-sharer to the extent of the latter's share of the revenue as against a purchaser. No such charge is given by any express statutory enactment. The question must, therefore, be decided on general principles of law. In *Enayet Hossein* v. *Muddunmoonee Shahoon* (1), MARKBY and MITTER, JJ., decided in favour of such a charge on general principles of equity. But that decision was based to a great extent upon a dictum of the Privy Council in *Nogenderchunder Ghose* v. *Kamini Dasi* (2), and it appears to us questionable whether that dictum was intended to apply to any case except that of payment by a mortagee. In *Nobin Chunder Roy* v. *Rup Lall Das* (3), McDONELL and FIELD, JJ., expressly followed the earlier decision. And the same view seems to have been taken by MITTER and MACLEAN, JJ., in *Ram Dut Singh* v. *Horakh Narain Singh* (4). On the other hand, in *Kristo Mohinee Dasi* v. *Kaliprosono Ghose* (5), GARTH, C.J., and PONTIFEX, J., expressed great doubt as to the existence of any such charge as that contended for; and intimated that, had it been necessary to decide the point in that case, they would have referred it to a Full Bench. We share the doubts expressed in the last-mentioned case. We do not see how the charge in question can be upheld, unless there be some general rule of equity by which an outlay properly incurred by one co-sharer upon the common property is charged in rateable proportion upon the share of his co-owner. English Courts of Equity do not seem to act upon such a rule—*Ex parte Young* (6); *Kay* v. *Johnston* (7). And except so far as the cases above referred to support it, we are not aware that such a doctrine has been established in India. We refer to a Full Bench the question stated at the beginning of this order of reference.

On the hearing before the Full Bench—

[813] The *Advocate-General* (with him Baboo *Jasoda Nund Pramanick*), for the appellant.—There is no principle of equity which gives the lien. A co-sharer upon payment of the whole revenue becomes entitled to contribution, which is a personal liability, and does not extend to a charge on the estate. On reference to s. 9, Act I of 1845, it appears that the Legislature did not declare any lien in a kindred case. In the corresponding section in the later Act, namely, Act XI of 1859, lien is for the first time declared by an additional clause in favour of a mortgagee who may have paid the revenue in order to protect the estate. The Legislature did not think there was a lien in any other case, or it would have so declared in express terms. The addition of the last clause in s. 9 clearly shows the intention of the Legislature to confine the principle to the case of the mortgagee alone, or why declare the law in part and leave out the rest. The principle of equity, relied upon in *Enayet Hossein* v. *Moddunmoonee Shahoon* (1), is founded upon a dictum of the Privy Council in *Nogenderchunder Ghose v. Kamini Dasi* (2). That was a different case, and the dictum of their Lordships has no application to a case like that of a co-sharer. The principle of equity contended for would be conducive to the greatest mischief if the if the co-sharer who paid the revenue came in after a future sale of the estate—Coote on Mortgage, 420. No lien belongs to a tenant in common against the share

(1) 14 B.L.R. 155. (2) 11 M.I.A. 258. (3) 9 C. 377.
(4) 6 C. 549=8 C.L.R. 209. (5) 8 C. 402. (6) 2 V. & B. 242.
(7) 21 Beav. 536.

of the co-tenant. [MITTER, J.—This is a peculiar payment by which the estate is saved, and it has been held that even the theory of a previous request is not necessary to render the defaulting co-sharer liable.] The two things are very different—the mortgagees' case and the co-sharers' case. [MITTER, J.—Before the Act of 1845 there was no law as to contribution.] The principle of contribution is a recognized principle of equity. The doctrine of salvage has no application to a case like this. The following authorities were discussed: *Gobindpersaud Pundit* v. *Soonduri Kunwar Debia* (1); *Fagan* v. *Sreemotee Dassee* (2); *Nagenderchunder Ghose* v. *Kamini Dasi* (3) *Kristo Mohini Dasi* v. *Kali* [**814**] *Prosunno Ghose* (4); *Kay* v. *Johnston* (5), *Ex parte Young* (6).

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Baboo *Srinath Dass* (with him Baboo *Guru Das Banerji*), for the respondents:—Government revenue is the first charge on an estate. Whoever pays the Government revenue pays for the estate and not for any particular person, and thus acquires a lien on the estate. Section 9 of the Sale Act, it is true, speaks of a personal liability; but there is nothing to show that that is the whole remedy intended. For the principle upon which a co-sharer becomes entitled—see *Rambux Chittangeo* v. *Madhusudan Pal* (7). [WILSON, J.—Can you show any authority that any person interested in the estate, who has made any payment by which he has saved the estate, has a lien?]

Baboo *Guru Das Banerji* followed:—The doctrine upon which we rely is supported by reason and analogy as well as by authority. There is no binding authority to the contrary, nor any statute, and the decided cases are in favour of the doctrine. [WILSON, J.—Is there no hardship on the purchaser?] The purchaser ought to be bound even without notice. [WILSON, J.—He must go back for 12 years.] Yes, but there is no hardship; the principle protects the co-sharer on the one hand and does harm to no one. A bailee is allowed his lien; for his labour must be remunerated. Compare also other cases of lien: the partner's lien, Coote on Mortgage, 615; Lindley on Partnership, 3rd Ed., 70. Consider the nature of the lien which a puisne encumbrancer has—*Gokaldas* v. *Puranmal Das* (8). The under-tenants' lien is explained in s. 13, cl. 4, Reg. 8 of 1819. See, also Beng. Act VIII of 1869, s. 62. The same principle is maintained in the Bengal Tenancy Act—s. 171 of that Act. See *Nogenderchunder Ghose* v. *Kamini Dasi* (9); *Doddington* v. *Hallet* (10); *Featherstone* v. *Mitchell* (11); *Hamilton* v. *Denny* (12). [MITTER, J.—*In re Leslie* (13) is somewhat against you.] *Ram* [**815**] *Dut Singh* v. *Horakh Narain Sing* (14); *Nobin Chunder Roy* v. *Rup Lall Das* (15). The authority of *Enayet Hossein* v. *Muddunmoonee Shahoon* is not shaken by *Kristo Mohini Dasi* v. *Kaliprosono Ghose* (4). The latter case overlooks the fact that one co-sharer has an interest in the land of the other co-sharer.

The *Advocate-General* in reply.—When a puisne mortgagee pays off a prior mortgagee he must make a declaration that he wants to keep it up. The case of a co-tenant is different from that of a co-partner. As to lien, see also *Moran* v. *Mittu Bibee* (16).

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(1) S.D.A. (1856) 867. (2) Marsh 226. (3) 11 M.I.A. 258.
(4) 8 C. 402. (5) 21 Beav. 536. (6) 2 V. and B. 242.
(7) B.L.R. Sup, Vol. 675=7 W.R. 377. (8) 10 C. 1035.
(9) 11 M.I.A. 241 (260). (10) 1 Ves. Sen. 497
(11) 11 Irish Equity Cases, 35, 44. (12) 1 Ball and Beatty 199.
(13) L.R. 23 Ch. Div. 552. (14) 6 C. 549=8 C.L.R. 209.
(15) 9 C. 377. (16) 2 C. 58 and 83.

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The judgments of the Full Bench were as follows:—

JUDGMENTS.

MITTER, J.—After carefully considering the arguments addressed to us in this case, I retain the opinion which I expressed in *Enayet Hossein alias Dhunnoo Mea* v. *Muddunmoonee Shahoon* (1). In the majority of cases as observed in that decision, a contrary view would result in injustice. Generally a co-sharer defaults to pay his quota of Government revenue when he is in insolvent circumstances. In these cases a mere personal decree against the defaulting co-sharer would be useless. On the other hand, if the principle laid down in that case be adopted, I cannot conceive of any instance in which injustice is likely to be done to any party. In cases not governed by any particular legislative enactment, Courts in this country are directed by the Legislature to act according to justice, equity and good conscience. It seems to me that if in this case we give effect to a principle which prevents injustice in many cases and in no conceivable case operates unjustly, which has been acted upon for more than 12 years and which had been adopted by the Legislature in cognate subjects, we shall be strictly following the direction of the Legislature referred to above. In *Enayet Hossein* v. *Muddunmoonee Shahoon* (1), Mr. Justice Markby and myself to a great extent relied upon a dictum of the Judicial Committee of the Privy Council in *Nogender Chunder Ghose* v. *Kamini Dasi* (2). It has been suggested that that [**816**] dictum was intended to be applicable to payment of Government revenue by a *mortgagee only*. It is true that in that particular case the payment of revenue was made by a mortgagee, but it seems to me that the dictum was laid down in terms wide enough to include any person who is interested in making it. If it was intended to be applicable to payment of Government revenue by a mortgagee only, I imagine it was also intended not to give to the mortgagee in respect of this payment any right superior to that which he has under the mortgage. Thus if a second mortgagee makes the payment, he would not be entitled to priority over the first mortgagee in respect of such payment. But that that was not intended is clear from the express language of the dictum. It says: "Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the taluk as entitled him to pay the revenue due of the Government and did actually pay it, was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of the money so paid." According to this dictum, therefore, a person, who makes the payment under the circumstances mentioned there, is entitled to a charge for the money paid "*as against all persons interested therein.*" It follows, therefore, that if a second mortgagee makes the payment, he would be entitled to a charge for the money paid by him as against the first mortgagee. This is exactly the principle upon which certain Irish cases, to which I shall refer hereafter, have been decided. Then, again, in describing the class of persons who would be entitled to a charge by payment of Government revenue, their Lordships used the expression: "That the person who had such an interest in the taluk as entitled him to pay the revenue, &c." This description is wide enough to include all persons

(1) 14 B.L.R. 155. (2) 11 M.I.A. 258.

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interested in making the payment. The judgment of the Judicial Committee was delivered by Lord Romilly, then Master of the Rolls, and it has been said that his Lordship, in deciding cases in his own Court, has disapproved of the doctrine which it is contended has been [817] laid down by the dictum in question. But no English case has been cited before us showing that he entertained a different opinion. It seems to me that in holding that a person who is interested in protecting the property by payment of Government revenue is entitled to a charge by making the payment "*as against all persons interested therein*," his Lordship has put it on the principle of a salvage lien. The Legislature in this country has also adopted this principle in the last two Bengal Tenancy Acts. It was for the first time recognized in Reg. VIII of 1819, s. 13, which enacts that money advanced by an under-tenant to protect the superior putni taluk from sale "shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means (*i.e.* by payment), and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage." In the sale law of 1845, a personal remedy was given to persons who are not co-sharers, and who are interested to pay the revenue to protect their interest. In the sale law of 1859, the same provision was made with this addition, that in the case of a holder of a lien the amount paid by him "shall be added to the amount of the original lien." In the Rent Act of 1869, s. 62 extends the provisions of s. 13 of Reg. VIII of 1819, cited above, to payments made by non-defaulting under-tenants to save the superior tenure from sale. The last enactment on this subject is contained in s. 171 of the Bengal Tenancy Act, 1885, which provides that the amount paid in order to prevent the sale of a tenure or holding by a person having an interest in it, which interest would be voidable upon the sale thereof, "shall be deemed to be a debt bearing interest at 12 per centum per annum, and secured by a mortgage of the tenure or holding to him. It further provides that this "mortgage shall take priority of every other charge on the tenure or holding other than a charge for arrears of rent." It was contended before us that the sale laws of 1845 and 1859 giving only a personal remedy, the intention of the Legislature was that an owner of a fractional share of a zemindari should not be deemed to have acquired a [818] charge upon the remaining share for saving the whole zemindari by the payment of Government revenue. Adopting this argument the Sudder Dewany Adawlut in *Gobindpersaud Pundit* v. *Mussummat Soonduri Kunwar Debia* (1), and the High Court in *Fagan* v. *Sreemotee Dasi* (2) decided against the existence of this lien. The decision of the Judicial Committee in *Nogenderchunder Ghose* v. *Srimati Kamini Dasi*. (3), cited above, was passed in appeal against this latter judgment of the High Court. Having regard to the dictum laid down by the Judicial Committee and extracted above, it is clear that their Lordships did not approve of this argument. They observe: "This section (*i.e.*, the section in the sale law of 1845 bearing upon this subject) clearly authorizes the personal action, but it gives no remedy against the land which it leaves to the then existing law."

In passing I may remark that the two cases from the Sudder decisions of 1850 and 1852, referred to in the course of the argument, have no direct bearing upon the question under our consideration. This was

(1) S. D. A. (1856) 867. (2) Marsh. 266. (3) 11 M.I.A. 258.

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the state of the case-law on the subject when *Enayet Hossein* v. *Muddunmoonee Shahoon* (1) was decided. The principle laid down in this decision was acted upon in *Nobin Chunder Roy* v. *Rup Lall Dass* (2), decided by McDonell and Field, JJ., in *Ram Dutt Singh* v. *Horakh Narain Singh* (3), decided by Maclean, J., and myself, in *Mohesh Chunder Banerji* v. *Ram Prosunno Chowdhry* (4), decided by Jackson and Tottenham, JJ., and in *Deo Nundun Agha* v. *Deshputty Singh* (5), decided by Jackson and White, JJ. At first sight the case of *Mohesh Chunder Banerji* v. *Ram Prosunno Chowdhry* (4) does not seem to touch the question under our consideration; but on a closer analysis of the judgment, it would appear that it not only affirms the principle in *Enayet Hossein's case*, but goes further, though in the same direction. The facts of that case are these. The plaintiffs, appellants, were the holders of a bond executed by defendants [**819**] Nos. 1 and 17, in which a putni taluk was hypothecated as a security for the loan. The taluk belonged to the defendants Nos. 1 to 40. On the 13th of May, 1875, *i.e.*, on a date subsequent to the bond, the putnidars made default to pay rent to the zemindars. The taluk was advertised for sale under Reg. VIII of 1819. The plaintiffs, in order to protect their interests as mortgagees, paid the rent. In may, 1876, Messrs. Gisborne & Co., who were also made defendants, are alleged to have deposited a certain amount of money in order to save the taluk from being sold in execution of a decree in a suit brought by the zemindars against the putnidars. They were assignees of a dur-putni interest in the taluk. The plaintiffs sought to recover the sum advanced under the bond, as well as the sum advanced by them to protect the putni from sale. The lower Court decreed the claim covered by the bond against the defendants Nos. 1 to 4, 17, 18, 19 and 22, *i.e.*, against persons who signed and made the bond, and those, who being co-parceners in the property mortgaged, by their presence and acquiescence were held to have taken part in the transaction. As to the rest of the claim, the lower Court held that the payments were voluntary, and that the plaintiffs acquired no charge upon the putni taluk in respect of them. In appeal to this Court by the plaintiffs it was contended on behalf of Messrs. Gisborne & Co., respondents, that the payment made by them being the last payment made for the purpose of saving the taluk, was entitled to priority on the principle applicable to bottomry bonds. This Court held that the decree regarding the claim covered by the bond was right; but the learned Judges were of opinion that the payments made by the plaintiffs to protect the sale of this land under the putni sale law were not voluntary payments, but consituted a good charge on this property, and it makes no difference for this purpose whether the suit upon the bond is followed by a decree as against all the defendants sued or against a part of them. They further directed an enquiry into the claim put forward by Messrs. Gisborne & Co. Now it seems to me that, in declaring the payments made to save the putni as a charge upon the *whole* taluk and not only upon that portion which was found to [**820**] have been mortgaged, the learned Judges affirmed the principle laid down in *Enayet Hossein's case*, and in directing an enquiry into the claim of Messrs. Gisborne & Co., they went further in the same direction by indicating their inclination of opinion that the rights

(1) 14 B.L.R. 155. (2) 9 C. 377. (3) 6 C. 549=8 C.L.R. 209.
(4) 6 C.L.R. 28. (5) 8 C.L.R. 210 note.

of the parties claiming such a charge should be regulated by the principle of salvage lien. Unless that was the inclination of their opinion, it would have been unnecessary to direct a further enquiry into the claim of Messrs. Gisborne & Co., because that claim consisted of payments made subsequent to those made by the plaintiffs. The learned Judges were evidently inclined to the opinion that the payment alleged to have been made by Messrs. Gisborne & Co., though made last in point of date, should be deemed to have priority over the earlier payments made by the plaintiffs. Referring to these cases, Sir Charles Sargent, Chief Justice, and Mr. Justice Birdwood, in *Achut Ram Chundra Pal* v. *Hari Kanti* (1), said (page 319): "We think the Calcutta decisions to which we have referred as recognizing a charge in those cases in which the assessment is paid by a part-owner to save the estate, are in accordance with equity, justice, and good conscience, and should be followed in this country." The only case in which a doubt has been expressed as to the existence of any such charge as that contented for is *Kristo Mohinee Dasi* v. *Kaliprosono Ghose* (2). But that case was decided upon other points which rendered it unnecessary to decide the question under our consideration. Mr. Justice Pontifex in delivering his judgment says: "Had it been necessary to deal with this question, we would certainly have referred it to a Full Bench, for we are not, as at present advised, at all satisfied as to the correctness of those decisions. They no doubt enunciate what at the first blush seems to be an attractive and catching equity, but it is difficult to see on what foundation such an equity could rest. Mr. Pugh has attempted to support the cases referred to, on the authority of certain Irish cases which are treated as insurance cases. It is sufficient with respect to those cases to say that there is a substantial difference between them and the present case. In all of those cases the person who claimed the lien was [**821**] previously interested in the estate which his payment went to save. But in the present case *A* had no interest in *B*'s share of the share originally held by *A* and *B*, and it may be remarked that none of the Irish cases go the length of establishing a personal liability." If what is enunciated in those cases at the first blush seems to be an attractive and catching equity, then, unless it is shown that in some cases it results in injustice, there would be no substantial ground for rejecting it after it has been acted upon in our Courts for several years. If it had been simply an attractive and catching equity, the Legislature in this country would not have adopted it in the recent Bengal Tenancy Act, 1885. I shall show hereafter that three is no substantial difference between the Irish cases referred to above and the present case. In ordre to give rise to the equity it is not necessary that *A* should have an interest in *B*'s share, but it would be sufficient, as held by their Lordships of the Judicial Committee in *Nogender Chunder Ghose's case*, if *A* has such an interest in the taluk owned by him and *B* as would entitle *A* to pay the revenue due to the Government. The foundation for such an equity is, as I have already stated, that if it be not acted upon it would result in injustice in many cases, and its adoption does not operate unjustly in any conceivable case. This appears to me to be a sufficient foundation for it, especially when the Legislature in this country has approved of it and enunciated it in s. 171 of the Bengal Tenancy Act, 1885. It would be only reasonable to suppose that if it were not well founded, it would not

(1) 11 B. 313. (2) 8 C. 402.

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have been adopted by the Legislature in the analogous case of payment of rent.

In the reference order it is stated that English Courts of Equity do not seem to act upon such a rule as was laid down in *Enayet Hossein's case*, and in support of this proposition *Ex parte Young* (1), and *Kay* v. *Johnston* (2) have been referred to. In *Ex parte Young* the facts were these: Two of the part-owners of a ship became bankrupts and their share in the ship was sold by the assignee. Young for himself and other part-owners applied out of these sale-proceeds for a [822] liquidated amount due to them by the bankrupts, who were the managing owners, for freight and earnings after deducting expenses on an account being taken. This application was based upon the contention that the part-owners of a ship, though tenants in common, are entitled to consider it as a chattel used in the partnership and as liable to be dealt with as partnership effects. This contention was overruled. It seems to me that this decision does not touch the question under our consideration. In *Kay* v. *Johnston* (2), the plaintiff and the defendants were joint-owners and in joint-occupation of a house. The plaintiff advanced to the defendants some money which was spent in the house in decorations and improvements. It was decided that the plaintiff was not entitled to a lien on the share of the defendant, in respect of money which was originally his but was advanced to the defendant and laid out by him in the decorations and improvements of the house. This case is distinguishable from the present case. Here the plaintiff was not compelled to pay any money for the protection of his interest in the house. It was paid quite voluntarily to improve the house. Such voluntary payment could not reasonably be held to be a charge on the house. These are the only two cases referred to in the course of the argument in order to establish that English Courts of Equity have refused to act upon the principle laid down in *Enayet Hossein's case*. But it seems to me that they do not conflict with it. On the other hand, there are English and Irish cases which lend considrable support to the decision in *Enayet Hossein's case*. In *Hibbert* v. *Coke* (3) a tenant for life of real estates, under a Will spent money in finishing a mansion house which the testator had left unfinished. In a suit for administering the trusts of the Will, the Court directed an enquiry whether it was for the benefit of all parties interested that the mansion house should be finished, and said if it was found for the benefit of all parties interested that the mansion house should have been finished, and there was no personal estate applicable, the expense should be a charge upon the real estates. In *Shearman* v. *British Empire Mutual Life Assurance Company* (4), [823] it was held that the premiums paid by a mortgagor of a policy of insurance after he became bankrupt were in the nature of salvage money, and ought to be repaid with interest at Rs. 4 per cent. out of the money covered by the policy. In *Kehoe* v. *Hales* (5), an encumbrancer agreed to advance a sum of money to preserve the lands of *K* from eviction for non-payment of rent, and took a security by deed affecting the lands of *K* and other lands for the repayment of the money so to be advanced. She afterwards paid the rent and redeemed the lands of *K*. It was held that under the circumstances she was entitled, as against a person who was an encumbrancer on the lands at the time when they were redeemed,

(1) 2 V. and B. 242. (2) 21 Beav. 536. (3) 1 S. and S. 522.
(4) L. R. 14 Eq. 4. (5) 5 Ir. Eq. 597.

to be paid the sum advanced in priority; and that as full effect could not be given to her security by deed she was remitted to her lien. In *Featherstone* v. *Mitchell* (1), the plaintiff, a decree-holder, while the property of the judgment-debtor was in the hands of a receiver for satisfaction of his decree, made advances for payment of the head-rent with the sanction of the Court and thereby saved the property. It was found for some reasons, which it is not material to state here, that he was not entitled as decree-holder to sell the property during the life-time of the debtor. It was held that as a salvager, though not as a decree-holder, he was entitled to sell the property and realize his salvage advances from the proceeds of the sale. In *Locke* v. *Evans* (2), a sub-tenant who had redeemed his landlord's interest by advances for head-rent, filed a bill for the sale of that interest, and subsequently made further advances for the same purpose. It was held that these several advances constituted the first charge on the landlord's interest in priority to incumbrances prior in date, and that the salvager was entitled to a sale for payment. In *Hamilton* v. *Denny* (3), a lease was granted to *A* and *B* as joint tenants. *B*'s moiety of the property had been settled by him. A payment of the renewal fines made by *A* was held to be a charge upon *B*'s settled share. *In the matter of Tharp* (4) Lord St. Leonards, referring to these [824] Irish cases, said: "In Ireland it is a very common equity to have as a prior charge to all other encumbrances what is called salvage money:—where a lease-hold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagegees according to certain priorities, the last man of all who is entitled after everybody being in possession redeems, I may say, the estate bv paying the landlord, who otherwise would have recovered the estate and taken it from everybody; this payment is what is called salvage money. That is an established equity and a very proper equity. He that pays the salvage has a prior encumbrance to every other charge and interest, because, so far as any interest is left to anybody beyond a charge, it is acquired by that payment in the shape of redemption money." Mr. Fisher, the author of a well-known treatise on the Law of Mortgage, says in his recent edition "that the lien is also allowed in respect of advances in the nature of salvage, namely, such as are made for the redemption of property for renewal fines or other payments made by way of salvage; and then whether he who pays the money fills the character of a trustee, joint tenant, tenant for life, or mortgagee or other creditor, and even though if he claimed to be a creditor his debt is disputed, he has a lien on the estate or interest of the person for whose benefit the payment was made in the property discharged," paragraph 216. The learned author cites several cases in support of his opinion. He cites also a recent case, namely, *Leslie* v. *French* (5), which to a certain extent conflicts with his opinion. In this last mentioned case there is this peculiar feature, that the person who paid the money in the nature of salvage had a prospect of becoming the sole owner of the property saved by right of survivorship. Conceding, however, that this case is against the contention in favour of the existence of a lien, yet there is, as I have shown above, a strong array of authorities in support of it. On the whole I am of opinion that the question referred to us should be answered in the affirmative. I may notice, however, that there is another question which calls for decision in these cases, namely,

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(1) 11 Ir. Eq. 35. (2) 11 Ir. Eq. 52. (3) 1 Ball and Beatty 199.
(4) 2 Sm. & Giff. 579. (5) L. R. 23 Ch. Div. 564.

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whether a *bona fide* purchaser for value without notice would be affected by a charge of this kind if it exists. I am inclined to [825] answer this question in the negative, but as it has not been referred to us, I do not think it necessary to say anything more upon it.

NORRIS, J.—I concur in the judgment just delivered by my brother Mitter. I express no opinion upon the question whether a *bona fide* purchaser for value without notice would be affected by a charge of this kind.

WILSON, J.—The question we are asked is, whether a part-owner of an estate who pays the whole Government revenue, thereby obtains a charge upon the share of his co-owner to the extent of the latter's share of the revenue. There is no statutory provision giving such a charge; if it exists, it must be by virtue of a broad principle of equity. It is clear, I think, that there can be no difference between the right of a part-owner and that of a tenure-holder, or other person having an interest in the estate; and it is clear, I think, that there can be no difference between one who pays Government revenue, and one who makes any other payment necessary to save the estate. And the contention before us has been in favour of the broad proposition that a payment of Government revenue, or any other payment necessary to save the estate, if made by one having an interest which would be sacrificed by the loss of the estate, gives a charge on the estate for the money paid. We have to say whether any such rule of equity is in force in this country.

In England it is, I think, now settled that no such general rule exists. A mortgagee, if he has to make payments necessary for the preservation of the mortgaged property, or even in some cases for its improvement, may add them to the amount covered by his security. There are some other special cases, such as that of trustees, in which a like lien may arise apart from contract. But even in the case of a mortgagee the right conceded by English law is a very different one from that now contended for: according to the English doctrine, as I understand it, the mortgagee of an undivided share of an estate who paid the whole revenue to save his lien might add the amount to his charge, thus increasing the extent of his lien on the share of his own mortgagor, whereas by the doctrine now contended for he also acquires a new lien upon the shares of the other part-owners; [826] and, except in the case of a mortgagee and the few other excepted cases, payments of the kind in question give rise to no charge. I do not think it necessary to examine the English authorities at large, for that has been done and the law explained by Fry, L.J., in *In re Leslie* (1), and by the Court of Appeal in *Falcke* v. *Scottish Imperial Insurance Co.* (2). In the latter of these cases the doctrine of what has been called salvage lien, acted upon in some Irish cases, is I think authoritatively rejected.

In this country it has long been well settled that one part-owner, paying the whole Government revenue, may sue his co-owner for contribution, though the precise process of reasoning by which the conclusion should be arrived at was not always very satisfactoriliy stated. The matter was explained in the judgment of a Full Bench of this Court delivered by Peacock, C.J., *Ram Buksh Chittangeo* v. *Modhusudan Pal Chowdhry*, (3). But it was settled law in the Court of Sudder Dewany that the right of the part-owner in such a case was limited to a personal suit

(1) L. R. 23 Ch. Div. 552.
(2) L. R. 34 Ch. Div. 234.
(3) B. L. R. Sup. Vol. 675=7 W. R. 377.

for contribution and carried no charge on the estate. In *Andrew* v. *Harris* (1), it was held that a part-owner of an estate could not recover from his co-owner arrears of Government revenue which accrued due before the latter acquired his share, whereas if the doctrine contended for were true, he could do so to the extent of the value of his share. In *Sone Kolee Kunwar* v. *Sheik Ezhas Hossein* (2) the same thing was again held. In *Gobindpershad Pundit* v. *Soonduri Kunwar Debia* (3), it was held that a tenure-holder who paid Government revenue had no preferential lien on the zemindari. In *Manik Mulla Chowdhrain* v. *Parbuttee Chowdhrain* (4), the same Court in explaining that the case before it fell under a different principle said: "We have always held that the decree for contribution which a proprietor in an ijmali estate obtains against his co-proprietors is a personal decree, in **[827]** the sense that it conveyed no lien on the estate binding against third parties, such as would have been derived from a decree under s. 13, Regulation VIII of 1819."

In 1867 the case of *Nogendra Chunder Ghose* v. *Kamini Dasi* (5) came before the Privy Council. The circumstances of the case were somewhat complicated, and it is unnecessary to examine them for the present purpose; it is enough to say that before the Judicial Committee it was argued that the appellant, the representative of a mortgagee, was entitled as against the respondent, the representative of the mortgagor, to a lien upon the mortgaged property for Government revenue paid to save the estate. What was actually decided was that, as the suit was framed, the question could not be raised in that suit. But at page 258 of the report we find it said: "Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the taluk as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of the money so paid." This dictum of the Privy Council has not the weight of a decision, but it is of course entitled to the most careful consideration. In applying it the first thing obviously is to ascertain the precise meaning of the observation. And upon the best consideration I have been able to give to the subject I do not think we should be justified in applying the dictum of their Lordships to any case except one similar to the case before them, which was the case of a mortgagee. I think so first, because of the context in which the words I have cited occur. The learned counsel, who argued the case for the appellant, according to the report, stated the question which he asked the Judicial Committee to answer in the affirmative as follows: "Whether the heir of the mortgagee paying arrears of Government revenue to save the estate from sale for arrears which the mortgagor's widow allowed it to fall into, is not entitled under Act No. I of 1845, s. 9, to a lien or charge on the **[828]** mortgaged estate." The dictun of their Lordships, which I have already cited, occurs on page 258 of the report. On the next page, and in almost the next sentence, it is said: "There were two courses open to her (the plaintiff); she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save

(1) S. D. A. (1852) 697.
(2) S. D. A. (1855) 44.
(3) S. D. A. (1856), 867.
(4) S. D. A. (1859) 515.
(5) 11 M. I. A. 244.

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the estate, and to have the estate sold to pay that amount, or she might have proceeded under the ninth section of Act No. I of 1845." Thus an examination of the report of the case tends in my judgment to show that the observation of the Judicial Committee ought to be understood as applicable to a case such as the one before it, the case of the mortgagee. I am led to the same conclusion by another consideration. Two of the decisions of the Court of Suddar Dewany on the subject in question were cited before the Privy Council. And to my mind it seems improbable that their Lordships can have intended by a *dictum*, in a case argued only on one side, and without assigning any reasons, to overrule, or suggest the propriety of overruling, a current of decisions of the Court of Sudder Dewany, and introduce a rule of equity so broad as that in support of which their words have been cited.

Since that decision of the Privy Council this matter has on several occasions come before this Court. In *Enayet Hossein* v. *Muddunmoonee Shahoon* (1), one of the sharers of an estate sued the persons interested in the other shares and asked, amongst other things, to have it declared that Government revenue, which he had paid in respect of the defendants' shares and to save the estate, was a charge on these shares. MARKBY and MITTER, JJ., held that it was so charged. Those learned Judges based their decision mainly upon the dictum of the Judicial Committee which I have cited. I have already given my reasons for thinking that that dictum is not applicable to such a case. In *Ram Dutt Singh* v. *Horakh Narain Singh* (2), MITTER and MACLEAN, JJ., applied the same rule in a case in which the plaintiff, who held one mouzah of a revenue-paying estate under a ticca lease and by *bai-bil-wafa*, sued the owner of another mouzah of the same estate in [829] respect of revenue that he had paid. The decision carried the matter somewhat further than the former decision had done. But I have no hesitation in thinking that it did so rightly if the former decision was right, for I can see no distinction between the two cases. In *Mohesh Chunder Banerji* v. *Ram Prosono Chowdhury* (3), a similar charge was allowed, but that was the case of a mortgagee, and I cannot say positively from the report whether a lien was given on anything more than the subject-matter of the mortgage. In *Kristo Mohini Dasi* v. *Kali Prosunno Ghose* (4), GARTH, C. J., and PONTIFEX, J. expressed strongly their dissent from the view taken by this Court on the matter in question, but it was not necessary in that case to arrive at any decision. In *Nobin Chunder Roy* v. *Rup Lall Das* (5), McDONELL and FIELD, JJ., followed the decision in *Enayet Hossein* v. *Muddunmoonee Shahoon;* the opinions of GARTH, C. J., and PONTIFEX, J., in the case just mentioned, do not appear to have been referred to. In a very recent case in the Bombay High Court which has appeared since the argument of this case, *Achut Ram Chunder Pai* v. *Hari Kamti* (6), SARGENT, C. J., and BIRDWOOD, J., expressed their concurrence in the same view, but the point was not strictly necessary for the decision of the case, for on the facts the learned Judges held that no such rule as that in question found place.

Although there is no statutory enactment directly affecting the precise case now before us, which is that of a part-owner, there are some enactments which have, I think, a material bearing upon the existence of the general principle of equity contended for. In Regulation VIII

(1) 14 B. L. R. 155.
(2) 6 C. 549=8 C. L. R. 209.
(3) 4 C. 539.
(4) 8 C. 402.
(5) 9 C. 377.
(6) 11 B. 313.

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of 1819, the Putni Regulation, s. 13, it is enacted that if a putni taluk is about to be sold for non-payment of the rent due to the zemindar, any of the talukdars of the second degree may pay the amount and stop the sale. And "if the person or persons making such a deposit in order to stay the sale of the superior tenure shall have already paid the whole of the rent due from himself or themselves, so that the amount lodged is an advance [830] from private funds, and not a disbursement on account of the said rent, such deposit shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto." Bengal Act VIII of 1869, s. 62, applied the provisions of the Regulation just cited to the case of a tenure about to be sold under that Act, and the payment of the rent by "any one interested in the protection of the under-tenure." And now by the Bengal Tenancy Act VIII of 1885, s. 171, somewhat similar protection is given to "any person having in a tenure or holding advertised for sale" "an interest which would be voidable upon the sale," who pays "the amount requisite to prevent the sale." I do not think any strong inference can be drawn from such enactments as these, either for or against the general principle contended for. I certainly think none can safely be drawn in favour of it; otherwise we should be led to the strange conclusion that wherever the Legislature has made a protective provision of this nature in a particular instance, we should have to infer from the very fact of its having been made that it is useless, because we should have to infer the existence of a general principle governing the case and rendering the specific enactment unnecessary.

The provisions of Act XI of 1859 have, I think, a much closer bearing upon the question before us. Section 9 of that Act says: "The Collector, or other officer as aforesaid, shall at any time before sunset of the latest day of payment determined according to s. 111 of this Act, receive as a deposit from any person, not being a proprietor of the estate or share of an estate in arrear, the amount of the arrear of revenue due, to be credited in payment of the arrear at sunset as aforesaid, unless before that time the arrear shall have have been paid by a defaulting proprietor of the estate. And in case the person so [831] depositing, whose money shall have been credited in the manner aforesaid, shall be a party in a suit pending before a Court of Justice for the possession of the estate or share from which the arrear is due or any part thereof, it shall be competent to the said Court to order the said party to be put into temporary possession of the said estate or share, or part thereof, subject to the rules in force for taking security in the cases of parties in civil suits. And if the person so depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said person, which would have been endangered or damaged by the sale, or which he believed in good faith would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit, with or without interest as the Court may determine, from the defaulting proprietor. And if the party so depositing, whose money shall have

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been credited as aforesaid, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate or share or part thereof, the amount so credited shall be added to the amount of the original lien." The corresponding s. 9 of Act I of 1845 was in similar terms, except that it did not contain the last clause about lien. It could not of course be contended that an enactment which purports expressly to confer a narrow and limited right, of necessity excludes a larger right, if the existence of the larger right is clearly established apart from the special enactment. But where the existence of a larger right is not clear but highly doubtful, I think the express creation of the narrower right tends strongly to negative the existence of the larger. In s. 9 the Legislature dealing with two classes of persons says that one of them shall have a personal right of suit, and that the other shall have a lien besides. I think the inference is that the Legislature intended the section to represent the law, and that seems to me to go far to negative the doctrine new contended for, by which both classes alike would have a lien. So too when in the same section it is said that if the holder of a lien pays the revenue, "the amount shall be added to the amount of the original lien." I think the inference is that [832] that is the lien which the Legislature intended him to have, a lien on the interest of his own mortgagor, not as now contended a general lien on all the interests in the estate. I have not overlooked the fact that the case of a part-owner is not dealt with in s. 9, nor, except in a particular instance, in s. 15, expressly dealth with at all. But the doctrine contended for is general.

The matter appears to me to stand thus: I think it is settled that according to the rules of equity in force in England, no such lien as that contended for exists. The same rule was consistently applied in the Court of Sudder Dewany. The recent cases in this country, in which a different view has been taken, have been based upon what seems to me a misapprehension of the meaning of the dictum of the Privy Council in the case referred to. And there are strong indications of an intention on the part of the Legislature inconsistent with such lien. We are not, under these circumstances, in my opinion, at liberty to treat the matter as if it were *res integra*, and, under the name of equity and good conscience, to adopt whatever rule we think most likely to work well. If we were, I should hesitate much before adopting such a rule as that pressed upon us. In the tangle of interests which an estate in this country presents—zemindari rights, tenures, and under-tenures without limit, every one of them commonly held in co-ownership and every share of every interest perhaps subject to mortgages—I cannot pretend to foresee what the consequences may be of broadly laying down such a doctrine as we are asked to do. I am disposed to think it a safer course to leave the Legislature to treat the matter as it may think fit, dealing, as heretofore, with each class of persons as occasion requires, and conferring such liens and subject to such restrictions as may be deemed desirable. I should answer the question referred to us in the negative.

PRINSEP, J.—I concur with the judgment of WILSON, J.

TOTTENHAM, J.—I now feel constrained to concur in the view expressed in Mr. Justice Wilson's Judgment. For, on the one hand, it is clear that the law of England does not recognize the lien which the plaintiff seeks to establish in this case; [833] and on the other hand, it was not recognized in this country until the principle was affirmed in *Enayet*

Hossein's case (1) and the decision in that case as well as those in which the principle has since been followed are based upon a dictum of the Judicial Committee in the *ex parte* appeal of *Nogendra Chunder Ghose* v. *Kamini Dasi* (2). I was myself a party to one of the judgments of this Court in which effect was given to that dictum—*Mohesh Chunder Banerjee* v. *Ram Prosunno Chowdhry* (3). But I am bound to say that the further consideration which I have now had to give to the question has satisfied me that I too readily accepted that dictum as implying more than I now think their Lordships can have intended. The case was that of a mortgagee, as was also that in which I was one of the Judges who affirmed the principle now in question. But I think now that it is at least extremely doubtful, for the reason stated by Mr. Justice Wilson, whether their Lordships intended to commit themselves in that case to the opinion that a co-owner of an estate, by the payment of the Government revenue which he is bound by law to pay, thereby acquires a lien upon the whole estate of his co-sharers for the amount paid, which he is by equity entitled to enforce against it after it has passed by sale to a stranger. The proposed equity is so attractive and has been so powerfully supported in Mr. Justice Mitter's judgment, while it has also been approved by such authorities as the High Courts of Bombay and Allahabad, that it is somewhat difficult to me to resist it; but nevertheless I cannot quite persuade myself of its soundness. I would, therefore, answer the question in the negative.

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K. M. C. *Appeal decreed.*

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14 C. 834=12 Ind. Jur. 152.

[**834**] CRIMINAL MOTION.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF THE PETITION OF BASUDEB SURMA GOSSAIN AND ANOTHER.*

BASUDEB SURMA GOSSAIN *v.* NAZIRUDDIN.

[8th August, 1887.]

Criminal Procedure Code, 1882, s. 517—Order as to property as to which offence has been committed—Discharge of accused.

On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate under s. 517 of the Criminal Procedure Code ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government: *Held,* that the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal and must be set aside. In setting it aside the High Court held, however, following *In re Annopurna Bai* (4), that they had no power to order restitution of the elephant.

[**F.**, 5 Bom. L. R. 25; 4 L.B.R. 14; **R.**, 18 A.W.N. 40; 14 C.P.L.R. 60; 30 C. 690=7 C.W.N. 634; **R. & Expl.**, 25 C. 630 (634).]

THE petitioners were the Government lessees of certain Government mehals, and were charged under ss. 403 and 176 of the Penal Code, and s. 7 of Act VI of 1879, with the criminal misappropriation of an elephant. The Extra Assistant Commissioner of Tezpore, before whom they were

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* Criminal Motion No. 22 of 1887, against the order passed by Baboo Madhub Chunder Bordolai, Extra Assistant Commissioner of Tezpore, dated the 22nd of December 1886.

(1) 14 B. L. R. 155.
(2) 11 M. I. A. 241.
(3) 6 C. L. R. 28.
(4) 1 B. 630.

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brought, ordered their discharge, and made an order under s. 517 of the Criminal Procedure Code that the elephant should be made over to the Executive Engineer of the district, on the ground that it was the property of Government.

The petitioners now moved the High Court under s. 439 of the Criminal Procedure Code to set this order aside.

Baboo *Ambica Churn Bose*, for the petitioners.

Baboo *Ram Churn Mitter, contra.*

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

JUDGMENT.

Two persons were brought before the Extra Assistant Commissioner, a Magistrate of the first class at Tezpore, charged with [835] criminal misappropriation of an elephant. They were discharged. The Magistrate, however, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer, Durrung, holding that it was the property of Government, and the elephant has consequenty been made over to that officer by the police. We are of opinion that the Magistrate was not competent to pass this order under s. 517 of the Criminal Procedure Code, because the elephant was not property produced before him regarding "which any offence had been committed or which had been used for the commission of any offence," the Magistrate having held that no offence was committed regarding this animal. We, therefore, set aside this order, although we are unable to give it any effect by ordering the restitution of the elephant. In this matter we follow the case of *In re Annopurna Bai* (1.) The rule is made absolute without costs.

J. V. W. *Rule made absolute.*

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14 C. 835.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

PUNCHANAN MULLICK (*Plaintiff*) *v.* SHIB CHUNDER MULLICK AND OTHERS (*Defendants*).* [15th July, 1887.]

Partition, Suit for—Partial partition—Jurisdiction of High Court, Original Side—Properties situate partly within and partly without jurisdiction.

On the Original Side of the High Court a suit for partition of joint estate, part of the property of which estate is situate within and part without the jurisdiction (there having been no leave granted under s. 12 of the Charter to sue concerning the portion outside the jurisdiction) is not liable to be dismissed on the ground that partial partition of a property cannot be granted, but may be decreed as far as the property within the jurisdiction is concerned.

Ruling of Jackson, J., in *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (2) explained.

[F., 22 B. 922 (927).]

THIS was a suit by one Punchanan Mullick for partition of certain properties formerly belonging to his great uncle Gour Kissore Mullick.

It appeared that Gour Kissore died in 1831 possessed of, amongst other properties, a pucca godown in Burra Bazaar, Calcutta; an [836] upper-romed house in Banstollah Street, Calcutta; some garden land in

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* Suit No. 96 of 1887.

(1) 1 B. 630. (2) 22 W. R. 333

Tiljullah in the suburbs of Calcutta; and a family dwelling, being No. 46, Banstollah Street, Burra Bazar, Calcutta; and that he by will left to his eight nephews (subject to a life-interest in the family dwelling-house, which had ceased long prior to the date of suit), a one equal ninth share in the above properties, leaving the remaining one-ninth share to two of his great-nephews, Prosonno Kumar Mullick and Mohun Loll Mullick, in equal shares as tenants in common.

The plaintiff asked for partition of the whole of the properties set out above; not having, however, obtained leave under cl. 12 of the Charter to sue in the High Court with respect to the properties situated out of the jurisdiction.

Some of the defendants raised the objection that, part of the property being outside the jurisdiction, and no leave having been obtained under s. 12 of the Charter, the suit was one for partial partition of the properties formerly belonging to Gour Kissore, and would not therefore lie.

The issues framed, which are necessary for the purposes of this report, were as follows:—

(1) Whether the Court has jurisdiction, inasmuch as part of the property is outside the jurisdiction, and no leave has been obtained under s. 12 of the Charter?

(2) Whether the suit is maintainable, inasmuch as it is one for partial partition?

Mr. *Bonnerjee* and Mr. *Garth*, for the plaintiff.

Mr. *Pugh* and Mr. *K. M. Chatterjee*, for one of the defendants.

Mr. *Allen* and Mr. *Abdul Rahman*, for others of the defendants.

Others of the defendants appeared in person.

Mr. *Pugh*:—The suit being one for partition of the whole property, leave should have been obtained under the Chater, so as to include so much of the property as was outside the jurisdiction. Partial partition is not allowable—Menu, Ch. IX, s. 46, and *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1). [TREVELYAN, J.—That is a mofussil case.] As regards that point there is no difference between the jurisdiction of the Original Side of the High [**837**] Court and that of the Mofussil owing to the terms of the Charter. The Courts have unanimously held that partial partition is not allowable. See *Nanabhai Vallabdhas* v. *Nathabhai Haribhai* (2); *Narayan Babaji* v. *Nana Manohar* (3); *Ram Lochun Pattuck* v. *Rughoobur Dyal* (4); *Trimbak Dixit* v. *Narayan Dixit* (5): *Radha Churn Dass* v. *Kripa Sindhu Dass* (6); *Parboti Churn Deb* v. *Pran Kristo Nundi* (7); *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (8); *Ramjoy Ghose* v. *Ram Runjun Chuckerbutti* (9); the only case to the contrary is *Subba Rau* v. *Rama Rau* (10); the case of *Padamani Dasi* v. *Jagadamba Dasi* (11) correctly sets forth the proposition contended for, and that has not been altered by the Charter.

The plaintiffs were not called on.

So far as is necessary for the purposes of the report, the following is the judgment of the Court:—

JUDGMENT.

TREVELYAN, J.—This is a suit for partition, but the real question is one of jurisdiction. Mr. Pugh contended on the first issue that I had no jurisdiction.

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(1) 14 C. 122. (2) 7 B. H. C. 47. (3) 7 B. H. C. 177.
(4) 15 W. R. 111. (5) 11 B. H. C. 69. (6) 5 C. 474.
(7) 9 C. L. R. 170=7 C. 577. (8) 22 W. R. 333.
(9) 8 C. L. R. 367. (10) 3 M. H. C. 377. (11) 6 B. L. R. 134.

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The suit is brought apparently for partition of all the immoveable property formerly belonging to Gour Kissore, but the intention of the plaintiff is really to seek partition of the family dwelling house. It has been contended by the plaintiff that if a person sues for partition of a *portion* of a property held jointly between him and the defendant that suit must be dismissed. Authorities have been cited for this proposition, and there are some on the opposite side.

The key to this proposition, however, is to be found in the case of *Rutton Monee Dutt* v. *Brojo Mohun Dutt* (1), where the plaintiff brought a suit in reality to enable him to separate from the joint estate a small portion which he desired to occupy for his own convenience. This suit was dismissed as being not maintainable, but it was contended on his behalf that, if the claim was not allowable, still he might have a declaration as to the extent of [**838**] his share. Jackson, J., there says: "If the plaintiff sought a declaration like that, he ought to have framed his suit properly for that purpose; he is not entitled, regard being had to the mode in which he framed his suit and the valuation he put upon it, when the main object of the suit failed, to turn round and ask for that declaration." The reason for the dismissal being that in the mofussil there is an *ad valorem* fee for such suits, and if the relief given should be greater than that covered by the plaint, the Government would be a loser in fees.

There is no doubt of this proposition, that if a man sues for partition of joint property and the defendant alleges that there is other property, the plaintiff is bound to submit to partition of all the properties; and if he sued in the mofussil, he would either have to amend his plaint accordingly, and pay the extra stamp duty, or have his suit dismissed. But there 's no *ad valorem* fee in this Court, and as I understand the law, in the absence of authority, if the defendant claims that there is other property to be partitioned, and it turns out that there is other property, that is no reason for the dismissal of the suit. It is a reason for including the other property in the suit if the Court has jurisdiction to deal with such property. Then it appears that one of the properties sought to be partitioned is outside the jurisdiction, and no leave has been granted under the Charter to sue in respect of that property, and it is said that for this reason I must dismiss the suit. The case of *Padmamani Dasi* v. *Jagadamba Dasi* (2) decided by Phear, J., is, I think, an authority as to this point, but if it is not, I should have no difficulty in deciding the case. In *Carrison* v. *Rodrigues* (3), I held that where a person sues in ejectment for properties under the same title, one of such properties being outside the jurisdiction, I can deal with the property within the jurisdiction. There is no authority shown contrary to this view, and the principle is, I think, practically the same in this case. The suit is one for partition of land, and I can deal with so much of the land as is within the jurisdiction. I think, therefore, that I have jurisdiction to deal with this suit. The plaintiff submits to partition [**839**] of the property within the jurisdiction, and that is admittedly joint. There will be a decree for partition of those properties.

Suit partially decreed.

Attorney for plaintiff: Mr. *E. J. Fink*.

Attorneys for defendants: Messrs. *Harris & Simmons*.

T. A. P.

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(1) 22 W. R. 333. (2) 6 B. L. R. 134. (3) 13 C. 115.

14 C. 839.

1887 May 25.

ORIGINAL CIVIL.

Origi-nal Civil.

Before Mr. Justice Trevelyan.

The Delhi and London Bank, Ld. (*Plaintiffs*) *v.* Hem Lall Dutt (*Defendant*).* [25th May, 1887.]

14 C. 839.

Easement—Light and air—South breeze—Limitation Acts; Act IX of 1871, s. 27; Act XV of 1877, s. 26—English Prescription Act, 2 & 3 Will. IV, c. 71—Limitation Act, Effect of on the pre-existing law as to nature and extent of the right to light or air.

The Indian Limitation Act, unlike the English Prescription Act, places light and air on the same footing; and the object of the Prescription Act and of the provisions of the Indian Limitation Act is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easements—a mode independent of legal fiction and capable of easy proof in a Court of law; these Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right.

The only amount of light for a dwelling house which can be claimed by prescription or by length of time (whether prior or subsequently to the Limitation Act of 1871) without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. Rule laid down in *Bagram* v. *Khettranath Karformah* (1) followed.

The right of air is co-extensive with the right to light. To give a right of action, either prior or subsequently to the Limitation Act of 1871, in a case (where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business.

There is no such right as a right to the uninterrupted flow of south breeze, as such.

The "45-degree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory.

[**F.**, 1 S.L.R. 32 (40); **R.**, 8 O.C. 356 (358); 7 Bom.L.R. 352 (381); 3 S.L.R. 36 (42)=1 Ind. Cas. 961; 39 C. 59 (79)=12 Ind. Cas. 60 (62).]

[**840**] This was a suit brought by the Delhi and London Bank against one Hem Lall Dutt, seeking to prevent the erection of a new building on the south side of the premises of the Delhi Bank on a piece of land belonging to the defendant, on the allegation that the erection of such building would materially interfere with the access of light, air, and south breeze hitherto enjoyed by the occupants of the premises of the Bank.

The facts of the case were, that prior to 1836 the premises belonging to the plaintiffs, and a piece of land to the south belonging to the defendant, were both the property of a Mr. Fairlie; and on the 30th March 1836, M. Robert Castle Jenkins (who was a trustee for the sale of amongst other properties these two parcels of land) conveyed one of such parcels to Thomas Sandes and the other of such parcels to Rose Donnelly Mangles, who, on the same date, executed a deed of covenant to produce title deeds, which deed recited the recent purchases by himself and Sandes. On the 28th April 1866, Sandes conveyed the property purchased by him to the Delhi Bank, on which property stood the present house occupied

* Original Civil Suit No. 122 of 1887.

(1) 3 B. L. R. O. C. 41.

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by the Bank, which was one of three stories, the lower and part of the middle flat being used for the purposes of business, and the rest of the middle and the upper flat being used as a dwelling-house. On the 4th January 1837, Mangles conveyed to the grandfather of the defendant the parcel belonging to him (which stood to the south-west and south of the Delhi Bank), and the same was, after being held successively by the grandfather and father of the defendant, allotted to the defendant in 1877 on partition. The premises so allotted consisted of a three storied house, No. 3, Council House Street, together with a plot of land to the east thereof, or south of the premises of the Delhi Bank, on which stood, until shortly before suit, a one-storied building occupied as a shop, which was in height 19 feet from the level of the defendant's land, 87 feet in length from north to south, and 18 feet 6 inches in width from east to west, the northern wall of which abutted on the premises of the Delhi Bank at a distance of about 15 feet from the front of the ground floor verandah of the Delhi Bank. In 1877 the defendant commenced to build a wall along the northern [**841**] edge of his property against the boundary wall of the Delhi Bank, and at a distance of about 14 feet from the outer wall of the Bank's south verandah, and at a distance of about 22 feet 6 inches from the verandah entrance to the southernmost room on the ground floor of the Bank. The attorneys of the Bank at once complained, and the defendant asserted his right to so build, but eventually, at the instance of his tenant, the occupier of the National Bank, desisted from completing the wall. This wall which ran from east to west was about 28 feet 4 inches in length, and was left in an unfinished state and of different heights; it overtopped the old boundary wall belonging to the plaintiffs, which from the plaintiffs' side was about 3½ feet in height, the land on the plaintiffs' side of the wall being about 3 feet higher than the ground on the defendant's side of the said wall by the following varying heights—from about 10 feet 3 inches from its east end by about 9 feet 9 inches, and the next 3 feet 3 inches by 8 feet 9 inches, for the next 2 feet 3 inches by 7 feet 11 inches, and from the next and remaining 13 feet 10 inches by 5 feet 10 inches. In the month of January, 1887, the defendant intimated to the plaintiffs that he intended to erect certain new buildings, 32 feet in height, on the open space of land to the south of the Bank's premises at a distance of 16 feet southward from the plaintiffs' boundary wall; and that he intended to raise his wall then left unfinished to a height of 12½ feet above the boundary wall of the plaintiffs, and also to erect a wall joining the proposed new building with the National Bank, such wall to be 16 feet in height, and to extend from east and west along the entire southern face of the plaintiffs' premises at a distance of from 45 to 50 feet from the boundary wall; to this the plaintiffs objected, and a long correspondence took place between the parties, but the buildings and wall were commenced, and the plaintiffs thereupon brought this suit for the purposes above set out. At the time the plaint was admitted the plaintiffs asked for and obtained an *ad interim* injunction, and likewise obtained a rule calling upon the defendant to show cause why he should not be restrained from continuing the building during the pendency of the suit. This rule and injunction were, however, discharged. The issues raised at the hearing were as follows:—

[**842**] (1) Are the plaintiffs entitled to the use andn access of light, free from obstruction, in the same manner as the same were enjoyed at the date of the conveyances of March 1836, in the plaint mentioned?

(2) How were such use and access of light had and enjoyed?

(3) Are the plaintiffs entitled to the use and access of air, free from obstruction, in the same manner as the same were enjoyed at the date of the conveyances of March 1836, mentioned in the plaint? 1887 MAY 25.

(4) How were such use and access of air had and enjoyed? ORIGINAL CIVIL.

(5) What access of light (if any) to their premises have the plaintiffs acquired the right to by possession or prescription?

(6) What access of air (if any) to their premises have the plaintiffs acquired the right to by possession or prescription? 14 C. 839.

(7) Has there been any actionable obstruction to the plaintiffs' rights, if any?

(8) To what remedy (if any) are the plaintiffs entitled?

(9) To what damages (if any) is the defendant entitled in consequence of the *ad interim* injunction?

The evidence showed that the plaintiffs had acquired a right to access of light and air as an easement, and also had acquired rights by prescription; that the new building of the defendant in no way affected the amount of light or of air or south breeze coming to the top floor of the Delhi Bank's premises; that it in no way interfered with the light to the middle floor, but that it impeded the direct flow of south breeze to that floor, but did not interfere with the access of air thereto, and did not render that floor unfit for the ordinary purposes of habitation; that there had been some trifling diminution of light to the lower floor, but that, after the complete erection of the new buildings, there would still be such an amount of light as could be reasonably necessary for the convenient and comfortable habitation of the lower floor; that the south wind had been shut out from the lower floor, but that there was sufficient adit for light, there being ample space round the ground floor of the Bank; and that the lower floor had not been rendered unfit for the ordinary purposes of habitation or business.

Mr. *Evans*, Mr. *Stokoe*, and Mr. *O'Kinealy*, for the plaintiffs.

[**843**] Mr. *Stokoe*.—As to the first issue: Where a common owner grants contemporaneously to two persons, each grantee has the right to all apparent easements existing at the date of the grant—*Wheeldon* v. *Burrows* (1). The principle is laid down by Lord Justice Thesiger; this case is not quite on all fours with ours. Our case is the same as *Allen* v. *Taylor* (2). The same rule is laid down in *Rigby* v. *Bennett* (3), and *Russell* v. *Watts* (4); as to the difference between an implied grant, and a grant reservated, see p. 584. We say the premises were conveyed on 31st March, 1836, by conveyances granted by Jenkins, ours being from Jenkins to Sandes our predecessor, and the other by Jenkins to Mangles, defendant's predecessor; in our deed there is an express grant of all easements and rights, and there was, at the same time, executed a deed of covenant to produce title deeds, which shows that the sales were contemporaneous, and that each purchaser was aware of the other's purchase. As regards the right to light, where the right to the access and use of light is acquired, the right is to the absolute quantity of light that comes through the aperture; this is subject to the rule that the Courts will not interfere unless the injury is material or substantial; the latter case shows that there is no difference in the right between town or country, nor has the way in which the house was used any bearing on the question; the Courts are more liberal now—*Yates* v. *Jack* (5). I am now on the subject of light, but I

(1) L. R. 12 Ch. D. 31 (49).
(2) L. R. 16 Ch. D. 355.
(3) L. R. 21 Ch. D. 567.
(4) L. R. 25 Ch. D. 573.
(5) L. R. 1 Ch. App. 295.

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contend the same right exists as to air. If we had the south breeze at any time, we are entitled to it still. Lord Cranworth at p. 297 says: "We are entitled to our full quantity of light." In *Dent* v. *Auction Mart Co.* (1), he said there must be a substantial privation sufficient to render occupation of the house uncomfortable to give a right of action; this case also shows the meaning of the word "*beneficially.*" The case of *Martin* v. *Headon* (2) follows the former cases. *Kelk* v. *Pearson* (3) shows that there must be a substantial interference with comfort, and detriment of the lettable value; I shall show that the comfort and value of the house has been affected.

[**844**] *Dyers Company* v. *King* (4) shows that getting light from other directions does not entitle the defendant to block up the south side, and emphasizes the principle that the actual right is to the specific volume of air which has existed previously. *Theed* v. *Debenham* (5) puts the principle of the right to a specific volume of light as being one which the Courts will only enforce in cases of substantial injury. See also *National Plate Glass Insurance Co.* v. *Prudential Insurance Co.* (6); *Moore* v. *Hall* (7) a common law case, recognizes the absolute right by directing nominal damages; the right is to the absolute quantity of light irrespective of the purpose for which it had been used. *Bullen* v. *Dickenson* (8) shows the amount of right to light; also see *Scott* v. *Pape* (9). As to the angle of 45° there is no rule on this matter; it is a question of fact as to whether there is an infringement. *Beadel* v. *Perry* (10) was the first case on the subject. *City of London Brewery Co.* v. *Tennant* (11) shows there is no absolute rule as to 45°. *Hackett* v. *Baiss* (12). *Ecclesiastical Commissioners* v. *Kino* (13) shows that the question is not what degree of light is left, but whether the light has been interfered with, and Brett, L. J., at p. 223, says, the doctrine is contrary to all authorities; also in *Parker* v. *First Avenue Hotel Co.* (14), it is laid down that there is no conclusion of law as to the angle of 45°. The cases show that in such cases as the present the question is as to whether there has been a substantial infraction of light rendering the house less fit for business or less comfortable, and that the angle of 45° at which the light comes in has nothing to do with the question further than being an element for the Court to take into consideration whether the access of light is unduly interfered with.

As to air, the English Act 2 and 3 William IV, c. 71, differs from the Indian Limitation Act, as the latter expressly includes air. In *Dent* v. *Auction Mart Co.* (15) observations are made [**845**] with regard to the difference in the nature of the right to an easement of light and of air; see also *City of London Brewery Co.* v. *Tennant* (11). The case of *Moore* v. *Rawson* (16) shows that the right to air is got by enjoyment, and is on the same footing as light. The right is acquired by mere occupancy. *Webb* v. *Bird* (16) shows that you cannot acquire a right to access of air over an open piece of land for the purpose of a windmill, but the right to an undefined quantity of air over a tenement stands on a different footing from the right to air through a window. The considerations on which the Judges proceeded there do not apply to claims to light and air through certain definite windows

(1) L. R. 2 Eq. 238 (245).
(2) L. R. 2 Eq. 425.
(3) L. R. 6 Ch. App. 809.
(4) L. R. 9 Eq. 438.
(5) L. R. 2 Ch. D. 165 (169).
(6) L. R. 6 Ch. D. 757.
(7) L. R. 3 Q. B. D. 178.
(8) L. R. 29 Ch. 155.
(9) L. R. 31 Ch. D. 554 (572), (575).
(10) L. R. 3 Eq. 468.
(11) L. R. 9 Ch. App. 220.
(12) L. R. 20 Eq. 494 (497).
(13) L. R. 14 Ch. D. 213 (217).
(14) L. R. 24 Ch. D. 282.
(15) L. R. 2 Eq. 235 (250).
(16) 3 B. and C. 332 (336).
(17) 10 C. B. (N. S.) 268.

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and apertures. The case of *Hall* v. *Lichfield Brewery Co.* (1) shows that there is an undoubted right in law to light and air coming to a house through a window for the purpose of beneficially carrying on of business or for sake of health. See also Goddard on Easements, 3rd Ed., 38, 39; see also *Bryant* v. *Lefever* (2) where a claim to access of wind to a chimney could not be claimed as a natural right of property; but it seems it could be claimed as an easement. These cases show how the English law on the question of air stands, but here we are not in the same position in India; there is a right to access of air against an adjoining tenement when the right can be claimed by implied grant, but we are here in a stronger position, as the Legislature has recognized a right to access of both light and air by the Limitation Act, and under that Act the same principles apply to both light and air; the words the right to access of light " shall be absolute and indefeasible " are identical with the words in the English Statute, and the interpretation of those words shows what the right is, and the same interpretation is to be put on the right to air in India—*Nandkishor Balgovan* v. *Bhagabhai Pranvalabhdas* (3). The case of *Modhoosoodun Dey* v. *Bissonath Dey* (4) is one to which the common law of England was supposed to apply, but I submit the same view would not be taken now-a-days. Mr. Justice Markby refers to the difference between the requirements [**846**] of India and England with regard to light and air, but the Legislature by the Easement Act have declared what their opinion is on the subject. The Act, although not in force in Bengal, may be used to show the meaning the Legislature put on the Limitation Act. They have adopted in the Easement Act the easement sections of the Limitation Act, and have embodied therein the rules of English law as laid down in the cases I have cited; and having accepted the law of England with regard to light they have also done so with regard to air. The right to air is the same as the right to light, but the extent is dependent on what it is proper to enjoy, and what it is proper and reasonable that the owner of the servient tenement should be bound to sumbit to. The case of *Advocate-General of Bengal* v. *Surnomoye Dossee* (5) points out that, although certain bodies of English law are recognized as governing British India, that law must be applied with due regard to the two countries, and the same principles apply to this case. The construction of the English Act in *Yates* v. *Jack* (6) should be applied to the Indian Limitation Act as regards air. Lord Cranworth says: " The right is indefeasible irrespective of the particular mode of enjoyment made use of." The obstruction of light can be remedied, but not so the air.

Mr. *Woodroffe*, Mr. *Hill*, and Mr. *Handley*, for the defendant.

Mr. *Hill*.—The case as stated in the plaint suggests a difference in the nature of the extent of the right sought to be supported founded on the varied origin of these rights. I say that, although the origin may be different, the nature and extent is the same. [Trevelyan, J.—The objects and reasons of the Easement Act say that an obstruction with regard to right to air must amount to a nuisance (*Gazette of India*, 27th November 1880, p. 542). I think I may use the objects and reasons for the purpose of seeing what is the law at the time.]

" Prescription " is defined in Gale, p. 151. In Goddard's book, p. 113 after showing five modes of acquiring easements, the author says it is .

(1) 49 L. J. Ch. 655. (2) L. R. 4 C. P. D. 172 (179). (3) 8 B. 95.
(4) 15 B. L. R. 367. (5) 9 M. I. A. 387. (6) L. R. 1 Ch. App. 295.

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question whether they are not all referable to grant. Mr. Justice Fry, in *Dalton* v. *Angus* (1), draws a distinction between positive and negative easements, but whether [847] the right lies in grant or in a restrictive covenant is immaterial as far as the extent of the right is concerned. *Dent* v. *Auction Mart Co.* (2) imported the common law rule into equity, that is, that a man is entitled to so much light as is necessary. The history of the Prescription Act is given by *Cockburn*, C.J., in *Angus* v. *Dalton* (3). The English Prescription Act did not change in any way the nature of the easement, but only supplied a new means of proof; it only dealt with existing rights. The nature of the right to light is shown by *Kelk* v. *Pearson.* (4); that case agrees that the Prescription Act has not altered the extent and nature of the right to air; the case is referred to and is not dissented from in *Pape* v. *Scott* (5), where Bowen, L.J., says "they are only entitled to so much as is necessary for the use and occupation." *Leech* v. *Shewder* (6) shows that the right by prescription or grant does not alter the nature of the right. Mr. Stokoe has contended the cases show a change in the law as to the nature of the right; his contention is supported only by incorrect head-notes and inaccurate statements used by the Judges.

In *Yates* v. *Jack*, the head-note is not supported by the judgment. *Dent* v. *Auction Mart Co.* (7) approves of *Back v. Stacey*, and shows what the extent of the right infringed is *Martin* v. *Headon* does not deal with the amount of light acquired, but only with the amount necessary to ground an action. In *Dyers Co.* v. *King* (8) the right is stated to be only what was necessary.

In *Theed* v. *Debenham* (9), Bacon, V. C., has defined the right as an absolute right of property; he only refers to such rights as the Courts will protect.

In *National Plate Glass Insurance Co.* v. *Prudential Insurance Co.* (10), Fry, L. J., assents to the judgment of Lord Chelmsford.

Before the Act in India there was no right to air, except when the interference with it became a nuisance. When the right to [848] air was recognized by Statue, it was only intended to give that same right to air. All the Act did was to recognize the same easement of air as had previously existed. In *Moore* v. *Hall* (11) the only question decided was, whether there was any interference with the light for any purpose for which it might be reasonably used. With regard to the argument that the law has been altered, I say that *Kelk* v. *Pearson* is not touched by *Tapling* v. *Jones* (12). The judgment there shows that all that the Prescription Act did was to alter the presumption of proving the right. [Trevelyan, J.—The English Act does not extend the right, nor, therefore, does the Indian Act. I shall start from Sir Barnes Peacock's case as far as air is concerned, as before 1871 there was no right to south breeze.

Luttrell's case (13) shows that the law laid down in *Yates* v. *Jack* is not new law; a change in the windows did not effect the right; the whole point is, has there been an abandonment? In *Moore* v. *Rawson* (14) the same position is taken up. The cases cited by Mr. Stokoe show that, in order to ascertain whether a right is abandoned, you must see whether the new light is different from the old one. The limits of

(1) L. R. 6 App. Cas. 771. (2) L. R. 2 Eq. 235 (250). (3) L. R. 3 Q. B. D. 103.
(4) L. R. 6 Ch. App. 809. (5) L. R. 31 Ch. D. 570. (6) L. R. 9 Ch. 472.
(7) L. R. 2 Eq. 238. (8) L. R. 9 Eq. 441. (9) L. R. 2 Ch. D. 169.
(10) L. R. 6 Ch. D. 765. (11) L. R. 3 Q. B. D. 178. (12) 11 H. L. 290.
(13) 4 Coke 87. (14) 3 B. and C. 332.

Luttrell's case are defined in *Newson* v. *Pender* (1). In *Scott* v. *Pape* (2) the Judges were only comparing the new and old windows; they do not say the extent of the right is to all the light that comes, they were only dealing with the question as to whether the new windows had the whole light which passed through the old windows; the head-note is therefore wrong. In *Greenwood* v. *Hornsey* (3) the Judge merely quotes the head-note of *Pape* v. *Scott*, and misinterprets the decision; besides the only question in the case was abandonment—*Chandler* v. *Thompson* (4). The case of *East India Co.* v. *Vincent* (5) shows that the old law as to abandonment is the same as at present. *Simper* v. *Foley* (6) shows the right to light is retrospective; it therefore shows the Prescription Act does not alter the nature and extent of [849] the right. The Prescription Act does not use the words "as of right." *Truscott* v. *Merchant Tailors Co.* (7), and *Frewen* v. *Philipps* (8), show that the enjoyment need not be as of right. *Flight* v. *Thomas* (9), *arguendo* the user should have been accompanied by an assertion of right; under the Limitation Act the enjoyment must be "as of right."

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The words "as of right" mean everything that one is entitled to. Now what is the right by way of easement? In *Embery* v. *Owen* (10) Parke, B., says the right to light is of exactly the same nature, and this was approved of in *Orr Ewing* v. *Colquhoun* (11). [TREVELYAN, J.—The same remarks are made in *Hall* v. *Lichfield Brewery Co.* (12).] Mr. Stokoe has said the later cases show that the right acquired is absolute, and will not be interfered with unless substantial damage is done; that comes exactly to what I say, *viz.*, that the right is not absolute; if it were it would be protected as in *Ashby* v. *White*.

As to the angle of 45° there is no such rule of law; each case must depend on its own circumstances. The 45° rule in London was a sufficient and fair basis to act on; the rule has only been adopted from the Statute, it does not follow that the same basis is suitable for India. The case of *Clement* v. *Meloney*, suit No. 271 of 1883, decided by Wilson, J., was a suit for obstruction of light to ground floor windows; the obstruction was 18 feet from the house, and the defendant was raising a wall 17 feet 9 inches at that distance from the house; it was found that the windows were ancient lights and the Court found that 45° of light was not obstructed, there being 60° left unobstructed. Mr. Justice Wilson says: "The 45° rule is not a rule of law, nor a presumption of fact until it is shown to be applicable;" and pointed out that the mere fact of shutting out the sky was nothing. In our case the 45° is clear. If I am right in saying the nature and extent of the right to light is not altered by the Prescription Act, then I am right in saying the nature and extent of the right to air is not altered either.

Mr. *Stokoe* in reply.—The head-note in *Scott* v. *Pape* is [850] correct; the same point has since been decided in *Theed* v. *Debenham* (13). *Buller* v. *Dickenson* (14) cannot be supported on any other view than that the dominant tenement's owner is entitled to the whole of the light from the servient tenement. It is true that in *Scott* v. *Pape* the question was whether there had been an abandonment, but to decide that question, the

(1) L. R. 27 Ch. D. 60 (2) L. R. 31 Ch. D. 554 (3) L. R. 33 Ch. D. 475.
(4) 3 Camp. 80. (5) 2 Atk. 83. (6) 2 J. and H. 555.
(7) 11 Exch. 864. (8) 11 C. B. N. S. 449. (9) 11 A. and E. 695.
(10) 6 Exch. 367. (11) L. R. 2 App. Cas. 855. (12) 49 L. J. Ch. 655.
(13) L. R. 2 Ch. D. 165. (14) L. R. 29 Ch. D. 155.

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quantity of light previously enjoyed was considered. *Greenwood* v. *Hormsey* (1) stands without *Scott* v. *Pape*. *Allen* v. *Taylor* shows that where conveyances are contemporaneous existing easements pass to purchasers. *Glover* v. *Coleman* (2) shows it is true that the enjoyment must be one of 20 years ending from institution of suit.

The trees are not an obstruction within the meaning of the Act; it must be an obstruction by a person; the Act is a remedial one, and in terms is very different from English Statute. See *Rajroop Koer* v. *Abul Hossein* (3) as to this. The case of *Bagram* v. *Kettranath Karformah* (4) is consistent with a decision in our favour if on the facts our comfort is interfered with.

JUDGMENT.

TREVELYAN, J.—In this suit the plaintiff Bank seeks to prevent the erection of a new building on the south side of their premises on a piece of land belonging to the defendant, and complains that the erection of such building will materially interfere with the access of light and air heretofore enjoyed by the occupants of the Bank premises.

The issues raised by counsel, and settled by me at the hearing, were as follows:—

(1) Are the plaintiffs entitled to the use and access of light free from obstruction in the same manner as the same were enjoyed at the date of the conveyances of March 1836, mentioned in the plaint?

(2) How were such use and access of light had and enjoyed?

(3) Are the plaintiffs entitled to the use and access of air free from obstruction in the same manner as the same were [851] enjoyed at the date of the conveyances of March 1836, mentioned in the plaint?

(4) How were such use and access of air had and enjoyed?

(5) What access of light (if any) to their premises have the plaintiffs acquired the right to by possession or prescription?

(6) What access of air (if any) to their premises have the plaintiffs acquired the right to by possession or prescription?

(7) Has there been any actionable obstruction to the plaintiffs' rights if any?

(8) Two what remedy (if any) are the plaintiffs entitled?

(9) To what damages (if any) is the defendant entitled in consequence of the *ad interim* injunction?

It was agreed at the hearing that in case I should determine this suit in favour of the defendant, I should not try the 9th issue, but should refer the question of damages to an officer of the Court.

It appears that prior to March 1836, the premises now belonging to the plaintiffs, and the piece of land to the south, which now belongs to the defendant, were both the property of the same person, a Mr. Fairlie.

On the 30th of March 1836, Robert Castle Jenkins, who was a trustee for the sale of, amongst other property, these two parcels of land, conveyed the portion, now occupied by the Delhi Bank, to Mr. Thomas Sandes.

On the same day he conveyed to Mr. Ross Donnelly Mangles the other premises which are now owned by the defendant.

On the 28th of April 1866, Mr. Sandes conveyed to the Delhi Bank the premises now occupied by the Bank.

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(1) L. R. 33 Ch. D. 471.
(2) L. R. 10 C. P. 108.
(3) 7 I. A. 240.
(4) 3 B. L. R. O. C. 41.

On the 30th of March 1836, Mr. Mangles executed a deed of cove- nant to produce title deeds. This deed recited the recent purchases by himself and Mr. Sandes. **1887** MAY 25.

In 1877 the defendant commenced to build a wall along the nothern edge of his property adjoining the property of the Bank. ORIGINAL CIVIL.

The attorneys of the Bank immediately wrote and complained of this wall. The defendant asserted his right to build, but, eventually at the instance of his own tenant, the National Bank, [**852**] he desisted from completing the wall. The wall was left in an unfinished state and of different heights. It ran from the north-west corner of a long godown which filled up the eastern side of the defendant's premises up to a distance of about 28 feet 4 inches. **14 C. 839.**

This new wall overtopped the old boundary wall, which from the plaintiffs' side was about 3½ feet in height, by the following varying heights—from about 10 feet 3 inches from its east end and by about 9 feet 9 inches, and the next 3 feet 3 inches by 8 feet 9 inches, for the next 2 feet 2 inches by 7 feet 11 inches, and from the next and remaining 13 feet 10 inches by 5 feet 10 inches.

This wall undoubtedly must have lessened the value of the plaintiffs' premises, as it shut out the direct breath of the south breeze from the greater portion of the lower floor of the Bank's house. It also must have excluded some of the direct sunlight. This wall has played an important part in the hearing of this suit, but, in the view which I take of this case, I think that its importance has been exaggerated. Nothing more was done until the present year, when the defendant proposed to erect the buildings now in question. Some correspondence then took place, the new buildings were commenced, and the present suit resulted. In admitting the plaint Mr. Justice Macpherson issued a rule calling upon the defendant to show cause why he should not be restrained from continuing the building during the pendency of the suit, and he also granted an *ad interim* injunction. For reasons which I gave at the time, I discharged the rule and the *ad interim* injunction. The building has been continued, and is now, as I understand it, approaching completion.

A great many cases have been cited to me by both sides. On a con- sideration of those cases I do not think that there is any doubt about the law in this case. Mr. Stokoe insists that the tendency of recent deci- sions is to show an expansion or development of the law in a direction favourable to the owner of the dominant tenement. I do not agree with this contention, as it appears to me on an examination of the cases that the right has not been in reality extended at all. Most, if not all, of the cases referred to are cases in which there has been an alteration in the dominant tenement, and [**853**] it was necessary to compare the opening in the old and the new buildings and the amount of light and air gaining access to each over the servient tenement. But even if there were in these cases observations tending to show that the law had altered in the way suggested, I think I am bound by the case of *Bagram* v. *Khettranath Karformah* (1), in which the law at the time (1869) was authoritatively laid down by a Division Bench of this Court hearing an appeal from the original side. This decision, it seems to me, concludes any question, as far as a Judge sitting on the original side of this Court is concerned, as to what was the law before the passing of the Limitation Act of 1871.

(1) 3 B. L. R. O. C. 18.

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As to how the present Acts have altered the law, which existed before the passing of the Act of 1871, I will hereafter consider.

Apart from any question under the Limitation Act, and apart from an express grant, it seems to me that easements of light and air, however acquired, do not vary so far as their extent and operation are concerned.

There is no doubt that where a person grants a portion of his land, reserving a portion to himself, he grants with it all the easements and *quasi*-easements which had been formerly used over the part reserved by the part granted, and which were necessary thereto. There is also no doubt that where contemporaneously an owner, as was done here, grants two portions of his land to each of two persons, each having notice of the grant to the other, the easements and *quasi*-easements are also granted. For the first proposition the case of *Wheeldon* v. *Barrows* (1) is an authority, and for the second the case of *Allen* v. *Taylor* (2).

These cases do not show that the easements of light and air, which are impliedly granted under these circumstances, are in their extent any greater than easements acquired by prescription.

The case of *Leech* v. *Schweder* (3) is an authority for the contrary proposition, and holds that a person who acquires an easement by the disposition of the owner of two tenements only acquires it to the same extent as if he had acquired it by prescription.

[854] Apart from any question as to the effect of the Limitation Acts of 1871 and 1877, it is clear what the rights to light and air are. The right to air was before the passing of the first of those Acts as Mr. Justice Norman put it in *Bagram* v. *Khettranath Karformah* (4): " To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business." There are numbers of authorities for this proposition both in England and in this country.

I think there can be no doubt that at any rate before the passing of Act IX of 1871, there was no right to the south, or any other, wind as such. In *Bagram* v. *Khettranath Karformah*, at page 47, Sir Barnes Peacock, the then Chief Justice, says: " I am of opinion that by the use of the south window uninterruptedly for upwards of 20 years, the plaintiff did not acquire a right to enjoy the south breeze without obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by prescription arising from user, whether the presumption is a presumption of prescription or not," and this alleged right to the south wind is also repudiated by Mr. Justice Peterson in the case of *Barrow* v. *Archer* (5).

The right to light is in *Bagram's case* at page 46 put by Sir Barnes Peacock as follows: " But the only amout of light for a dwelling-house which in my opinion can be claimed by prescription, or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house."

For this proposition there is an abundance of English authorities, and there is also the case of *Modhoosoodun Dey* v. *Bissonauth Dey* (6).

(1) L. R. 12 Ch. D. 31.
(2) L. R. 16 Ch. D. 355.
(3) L. R. 9 Ch. D. 472.
(4) 3 B. L. R. O. C. 45.
(5) 2 Hyde 125 (129).
(6) 15 B. L. R. 361.

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Now as to the Limitation Acts. The first Act which has any bearing on this subject is Act IX of 1871. The preamble to that Act recites that it is expedient to provide rules for acquiring [**855**] ownership by possession. The recital in the Act of 1877, the easement section (26) of which is identical with the easement section (27) of the Act of 1871, recites that it is expedient to provide rules for acquiring by possession the ownership of easements and other property.

Section 27 of Act IX of 1871 is as follows: "Where the access and use of light or air to and from any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption and for twenty years,...............the right to such access and use of light or air ....shall be absolute and indefeasible." I agree with Mr. Stokoe that the Indian Act, unlike the English act, places light and air upon the same footing, and if the English cases show that the effect of these words (which are similar to the words in the English Prescription Act) is to enlarge the right of the dominant tenement as far as light is concerned it follows that they also extend the right of air.

But I do not think that this is the real effect of the English cases. The object of the Prescription Act and of these provisions in the Limitation Act was not to enlarge the extent and operation of the easement, but to provide another and more convenient mode of acquiring such easements—a mode independent of any legal fiction and capable of easy proof in a Court of Law. In *Kelk* v. *Pearson* (1) Lord Justice James distinctly holds that the Prescription Act has in no degree whatever altered the pre-existing law as to the nature and extent of the right, and Lord Justice Mellish said that he entirely agreed with the opinion expressed by Lord Justice James that the Prescription Act 2 and 3, William IV, c. 71, has not altered the nature of the right to light and air.

I am not aware that this decision has ever been dissented from, and I do not think that there is anything in any subsequent case which in any way reduces the value of this decision. In the case of the *City of London Brewery Co.* v. *Tennant* (2) Lord Selborne expressly approved of this decision, and Lord Selborne's decision was approved of by Hall, V.C. in [**856**] *Lady Stanley of Alderley* v. *The Earl of Shrewsbury* (3). The case of *Leech* v. *Schweder*, to which I have before referred, is also an authority for this same proposition. Mr. Stokoe has relied upon expressions seeming to show that the owner of the dominant tenement is entitled to the whole amount of light which, for the prescribed time, has passed to him over the servient tenement, but these expressions are most of them to be found in cases where the only question for decision simply necessitated a comparison between the light passing through an old aperture and that passing through a recently erected aperture. Besides, these expressions are, I think, to be taken with the qualification which, as it expresses the legal right, must be taken as being always understood, namely, that the owner was only entitled to so much of the light as is reasonably necessary for the comfortable habitation of the dominant tenement. All these expressions show that the owner of the dominant tenement is entitled to every portion of the light to which he has acquired a legal right, even though he may have altered the apertures through which the light comes to him.

I may here, before I go on to examine the evidence and to decide whether there has been any actionable obstruction, make some observations with reference to the wall of 1877. In the view which I take of the

(1) L. R. 6 Ch. 809. (2) L. R. 9 Ch. Ap. 212. (3) L. R. 19 Eq. 616.

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law and of the evidence, the existence of this wall is not material, but so far as the Bank has acquired an easement by lapse of time or by virtue of the Statute, this wall limits such right, as the Bank cannot have acquired a greater right to light and air than it has enjoyed since the building of that wall. The wall may also in one aspect of the case have affected the rights which the Bank obtained by implied grant, on the principle of the cases of *Weldon* v. *Burrows* and *Allen* v. *Taylor*.

The wall has been in existence for nine years, and I do not think that a Court would compel the defendant to pull it down or would restrain him from erecting a building which would not obstruct more light and air than was obstructed by the wall of 1877.

[**857**] Under the circumstances I think that the Bank may be taken to have acquiesced in the existence of that wall, and that even if the wall be taken to be a continuing injury, no specific relief would be granted in respect of it. [See Specific Relief Act of 1877, s. 56, cl. (*b*)].

Now as to the obstruction: There is no doubt whatever that the complaint that the new building injures the top floor of the Delhi Bank is purely fanciful, and that the injury (if any) is not such that the law can remedy.

The new building in no way affects the amount of light, or of air, or even of south breeze, which comes to the top floor of the Bank's premises. There may be a little glare, and as the air will pass over heated masonry when the wind is from the south, the breeze will be a little heated when it reaches the premises of the Bank, but this is not an injury which can be remedied by the law. So long as he does not interfere with any easement acquired by the Bank, the defendant is entitled to use his land in a lawful and proper way, and to erect a building thereon.

As to the middle floor there is also very little difficulty. There can be no doubt that there is no interference with the light of the middle floor. Mr. Osmond, the chief witness for the plaintiff Bank, says that he does not think that, as regards light, the higher portion of the new building would interfere with the plaintiffs' light. He is there speaking of the lower floor of the Bank. *A fortiori*, the higher portion of the new building would not affect the light of the middle floor. As the top of the lower portion of the new building is lower than the floor of the middle story of the Bank, it follows that the lower portion of the new building cannot affect the light of the middle storey of he Bank.

Now as to the air of the middle floor. There is no doubt that the south breeze cannot now find its way directly to the middle floor to the same extent as it did before the erection of the new buildings; but as I have pointed out before, the cases prevent me from giving effect to any asserted right to a south breeze as such. The higher part of the new building is some way off the middle floor, and there is no doubt that there is ample free room for an abundant supply of air to come to the middle floor of the Bank's premises. A glance at the models and plans put in this case [**858**] will immediately show that the new buildings do not interfere with the access of air to the middle floor in the sense that access of air is used in the cases. The access of wind is interfered with, it is true, but it is impossible for me to hold that the middle floor has been rendered unfit for the ordinary purposes of habitation or business. The chief contest in this case has been with reference to the lower floor. I am assuming throughout in dealing with this case that the plaintiffs have acquired a right to access of light and air, whatever the extent of that right may be. There is no doubt, I think, that under the conveyance of 1836

they acquired this easement, and that they have also acquired rights by prescription. As to this there is evidence as to the time that the windows have existed, and there is no doubt that with the exception of Matthewson's godown there was no building on that portion of the defendant's land, which lies to the south of the Bank premises. They have, I find acquired rights of light and air, but not to the extent which they pretend. Has there been an actionable interference with the plaintiffs' right to light to the lower floor of the plaintiffs' premises? I think not.

There is no doubt here that 45° of sky are unobstructed. In *Beadel* v. *Perry* (1), which was, as far as I know, the first case in which what is known as the 45° rule was enunciated, the Vice-Chancellor, Sir John Stuart, says this: " It seems to me that where, opposite to ancient lights, a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obstruction of the ancient lights as to make it necessary for this Court to interfere by way of injunction."

This is, it is true, not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. Of course where lights are closed up by high buildings at the sides, this rule may not be applicable, but here there is no circumstance of that kind.

The plaintiffs' evidence on this head is of two descriptions: first, evidence that it is now necessary to light candles about half an hour earlier than before; and, secondly, evidence as to an experiment **[859]** which was conducted by Mr. Apjohn, Mr. Mills, and others. This experiment was not sufficiently carefully made to make it of much value. The persons who have given evidence with regard to it are those who remained inside. No one who actually saw what was being done with the tarpaulins while the experiment was in progress has been called. It is impossible to be certain that the tarpaulins were kept at the right height throughout the time that the experiment was being made.

The evidence as to the candles does not come to very much. Mr. Ward, who is the only witness who speaks to the actual use of candles, has had to use them on two cloudy evenings. He would probably have had to use candles on those evenings even if the new buildings had not been put up.

Some witnesses speak to the probable diminution of light, but their evidence is practically of no use to me in determining this question. There may have been some trifling diminution of light, but I do not think it amounts to a material diminution. I think that enough is still left for the convenient and comfortable habitation of the lower floor of the house.

On this question the observations of Lord Cranworth in the case of *Clarke* v. *Clark* (2), which was followed in the case of *Robson* v. *Whittingham*, at page 442 of the same volume, are of value. *Yates* v. *Jack*, at page 295 of the same volume, which was much relied upon by Mr. Stokoe, does not affect either of these decisions.

The evidence does not to my mind show any substantial diminution of the light, and I think that I can fairly apply the 45 degree principle to this case. To use the words of Sir Barnes Peacock in the case I have referred to, I am of opinion that the plaintiff Bank will have, even after the complete erection of the new buildings, such an amount of light as is

(1) L. R. 3 Eq. 465.

(2) L. R. 1 Ch. Ap. 16.

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reasonably necessary for the convenient and comfortable habitation of the lower floor of the house.

Now as to the air on the lower floor. The doctors have differed a good deal as to this. They are equally divided, but I think that, on seeing what amount of open space there is in front of the [860] verandah of the Bank, it is not difficult to come to a conclusion on this question.

As I have pointed out before, I can give the plaintiff relief in this respect. I must find that the obstruction is such as to render the house unfit for the ordinary purposes of habitation or business. There is a good deal of evidence to show that the south wind has been shut out from the lower floor. This question is one which Sir Barnes Peacock's decision prevents me from entering into. Mr. Justice Peterson in *Barrow* v. *Archer* (1) says: "The right of air is co-extensive with the right to light, and I am of opinion that where there is sufficient adit for light, it will be presumed there will be sufficient adit for air."

As I have found that there is sufficient adit for light, this decision would conclude the case; but apart from this, I think it clear that there is ample space round the ground floor of the Bank, and there being this space, I cannot find the lower floor of the Bank has been rendered unfit for the ordinary purposes of habitation or business.

The plaintiffs' witnesses seem to ignore every mode of ventilation except the direct breeze. This, I think, is clearly wrong. There are other means of ventilation of which probably the principal one in this case is aspiration, as there will be a breeze over the new building and also up Fancy Lane. During the limited time in the year when the south breeze is blowing the lower floor may not be so pleasant a habitation as a room into which the south breeze is blowing directly, but this consideration is far removed from the present question.

Except that it has kept out the south breeze, I do not think that the new building has made any difference in the air. When the wind is not from the south I do not think the new building will make any difference at all in the atmosphere of the ground floor or will make it a less comfortable habitation.

The whole case for the plaintiffs is that they are entitled to the south breeze. Failing in this practically they fail in the rest of the case so far as the air is concerned.

There has been a good deal of evidence given on both sides with reference to the trees in the plot of land to the south of the Bank. [861] In the view which I take of the case, I need not consider that evidence.

My finding on the issues is as follows: On the first and second issues I find that the plaintiffs are entitled to so much of the use and access of light over the defendant's premises as is reasonably necessary for the comfortable habitation of their premises.

On the third and fourth issues I find that the plaintiffs are entitled to so much of the use and access of air over the defendant's premises as may be necessary to prevent those premises being rendered unfit for habitation or business.

On the fifth issue I find that the plaintiffs have acquired by prescription the access of the amount of light mentioned in my answer to the first and second issues.

(1) 2 Hyde 129.

On the sixth issue I find that the plaintiffs have acquired by prescription the access of the amount of air mentioned in my answer to the third and fourth issues. 1887 MAY 25.

On the seventh issue I find that there has been no actionable obstruction to the plaintiffs' rights, and accordingly I find in answer to the eight issue that the plaintiffs are entitled to no remedy. ORIGINAL CIVIL.

The ninth issue will be referred to the Registrar. The suit must be dismissed with costs. 14 C. 839.

Suit dismissed.

Attorneys for the plaintiffs: Messrs, *Watkins & Co.*

Attorneys for the defendants: Messrs. *Morgan & Co.*

T. A. P.

[NOTE.—An appeal from this decision was filed, but was withdrawn before it came on for hearing.—Ed.]

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14 C. 861=12 Ind. Jur. 179.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

GRISH CHUNDER ROY (*Plaintiff*) v. BROUGHTON AND OTHERS (*Defendants*).* [12th August, 1887.]

Hindu Law, Widow—Accumulations by Hindu widow—Accumulations, period up to which they may be dealt with—Probate, Effect of—Legacy to Hindu widow—Executor, Power of, before Hindu Wills Act—Evidence Act (I of 1872), s. 41—Probate Act (V of 1881), ss. 2, 149.

The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not [862] affected by the fact that she may receive them in a lump sum; but whether she receives them as they fall due or after they have accumulated in the hands of others her right is the same.

The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate, she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate; but if she has evinced no such intention, she can, at any time during her life, deal with the profits.

Where she invests her income making a distinction between the investments and the original estate, she can at any time thereafter deal with such investments, save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate.

Section 41 of the Evidence Act is applicable to probates granted prior to the passing of the Hindu Wills Act.

[R., 20 C. 433 (442) (P.C.); 11 O.C. 310 (314).]

ON the 16th November 1856, one Nobocoomar Mullick died, leaving him surviving a widow Badamcoomary, four daughters, Surrutcoomary, Soudaminey, Kadambinee and Surbonosa, and also a younger brother, Shama Churn. Nobocoomar by his will made the following amongst other dispositions: "My wife shall receive for her food and clothing and

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* Original Civil Suit No. 64 of 1887.

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for expenses, religious acts, and the appointed voluntary religious observances, one lac of rupees," and should my executor Shama Churn, my youngest brother, have more than two sons within eight years from this date, in that case such son shall be made my adopted son; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years, power is reserved of adopting up to the extent of a third time; should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me, of Company's paper and lands and houses and gardens and so forth, the whole real and personal estates will be received by my youngest brother Shama Churn."

[**863**] Probate of the will was granted by the Supreme Court to Badamcoomary and Shama Churn. At the expiry of the eight years from the death of the testator, no second son had been born to Shama Churn, and disputes having arisen between Badamcoomary and Shama Churn regarding the estate of Nobocoomar Mullick, Shama Churn claiming to be solely entitled to the said estate, and to the surplus income thereof which had accrued thereto, and had accumulated during the period of eight years, it was on the 14th August, 1866, agreed between Badamcoomary and Shama Churn that the latter should pay to the former the sum of Rs. 2,89,000 in lieu of all her claims to such accumulated income, which payment was duly made, and a release given therefor. On the same date a further sum of Rs. 24,000 was paid to Badamcoomary by Shama Churn in consideration of her giving up her right to reside in the family dwelling house. On the same date Shama Churn paid over to Badamcoomary the legacy of one lac of rupees and the interest accrued thereon, which amounted to Rs. 62,450, the recitals in the release being worded as follows:—

" And whereas I have consented and agreed to live separately from the family of the said Shama Churn Mullick, and with that view I have agreed to accept from the said Shama Churn a sum of Rs. 24,000 in lieu of and for and by way of compensation and consideration of and for my absolutely relinquishing my right to live in the said family dwelling house of my deceased husband: And whereas it has been agreed that I should take and receive the said sum of Rs. 2,89,000 in full payment, discharge and satisfaction of all claims I have or had on my said deceased husband's estate in respect of the said accumulations therefor, and I the said Badamcoomary have accordingly agreed of my own free will to accept and take that sum in full payment, discharge and satisfaction of all claims on the estate of my said deceased husband, and in consideration thereof to waive all rights and claims I had or may have to an account of the same." Out of the aforesaid sums of Rs. 1,00,000, Rs. 62,450, and Rs. 24,000, Badamcoomary purchased, for a sum of Rs. 35,000, a house No. 59, Chitpore Road, and established in the said house certain family idols.

[**864**] On the 12th July 1886, Badamcoomary endorsed and made over to Mr. L. P. D. Broughton the Government Paper representing the sums abovementioned, and created therewith two deeds of trust, one being a deed of trust of the Government Paper representing Rs. 2,89,000, and the other a deed of dedication of the house and premises, No. 59, Chitpore Road, and of the balance of the sums (after purchase of the house thereat at a price of Rs. 35,000) of Rs. 1,00,000, Rs. 62,450 and Rs. 24,000.

The deed of trust directed Mr. Broughton as trustee to hold the sum of Rs. 2,89,000 in trust, to pay the income thereof to Badamcoomary for life, and after her death to hold the principal and interest in trust for Grish Chunder Roy for his own absolute use aid benefit; it being thereunder recited that it was intended that the interest of the said Grish Chunder Roy in the said Government Securities should vest in him upon the execution of the deed. The deed further provided for payment of a proper sum to the guardian of Grish Chunder for his maintenance during his minority. The deed of dedication directed Mr. Broughton as trustee to hold the house and the Government Notes abovementioned in trust, to allow Badamcoomary during her life, as shebait of the idols, to reside in the house No. 59, Chitpore Road, and to set apart out of the said Government Promissory Notes a sum of Rs. 10,000 for the extension and repairs of the said house, and to pay the income of the residue to her as shebait for life, and after her death to the shebait for the time being; and that from and after her death until the trust funds of the deed of trust (abovementioned) should be indefeasibly vested in some person, the person for the time being entitled under the said deed of trust to the trust funds, should be the shebait of the idol.

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Badamcoomary died on the 7th September 1886, and thereon the properties mentioned in the said deeds of trust and dedication became vested in Grish Chunder Roy.

Grish Chunder Roy, in accordance with certain provisions set out in the said two deeds, applied to the trustee, through his guardian, for such maintenance as would be in the discretion of the trustee fit and proper for his support, and also for the payment of a certain sum which had become necessary for the [865] repairs of the house No. 59, Chitpore Road, and for the necessary performance of ceremonies in honour of the idol.

Mr. Broughton having left India (having empowered Mr. Marsden to act for him, in, amongst other matters, the matter of these trusts), Mr. Marsden declined to make any payments to the guardian for the maintenance, education or establishment of Grish Chunder Roy, inasmuch as the daughters with sons of the late Nobocoomar were disputing Badamcoomary's right to deal with the property of her late husband otherwise than in the manner in which such property could be dealt with by a Hindu widow, and had already given instructions for the filing of a plaint to set aside the deeds of trust made by Badamcoomary.

Grish Chunder, through his father, thereupon brought the present suit against Mr. Broughton to have it declared that he was entitled to the maintenance and establishment given him under the deeds of trust and dedication, and asking that a fit and proper sum might be paid to his guardian for that purpose.

Subsequently to the filing of this suit Surrutcoomary and Soudaminey were added as parties defendants, and the plaint was amended by a statement that Surrutcoomary had already brought a suit to set aside the deed of trust, which suit was then pending, and that both she and Surrutcoomary had threatened to bring suits to set aside the deed of dedication; the relief prayed for as against the added defendants being that they should be restrained from interfering with the said Mr. Broughton in carrying out the trusts of the two indentures.

Soudaminey in her written statement denied the factum of the will of Nobocoomar, and both Surrutcoomary and Soudaminey claimed to be entitled as the heiresses and legal representatives of Nobocoomar Mullick to

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the whole of his estate left by him at his death, and not disposed of by any valid testamentary disposition; they further impugned the validity of the bequest to Shama Churn Mullick; and submitted that Badamcoomary had only a Hindu widow's estate in the sums dealt with by her in the deeds of trust and dedication; and further contended that Badamcoomary was of unsound mind, and that undue influence had been exercised on her at the time of the execution of the two indentures.

[866] The defendant, Mr. Broughton, stated that he was willing to make the payments for maintenance, etc., should the Court be of opinion that under the circumstances of the case he could legally do so.

Previous to the hearing, an application was made on behalf of the plaintiff by motion for an order directing Mr. Broughton to allot maintenance to the plaintiff and a sum for the repairs of No. 59, Chitpore Road; this motion was ordered to stand over till the hearing of the settlement of issues, when both matters came on together.

Mr. *Hill*, Mr. *Henderson* and Mr. *Barrow*, for the plaintiff.

Mr. *Pugh*, Mr. *Bonnerjee* and Mr. *O'Kinealy*, for Soudaminey.

Mr. *Bonnerjee*, Mr. *Amir Ali* and Mr. *Roberts*, for Surrutcoomary.

Mr. *Stokoe* and Mr. *Pearson*, for Mr. *Broughton*.

The issues settled were—

(1) Were the deeds of trust and dedication duly executed by Badamcoomary?

(2) If so, was she at the time capable of executing the said deeds or either of them?

(3) Dod she understand the contents of the said deeds or either of them?

(4) Were the said deeds or either of them executed under the undue influence of Gopinath Roy, the guardian of the plaintiff?

(5) Had Badamcoomary any, and, if so, what power of disposition over the accumulations of her husband's estate during the first eight years after his death received by her from Shama Churn, and if she had no such power, who became entitled to such accumulations, and when?

(6) What, according to the true construction of the will of Nobocoomar Mullick, was the estate of Badamcoomary in the corpus, and what power of disposition had she over the legacy?

(7) Was the Rs. 24,000 paid to Badamcoomary out of the estate of Nobocoomar Mullick?

[867] Mr. *Bonnerjee* further wished to raise an issue as to whether or no Nobocoomar did not die intestate. This issue being objected to, the argument as to that objection was first heard.

Mr. *Bonnerjee*.—It is objected that I cannot raise the issue as to intestacy as probate has been granted, but the will was prior to the Hindu Wills Act, and probate was not necessary for such a will. I can contest such a will without going to the Ecclesiastical Court. See *Bibi Muttra's* case; *Montriou on Morton*, 191. Before the Hindu Wills Act the Mofussil Courts had no jurisdiction to grant probate, and grant of probate did not confer on an executor any estate or character—see *Treepoorasoondery Dossee* v. *Debendronath Tagore* (1). As to the position and powers of an executor, see *Sharo Bibi* v. *Baldeo Das* (2); *Jaykali Debi* v. *Shibnath Chatterjee* (3); *Nilkant Chatterjee* v. *Peari Mohun Das* (4). The Supreme Court granted probate of this will. Probate to

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(1) 2 C. 45 (49).
(2) 1 B. L. R. O. C. 24.
(3) 2 B. L. R. O. C. 1.
(4) 3 B. L. R. O. C. 7.

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a Hindu in common form is no evidence of the proof of the will—*Gopalnarain Mozoomdar* v. *Muddomutty Guptee* (1); see also *Thompson* v. *Donaldson* (2); *Barraclough* v. *Greenhough* (3); *Hume* v. *Rundell* (4).

Mr. *Hill.*—Besides the cases cited by the other side, there are two others which ought to be placed before the Court; the first case is against me, but I shall point out that s. 41 of the Evidence Act and other statutory enactments have done away with the effect of those cases.

The cases are *Lalchand Ramdayal* v. *Gumtibai* (5), and *Jaykali Debi* v. *Shibnath Chatterjee* (6), but the order of the Probate Court being a decision *in rem* is binding on all the world. See as to this *Castrique* v. *Imrie* (7). In *Brajanath Dey Sirkar* v. *Anandamayi Dasi* (8), the will was under the Hindu Wills Act, and Phear, J., held that the effect of ss. 187 and 242 of the Succession Act, which by s. 2 of the Hindu Wills Act were made applicable to wills of Hindus, was to make probate [**868**] evidence of the contents of the will as against all interested in the will. Probate, if existing, is effectual. See *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (9); *Komolochun Dutt* v. *Nilruttun Mundle* (10); and *Uma Nath Mukerjee* v. *Nilmoni Singh Deo* (11), in which Markby, J.'s decision in *Komolochun Dutt's* case was approved. *Mohun Dass* v. *Lutchmun Dass* (12) lays down that the proper way is to have probate revoked. The will there was dated 1821.

The sovereign authority had not conferred on the Supreme Court a jurisdiction to issue probate, but the Court's jurisdiction was founded on consent of parties; but the Succession Act applies, and under s. 242 probate is conclusive against all the world, and the only way of getting rid of it is by a proceeding in the Court having jurisdiction. All this, however, was before the legislation of 1872 and 1881. The Hindu Wills Act provided for the application of the Act to all wills after September 1870.

Then the question is how far the Succession Act and the Act of 1881 affect the point.

The case of *Barraclough* v. *Greenhough* (3) was a case in the Common Law Courts. That case only shows that probate is good unless notice of dispute of the will is given within the statutory period. The case of *Thompson* v. *Donaldson* (2) really goes on this principle, that the Ecclesiastical Court had power conferred upon it by Government to grant probate of wills of persons who were dead, and, therefore, where they granted it with regard to a person who was not proved to be dead, it was held that they had no jurisdiction. The Evidence Act by s. 41 makes a final order in exercise of probate jurisdiction conclusive proof that the character of executor accrued to the executor at the date of the order for probate. In the English Statute the words "sufficient evidence" are used, which means evidence sufficient to go to the jury as proof in favour of the producer of probate—see *Barraclough* v. *Greenhough* (3). Section 41 takes us quite outside [**869**] such cases as *Barraclough* v. *Greenhough*. The Legislature intended probate whenever granted to be conclusive evidence for purposes of future litigation. This issue, therefore, does not arise.

As to the Probate and Administration Act, 1881, chapters 2 to 13 apply to Hindus dying before 1st April 1881; s. 2 vests property in the

(1) 14 B. L. R. 21 (43).
(2) 3 Esp. 63.
(3) L. R. 2 Q. B. 612 (619).
(4) Madd. and G. 331.
(5) 8 B. H. C. R. O. C. 144.
(6) 2 B. L. R. O. C. 1.
(7) L. R. 4 H. L. 429.
(8) 8 B. L. R. 220.
(9) 4 C. 5.
(10) 4 C. 360.
(11) 7 C. L. R. (337 340)=6 C. 429.
(12) 6 C. 11.

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executor even when the will is 100 years old, and the testator died without the property having vested in his executor. There is nothing in the saving clause, s. 149, with respect to the sections I have mentioned, or of wills made 100 years ago.

But further, no issue regarding the factum of the will of Nobocoomar can be raised, as Shama Churn is not before the Court. This Court is now sitting as a Court of Equity, and where the Court is asked to decide on the factum of a will in the absence of necessary parties, it will refuse to do so in order to avoid multiplicity of suits. I say, therefore, that the course of legislation, by the Evidence and Probate Acts, has rendered probate conclusive in this Court.

[The argument on the other issues was then proceeded with.]

Mr. *Hill.*—As regards the widow's right to the accumulations for eight years, the payment of these accumulations was made ten years after the right accrued; therefore she could have sued only for one-tenth of the corpus, and only for a small proportion of interest. The rest would have come to her under the agreement with Shama Churn, and not as widow and heiress, and could not become the property of persons who claim as present representatives of Nobocoomar. As to her right to accumulations and the period within which a widow may make use of the accumulations, see Ainslie, J.'s judgment in *Hansbutti Koerain* v. *Ishri Dutt Koer* (1), which case has been approved by the Privy Council. The later cases tend to show that you cannot fix a time up to which the widow has a right to deal with the accumulations during her lifetime. A clear distinction does not seem to have been drawn in former cases, as to whether or no the widow had an intention to sever the accumulations from the corpus. No period can be fixed as to when she shall exercise that intention; lapse of time is only *prima facie* evidence, but [**870**] can be rebutted. As showing that if she shows a distinct intention to sever, the accumulations belong to the widow, I cite *Gonda Koer* v. *Koer Oodey Sing* (2).

I also refer to the judgment of Ainslie, J., in *Hansbutti Koerain* v. *Ishri Dutt Koer* (1) where he sets out his reasons for there being no fixed period for her right to dispose of the accumulated income, and the appeal of that case to the Privy Council—*Ishri Dutt Koer* v. *Hansbutti Koerain* (3); also as to there being circumstances which would show an intention to make use of accumulations—*Sheolochun Singh* v. *Saheb Singh* (4).

The present case is purely a question of intention. Upon the later cases the conclusion is that the intention need not be manifest at any fixed period, but that she may deal with the accumulations at any time during her lifetime. Here her intention is shown in the recitals of the deeds of trust and dedication; they most clearly indicate an intention to sever. Issue No. 7 is said to be by the other side a question of fact, but, if it is not, I submit a sum given in lieu of right to live in the family dwelling house is clearly a sum given to the widow absolutely.

Then, as to the legacy of a lac, the words of the will clearly give it to her absolutely.

Mr. *Stokoe* for Mr. Broughton.—With regard to the intention of the widow, I wish to point out that the recitals in the deed of release executed by the widow in favour of Shama Churn clearly show that Shama Churn retained no interest in the sums mentioned therein. I say the money was received under circumstances which render it impossible that

(1) 5 C. 512. (2) 14 B. L. R. 159. (3) 10 C. 324 (334). (4) 14 C. 387.

the widow could have subsequently intended to use the money otherwise than as her own absolutely. **1887** AUG. 12.

Mr. *Pugh* for Sondaminey.—At the time the deeds of trust and dedication were executed, the gift to Shama Churn was void; the recitals in the release show that the widow was claiming a part of the residuary estate of her husband; all she does by the deeds of trust is to change the succession; as to the release, it is therein recited that the whole of the estate vests in Shama Churn; it recites that the widow has separated her *stridhan* and the [**871**] receipt of the undisposed of savings. Now as to the accumulations, Mayne in para. 538 sets out the different classes of accumulations; if at the last the widow decides to treat them as the estate of her husband, she cannot afterwards turn round and dispose of them otherwise. I am not within the 3rd class referred to by Mayne. In the deed of trust she has invested the very Government paper she received from Shama Churn, she has therefore kept that property distinct; she had no other property of her husband's, and she kept that which she had separate from the rest of her own estate. ORIGINAL CIVIL. **14 C. 861 = 12 Ind. Jur. 179.**

Moreover, accumulations can only be held in suspense or as *stridhan*. The case of *Rabutty Dossee* v. *Sibchunder Mullick* (1) has a close bearing on this case, inasmuch as that case turns on a deed of release as does also the present case. Accumulations are not the same as income—see *Grose* v. *Amirtamayi Dasi* (2). There is no authority for saying that a widow can deal with accumulations accruing before the estate came into her hands, and after her husband's death. As to whom accumulations made by a widow during her lifetime belong, see *Bhagbutti Daee* v. *Chowdry Bholanath Thakoor* (3); also *Rivett Carnac* v. *Jivibai* (4). The case of *Sheolochun Singh* v. *Saheb Singh* (5) seems to support me; there the gift was of the husband's estate together with estate purchased by the widow. Here the widow has not treated the accumulations made by her in any way differently from the accumulations handed over to her by Shama Churn. She did not intend to keep the estate entire, but really wished to change the succession. With regard to the case of *Ishri Dutt Koer* v. *Hansbutti Koerain* (6), the widow might have spent the income as it accrued; but the case has no application, except so far as the case deals with the point that "it is impossible to draw any sharp definition of the line which separates accretions from income held in suspense, as to which she has not determined whether or no she will spend it." With reference to the power which a widow has over money that she has herself received and accumulated, see *Puddo Monee* [**872**] *Dossee* v. *Dwarka Nath Biswas* (7). The Case of *Gonda Koer* v. *Koer Oodey Singh* (8) deals with *Soorjeemony Dossee* v. *Denobundoo Mallick* (9), so I shall not refer to *Soorjeemony's case*. As to the question of the validity of the deeds of trust, it was not contended that she could dispose of the accumulations by deed, but they say that the property vests in plaintiff under the two deeds. The two deeds are really testamentary; they were made the day after her will was made. [TREVELYAN, J. —The deeds are irrevocable. We shall have to see whether the disposition amounts to a will or not, for she cannot evade the law by a dodge.] If the widow had given over this property by will, it would not have been valid. Then supposing she gave the property over to a trustee by deed in trust for the plaintiff, would it not have been equally invalid?

(1) 6 M. I. A. 1. (2) 4 B. L. R. O. C. 1. (41). (3) 2 I. A. 258. (4) 10 B. 478. (5) 14 C. 387. (6) 10 C. 334. (7) 25 W. R. 335 (340). (8) 14 B. L. R. 159. (9) 9 M. I. A. 123.

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Have the deeds any further efficiency by reason of the widow having vested the beneficial interest in a trustee during her life? I submit it is a transparent device and cannot stand.

Mr. *Amir Ali* for Surrutcoomary.—I wish to point out that the widow took only a life interest in the legacy of one lac. Her case is that she has a duly adopted son. The gift of the one lac is only of the use of the money, and the widow cannot dispose of it as it was given for her maintenance. The mere fact that it is given in the shape of a legacy is nothing if the intention is that she should only take a life interest—*Mahomed Shumsool Hooda* v. *Shewukram* (1).

Mr. *Hill* in reply.—The cases cited by Mr. *Pugh* do not touch the point raised by the Privy Council cases. As to the case of *Grose* v. *Amirtamayi Dasi* (2), the passage relied on in Macpherson, J.'s judgment is *obiter;* since that time we have had a new set of authorities, and the Privy Council have laid down that a widow is entitled to spend the entire income of the estate. Whatever it may be, Sir Lawrence Peel says, "accumulations and accretions are not the same." If Macpherson, J., meant by "accumulations," "accretions to income," his judgment cannot be supported. It was, moreover, unnecessary to deny the [**873**] widow's power to dispose of accumulations. Sir Barnes Peacock does not touch upon it, and the decree is affirmed except as to costs; the decree does not touch it, and there being an ambiguity whether he meant income accumulated in her hands as distinguished from something that has already accreted to her husband's estate, the authority does not help the defendants. The Privy Council do not say they cannot regard *Gonda Koer's case* as an authority *at all*, but merely on *the questions raised on appeal. Soorjeemony's case* is the only one which governs it, and it has not been broken into. In the case of *Rabutty Dossee* v. *Shib Chunder Mullick* (3), the corpus and accumulations were paid over together to the widow, and the Privy Council say the whole was given to her for her absolute use, that she could not take the corpus absolutely, yet as the whole was one transaction, she took as a Hindu widow; that case is distinguishable. In the case of *Rivet Carnac* v. *Jivibai* (4), the point was whether there was any severance by the widow; there the word "accumulations" is used in the sense of "to add" to her husband's estate. The case of *Pannalal Seal* v. *Bamasundari Dasi* (5) shows that accumulations wrongfully withheld from a widow are her separate property.

The later cases show that up to the time of her death a widow may evidence her intention to separate; the Bombay case shows that accumulations go after her death as her estate and not as her husband's.

But here the widow never had the corpus in her hands, and so never intended to accrete. On the contrary, Shama Churn kept her out of possession, and it is only after threats of suit that Shama Churn pays her the accumulations. Suppose she had sued for those accumulations for the ten years, the decree would have been for her to hold them absolutely. She cannot be said to have taken the accumulations as accretions and to have severed them, when the money was in the hand of Shama Churn. As to the deeds being in reality a testamentary disposition if the widow is in possession of the corpus and saves income, and does not manifest any intention to sever, it may be that she [**874**] would have no power to deal with it by will; but, as she never had the corpus, and

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(1) 2 I. A. 7. (2) B. L. R. O. C. 1 (41). (3) 6 M. I. A. 19.
(4) 10 B. 478. (5) 4 B. L. R. 732.

clearly severed that which she did receive, she could deal with it even by will.

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JUDGMENT.

Trevelyan, J.—This case came before me for settlement of issues. Several issues, which I will afterwards mention, were raised, but before referring to them I must decide the question whether Mr. Bonnerjee is entitled to raise in this suit the following issue, proposed by him, namely, "Did Nobocoomar Mullick leave a will or did he die intestate?"

Nobocoomar Mullick died on the 16th of March 1856.

On the 29th of March 1856, the late Supreme Court in the exercise of its ecclesiastical jurisdiction granted to Shama Churn Mullick and Badamcoomary Dossee, the widow of the deceased, probate of an alleged will of Nobocoomar Mullick, dated the 15th of March 1856.

This probate has never been revoked. The present suit is brought for the administration of trusts which were established by Badamcoomary out of monies received by her under the provisions of the will of Nobocoomar. Mr. Bonnerjee for a defendant, an heir of Nobocoomar, suggests the issue I have mentioned, but Counsel for the plaintiff contends that unless and until the probate be revoked by the Court which granted it, the question of the factum of the will cannot be entered into.

This question depends upon the applicability of s. 41 of the Indian Evidence Act of 1872.

That section is as follows:—

"A final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person a legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing not as against any specified person, but absolutely, is relevant, when the existence of any such legal character or the title of any such person to any such thing is relevant. Such judgment, order or decree is conclusive proof—

"That any legal character which it confers accrued at the time when such judgment, order or decree came into operation,"

[875] "That any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person,"

"That any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease,"

"And that anything, to which it declares any person to be so entitled, was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

Mr. Bonnerjee contends that as the testator died before the Hindu Wills Act came into force, and as the executor of the will of a Hindu dying before that Act came into force was a mere manager having no title to the estate, the probate neither conferred a legal character nor declared the executor to be entitled to any legal character.

I have examined the cases which have been cited, but I am of opinion that s. 41 of the Evidence Act applies to this case. It is quite true that a Hindu executor was, at any rate until the passing of the Hindu Wills Act, only a manager, but as such manager he had certain

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powers over the estate and for many purposes he represented the testator. It may be that the probate did not confer upon the executor any legal character, but I think that the effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. The words "legal character" is not anywhere defined, but I think that it is quite clear that it is intended to include the case of an executor. The fact that this section has been frequently applied to cases of persons dying after the Hindu Wills Act came into force shows this.

The only legal character which the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless "legal character" included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited makes any difference in the construction of the section. [876] I must decline to allow Mr. Bonnerjee to raise the issue I have mentioned.

The other issues raised were as follows:—(Here followed the issues as set out above.)

It was agreed by counsel that the 5th issue should now be decided by me upon the materials before me. The 6th issue is an issue of law, and I must, therefore, decide that also. So far as material on the present questions, the facts of this case are as follows:—

Nobocoomar Mullick died on the 16th of March 1856, leaving him surviving his widow Badamcoomary and four daughters. He left a will, of which he appointed his wodow and his brother Shama Churn executrix and executor.

The only portions of the will which are material to the present question, are the 5th and 9th clauses.

In the beginning of the 5th clause the testator says: "My wife Sreemutty Badamcoomary Dossee shall receive for her food and clothing, and for expenses of religious acts and the appointed voluntary religious observances, one lac of rupees."

The 9th clause of the will is as follws: "Should my executor Sreeman Shama Churn Mullick, my younger brother, have more than two sons within eight years from this date, in that case such son shall be made my adopted son; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years, power is reserved for adopting up to the extent of a third time; should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me of Company's paper and lands and houses and gardens and so forth, the whole real and personal estate will be received by my younger brother Sreeman Shama Churn Mullick—finis."

Shama Churn Mullick had not more than two sons within eight years from the date of the testator's death, so the residuary estate became his. The testator made no provision for the disposal of the rents and profits for the eight years during which the succession to the property remained in suspense, and therefore his widow as his heiress became entitled to them, but during [877] such eight years she did not receive these rents and profits. They seem to have accumulated in the hands of Shama Churn Mullick, her co-executor.

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Disputes arose between Badamcoomary and Shama Churn Mullick regarding their respective rights to the eight years' income. In settlement of these disputes Shama Churn, on or about the 13th of August 1866, paid Badamcoomary a sum of Rs. 2,89,000.

On receipt of this money Badamcoomary gave Shama Churn a release in the form of a deed-poll, the terms of which are important. This deed, after reciting the will and death of Nobocoomar, and that as there was only one son born to Shama Churn Mullick, the direction to adopt had become inoperative, and the whole of the estate of Nobocoomar became vested absolutely in Shama Churn by virtue of the will of Nobocoomar recites as follows:—

"And whereas the whole of my stridhan property, estate and effects of whatever nature and description the same did or doth consist has been fully and entirely separated, and is in my absolute and sole possession, custody and control, as I, the said Sreemutty Badamcoomary Dossee, do hereby admit and acknowledge. And whereas a question has arisen between myself and the said Shama Churn Mullick as to whether or not under the form of words used by the said Nobocoomar Mullick in his said will the whole of the estate, property and effects left by the said Nobocoomar Mullick, together with the accumulations thereon from the time of his death after payment of the specific legacies therein given and bequeathed, passed to and became vested in the said Shama Churn Mullick as a residuary legatee, or whether the corpus only of the said estate and effects of the said Nobocoomar Mullick at the time of his death after the lapse of time specified in the above recited clause of the said will passed to and become vested in the said Shama Churn Mullick, leaving the accumulations of the said estates from the said death down to the expiration of the said eight years next succeeding his death undisposed of *to pass to the next heir or representatives of the said Nobocoomar Mullick as residuary estate of the* said deceased; and I the said Sreemutty Badamcoomary Dossee *as the sole widow,* [878] *heiress and legal personal representative of the* said Nobocoomar Mullick, deceased, claim to have the accumulations of the said estate from the time of his death, the same as I contend and am advised being residuary estate undisposed of by the said will of the said Nobocoomar Mullick. And whereas the said Shama Churn Mullick has consented and agreed to concede the point in question and to give up to me as such heiress of the said deceased the accumulations of the said estate from the death of the said deceased for the period of eight years, the time within which the contingency of a son being born to the said Shama Churn Mullick to be adopted by me was limited and fixed. And whereas to avoid the expense, delay and trouble of taking an account of the said accumulations of the said estate, it has been by mutual consent agreed between me and the said Shama Churn Mullick that I should take and receive the sum of Rs. 2,89,000 in full payment, discharge and satisfaction of all claims I have or had on my said deceased husband's estate in respect of the said accumulations thereof; and I the said Badamcoomary Dossee have accordingly agreed of my own free will to accept and take that sum in full payment, discharge and satisfaction of all claims on the estate of my said deceased husband in respect of such accumulations, and in consideration thereof to waive all rights and claims I had or may have to an account of the estate of my said deceased husband in respect thereof. And whereas since the death of my said husband I have up to the present time continued to live and still am living and residing with the said Shama Churn Mullick and his family. And whereas domestic disagreements and dissensions

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have arisen between myself and the other female members of the family, and with a view to terminate and end the said family feuds and dissensions I have consentend and agreed to live separately and absolutely several and distinct from the said family of the said Shama Churn Mullick, and with that view I have agreed to accept from the said Shama Churn Mullick a sum of Rs. 24,000 in lieu and as for and by way of compensation, and in consideration of and for my absoutely releasing and relinquishing my right to live and reside in the family dwelling or other the house or houses of my said late husband and the said Shama Churn Mullick. **[879]** And whereas I have also agreed that on payment to me of the said legacy of sum of Rs. 1,00,000, and the further sum of Rs. 62,480 being interest thereon from the 17th of March 1856 to 13th August 1866, and on payment to me of the said sum of Rs. 2,89,000 as and for and in full of all claims on my deceased husband's estate in respect of such accumulations thereof as aforesaid, and on payment to me of the said sum of Rs. 24,000 as and for and by way of compensation for my relinquishing my right of residence in the said family houses as aforesaid, I would execute to the said Shama Churn Mullick such release of all claims, accounts, reckonings and demands whatsoever": the payment of the monies is then recited.

The operative part after declaring the receipt of the monies states that in consideration therefor—

1, the said Sreemutty Badamcoomary Dossee, do hereby remise, release and for ever quit claim unto the said Shama Churn Mullick, both in his capacity of executor of the last will and testament of the said Nobocoomar Mullick deceased and as such co-trustee with myself under the said will of the said estate and effects of the said deceased, and also as such legatee taking, receiving, and possessing the whole of the estate, real and personal, of the said Nobocoomar Mullick deceased under his said recited will as aforesaid, and the heirs, executors, administrators, representatives, and assigns of the said Shama Churn Mullick and the estate and effects of the said Nobocoomar Mullick my said deceased husband, of and from all and all manner of action and actions, cause and causes of action and actions, suits, enquiries, investigations and proceedings whatsoever touching or concerning, or on account or in respect of or in any way relating to the premises or any question, matter or thing relating or appertaining thereto, and of and from all and all manner of actions, suits, debts, duties, legacies, estates, trusts, accounts, reckonings, sum and sums of money, and all other claims and demands whatsoever both legal and equitable which I, the said Sreemutty Badamcoomary Dossee, or my heirs, executors, administrators or representatives now have, or at any time or times heretofore ever had, or at any time or times hereafter may have, claim, challenge or demand against the said Shama Churn Mullick as such executor of the said last will and **[880]** testament of the said Nobocoomar Mullick as aforesaid, or as such legatee, taking the whole of his estate as aforesaid, or to, against, on, or, upon, arising out of, or in any way respecting the said estate of my said deceased husband, the said Nobocoomar Mullick deceased, and of, and from, all manner of other claims and demands whatsoever from the beginning of the world to the day of the date hereof. And these presents further witness that I the said Sreemutty Badamcoomary Dossee do hereby acknowledge, declare and testify that I have also actually had and received before the sealing and delivery of these presents of and from the said Shama Churn Mullick the further sum of Rs. 24,000 paid to me by the said Shama Churn Mullick as consideration and compensation for my relinquishing, giving up, and releasing, and in

lieu of my right to live and reside the said family dwelling-house of my said deceased husband, or any other the said house or houses of his or his estate, and in consideration of the said last-mentioned sum so paid to me as aforesaid, I the said Sreemutty Badamcoomary Dossee have bargained, sold, assigne, surrendered, yielded up, and released and by these presents do bargain, sell, assign, surrender, yield up, and release unto the said Shama Churn Mullick, his heirs, executors, administrators, representatives, and assigns all and every the estate and interest, right, title, claim, and demand whatsoever of me the said Sreemutty Badamcoomary Dossee to, for, in respect or on account of all and every or any my right or rights to a residence in the family dwelling-house and premises No. 66, Chitpore Road in Calcutta, and in all and every or any messuages or messuage, houses or house, hereditaments and premises of my said deceased husband in any right, title, or capacity whatsoever.''

Out of a portion of the money, which she received on account of her legacy, Badamcoomary purchased a house No. 59, Chitpore Road, and out of the Rs. 2,89,000 she bought Government paper to the extent of Rs. 2,69,500, the interest of which she from time to time invested in the purchase of other Government paper. On the 12th of July 1886, this accumulated interest was represented by Government paper for Rs. 10,500.

On that day she endorsed over both the Government notes for the Rs. 2,69,500, and those for the Rs. 10,500, to Mr. Broughton, [**881**] one of the defendants in the present suit, and by a deed of the same date, of which she constituted him the trustee, she provided for the application of these funds.

This deed, which it may be convenient hereafter to describe as the deed of settlement, after reciting the way in which Badamcoomary had obtained the Government paper and her purchase of the house No. 59, Chitpore Road, recites that it had for several years been her desire to bring up some one of her grand-children or more remote issue as her own child, and so in a manner to preserve and maintain a separate family branch represented by herself as the origin and present head.

It also recites the intention of the settlor to bring up her grand-child, the present plaintiff, as her own child. This deed provided that Mr. Broughton " or other trustees or trustee for the time being should stand possessed of the said Government Securities upon trust during the lifetime of the settlor to pay her the interest and dividends, and after her death as well principal as interest upon trust for the plaintiff, his heirs, executors, administrators and assigns for his and their own absolute use and benefit.'' This deed declared that it was intended that the interest of the plaintiff in the Government Securities should vest in him upon the execution thereof, and it was thereby further provided that in case the plaintiff should die in the lifetime of the settlor without leaving male issue surviving him, or in case he should die without having attained his majority and without leaving male issue, and in the case he should within the lifetime of the settlor, or at any time after her death and before the expiration of a period of 24 years from the date of the deed, cease to reside permanently in, or to occupy as his family dwelling-house the house No. 59, Chitpore Road, then his interest in the Government Securities should cease.

The deed provided for the application of the interest of the Government Securities on the cessor of the plaintiff's interest.

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There was also a provision that after the death of the settlor, and during the minority of any person for the time being entitled to the trust funds, the trustees should out of the interest pay to the natural or other guardian of such person during [882] his or her minority such monthly or other sums for the maintenance and necessary expenses of such person as the trustees should in their discretion deem fit. After purchasing No. 59, Chitpore Road, Badamcoomary invested the balance of her legacy and its interest in Government paper, which on the same 12th July 1886 she endorsed over to Mr. Broughton, to be held on the trust of another deed of the same date, which I shall call the deed of dedication. By this deed Badamcoomary conveyed to Mr. Broughton the house No. 59, Chitpore Road, and certain jewellery, household furniture and effects upon trust to permit her as shebait of the idols Sri Sri Issur Sreedhurjee and Sri Sri Luckey Thakooranee during her lifetime, and after her death the shebait or shebaits for the time being of the said idols, to use and employ the house and other property respectively for the worship and service of the idols, and subject as to the house, land and premises and the household furniture and effects therein and thereon to such right of residence and use and occupation of the said shebaits and their families respectively as therein provided.

This deed also provided that Badamcoomary as the shebait of these Thakoors and other the shebaits for the time being should be entitled to reside in No. 59, Chitpore Road, with the members of her, his or their families, and that the Governmet Securities which were subject to the trusts of this deed should be held upon trust to set apart thereout Government Securities for the sum of Rs. 10,000 for the purpose of extending the premises and upon trust with or out of the interest or income of the residue of such Government Securities to discharge revenue, rent, rates, taxes and outgoings in respect of No. 59, Chitpore Road, and in the necessary repairs thereof, and to pay the residue to Badamcoomary as shebait of the said Thakoors during her life, and after her death to the shebait or shebaits for the time being of these Thakoors. This deed declared that Badamcoomary should during her lifetime be the shebait, and that from and after her death until the trust funds settled by the deed of settlement should under the trusts thereof be indefeasibly vested in some person, the person for the time being entitled under the deed of trust [883] to the funds settled thereby should be the shebait, and when the funds should become indefeasibly vested, the person in whom they should be so indefeasibly vested, and his or her heirs, should thenceforth be and continue such shebait or shebaits for ever.

This deed of dedication also contained a provision that, if the shebait for the time being should happen to be a minor, the payments directed to be made to him for the purposes of the trust should be made to his or her natural guardian. It was also provided that subject to the use thereof for the service of the Thakoors, the shebait and shebaits for the time being should be entitled to the use of the jewellery, &c.

Badamcoomary died on the 8th of September 1886. In consequence of two of the daughters of the settlor asserting rights to the property subject to these deeds, this suit has been brought. This suit seeks the administration of the trusts of the two deeds.

I have now to consider the 5th issue.

It is contended that the cases establish the following propositions:—

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In the first place.—That a widow may use for her own purposes and may alienate the income of her husband's estate which has accumulated in her hands. It is said that she is not confined to the current income;

Secondly.—That should she invest the income and make a distinction between those investments and the original estate, she can at any time thereafter deal with such investments;

Thirdly.—That should she invest the savings in such a way as to show that she intended to increase the original estate by such investment, she cannot afterwards deal with such investments except for reasons which would justify her dealing with the original estate; and

Fourthly.—That should she invest the savings in property held by her without making any distinction between the original estate and the after purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after purchases are an increment to the original estate.

The whole question is, I think, one of intention. If she has [884] once shown her intention to augment her husband's estate she cannot alter, but if she evinced no such intention she can, at any time during her life, deal with the profits. The fourth proposition is established by the recent case of *Sheolochun Singh* v. *Saheb Singh* (1).

The third proposition is laid down in the case of *Ishri Dutt Koer* v. *Hansbutti Koerain* (2). At page 337 of the report in the Indian Law Reports, their Lordships of the Privy Council, after pointing out that no distinction was then made between the original estate and the after-purchases, say: "These are circumstances which in their Lordships' opinion clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purpose."

For the first proposition there is, I think, ample authority. *Soorjeemoney Dossee* v. *Denobundoo Mullick* (3) decides the absolute right of the widow in her own right to the accumulations since the death of her husband, and in that case, as in the present, the income had not accumulated in the hands of the widow herself, but in the hands of the person from whom she was seeking to recover.

That case shows that her right to them is not affected by the fact that she may receive them in a lump. Whether she receives them as they fall due, or whether she receives them after they have accumulated in the hands of others, her right is the same.

In *Grose* v. *Amirtamayi Dasi* (4) Mr. Justice Macpherson held that the accumulations followed the corpus, but as pointed out by the Privy Council in *Ishri Dutt Koer* v. *Hansbutti Koerain* the opinion expressed by Mr. Justice Macpherson seems to be at variance with the case of *Soorjee-Mony Dossee* v. *Denobundoo Mullick.* Much reliance was placed by Mr. Pugh on the case of *Rabutty Dossee* v. *Shib Chunder Mullick* (5), but on a careful consideration of that case I do not think it [885] has in reality any bearing on the present. There what the widow was receiving, or at any rate the greater part of it, represented the corpus of the husband's estate. The result of the compromise was that a sum of money was allotted to her as compensation for her husband's share. In the present case the money received by the widow was in respect of her right to the profits after her husband's death. At page 25 of the report the learned Judge, delivering the judgment of the Privy Council, shows that the

(1) 14 C. 387. (2) 10 C. 324=10 I. A. 150. (3) 9 M. I. A. 123.
(4) 4 B. L. R. O. C. 1. (5) 6 M. I. A. 1.

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present question was to some extent considered by the Board, but that they did not think it necessary to decide it.

In *Ishri Dutt Koer* v. *Hansbutti Koerain* (1) the Privy Council say:—"It is impossible to read Mr. Justice Ainslie's forcible argument without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get some income from them, and so on through all the steps of the sorites."

About the first proposition there is, I think, no doubt. With regard to the second proposition, I think I must hold that if a Hindu widow invests the income of her husband's property in the purchase of other property as a permanent investment, she cannot afterwards alienate it. Judging from expressions which have been used by the Privy Council, I think it possible that if the matter were again considered the power of the widow over the property might be established; but I am bound by what the Privy Council say in *Ishri Dutt Koer* v. *Hansbutti Koerain*. * * * * After examining the authorities on this very question they there say: "This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow." The question has never been expressly decided either by the Privy Council or by a Full Bench of this Court, but as a Judge of an Original Court [886] I must act upon what has been held to be the state of the authorities.

The question here is really on the facts. Has there been an investment of a permanent nature such as to add to the corpus of the husband's estate, or rather, as in this case the residue of the estate went to Shama Churn Mullick, such as to render it available to the heirs of the husband. All the cases in which property bought by the widow out of the profits of her husband's estate has been held to belong to that estata are cases where immoveable property has been bought. In no one of the cases that have been cited, except in the case of *Bhagbutti Daee* v. *Chowdhry Bholanath Thakoor* (2), where the expressions used have been held only to apply to the particular case (see I. L. R., 10 Calc., 337), has it been held that a widow cannot purchase jewellery or other moveable property for her own absolute use out of the profits of her husband's estate? Were she to advance to any person any portion of the profits by way of loan, does she by doing so make the money advanced by her a portion of her husband's estate? I think not. If it were so, having once lent any money, she would never lend it again. I do not know that there is any real difference between the case of lending money to a private individual on a promissory note and purchasing a Government promissory note.

The notes are purchased more as a convenient and safe mode of keeping the money than as an investment of a permanent nature. Putting the case in another way, does a widow by using them only alter her rights in it? Were she to accumulate it in her house or in a bank, she would retain her absolute right. I do not think that the fact that she lends it out at interest to Government alters her right. There might be a case

(1) 10 C. 334. (2) 2 I. A. 256 (260, 261).

where a widow in buying Government paper showed that she inetnded to augment her husband's estate, but there is no evidence which can suggest this here. There is everything to the contrary here. There was no estate of her husband's in her hands for her to augment.

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I do not think that the law intends the husband's estate to benefit by any investment which is not of a permanent [887] nature and I do not think that the widow here intended the money to remain permanently in Government paper.

I find as a fact that the widow by purchasing the Government paper did not intend to augment her husband's estate, and that she kept it distinct from her husband's estate. On the 5th issue, I find that Badamcoomary had power to dispose of the Government paper which she made over to Mr. Broughton on the trusts of the deed of settlement.

As to the 6th issue I think it clear beyond argument that she was entitled to the legacy of a lac of rupees, and not merely to the income of that legacy. The terms of the will are perfectly clear.

The other issues are issues, of fact, and will have to be tried. It remains to deal with the application for maintenance. I think there must be a reference to the Registrar to enquire and report what should be allowed for the maintenance of the plaintiff. Costs of this hearing and of the motion to be costs in the cause.

T. A. P. *Case set down for hearing.*

Attorney for plaintiffs: Mr. *G. C. Farr.*

Attorneys for defendants: Mr. *A. Watkins*, Mr. *H. Remfry* and Baboo *Ashutosh Dhur.*

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CRIMINAL MOTION.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF THE QUEEN EMPRESS *v.* REOLAH AND OTHERS.*

[1st November, 1887.]

Practice—Criminal Procedure Code (Act X of 1882), *s.* 435—*Revision by the High Court; Revision where lower Court has concurrent jurisdiction with High Court.*

The High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court save on some special ground shown, unless a previous application shall have been made to the lower Court; but in cases in which concurrent jurisdiction is not possessed by the lower Courts, on such general rule exists.

[**R.**, Rat. Unrep Cr. Cases 499; 14 B. 331 (342); 7 C.P.L.R. 47 (Cr.); **Rel. upon.** 13 C.W.N. 753=10 Cr. L.J. 190=2 Ind. Cas. 846=36 C. 645.]

[888] THIS was an application made, on 7th October 1887, during the vacation, to set aside, a conviction and sentence of the Deputy Magistrate of Giridhi, on the ground that he had heard and tried cross cases of rioting together, and had thereby prejudiced the applicants in their defence.

Before hearing the application, the Court (Mr. Justice Norris and Mr. Justice Ghose), on discovering that the applicant had not, before coming up to the High Court, applied to the Sessions Judge, and being

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* Criminal Motion No. 309 of 1887, from an order of J. R. Jarbo, Esq., Deputy Magistrate of Giridhi, dated 15th September 1887.

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divided in opinion as to whether the applicant was legally bound so first to apply to the Sessions Judge, directed that the application should be renewed, if necessary, before the Criminal Bench after the re-opening of the Court after the vacation.

On the 1st November 1887, the application was renewed before Mr. Justice Prinsep and Mr. Justice Pigot, who, after hearing Mr. Bell on behalf of the applicant, and after consultation with the Chief Justice and the other Judges of the Court on the point, decided that they would hear the application, intimating that the practice of the Court should be understood to be, that in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, an application in revision will not be entertained save on some special ground shown unless a previous application shall have been made to the lower Court; but that in cases in which concurrent jurisdiction is not possessed by the lower Court no such general rule exists.

T. A. P. *Application admitted*

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SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

MITCHELL REID AND CO. (*Plaintiffs*) *v.* BULDEO DOSS KHETTRY (*Defendant*)* [13th June, 1887.]

Sale of goods by description—Purchaser's right to reject—Whether goods according to contract or not, how relevant—Delivery of part of the goods—Contract Act, s. 78— Suit for price of goods rejected.

B.K. agreed to buy from *M.R.* five bales of chrome orange twist, "or any part thereof that may be in a merchantable condition, ex 'City of Cambridge,' or other vessel or vessels, with specific marks and numbers, each bale containing 500 lbs. at so much per lb., to be paid for on or before delivery. *B.K.* took delivery of and paid for only one bale, but rejected the others. *M.R.* brought a suit for the price of the four bales rejected.

Held, that the property in the goods did not pass to the defendant by the terms of the contract, nor was the delivery that was taken by him of the one bale a delivery of "part of the goods" within the meaning of ss. 78 and 92 of the Contract Act; the suit, therefore, did not lie.

Held, also, that the question whether the defendant was entitled to refuse the goods, in other words whether the goods were according to the contract or not, was one that was unnecessary for the purposes of the present suit; but it would have been otherwise if the suit were one for damages on the ground of the defendant's refusal to accept the goods.

A purchaser's right to reject goods by reason of their not answering the description in the contract may be independent of the question whether the property in the goods has passed to him or not.

[**R.,** 2 L.B.R., 91 (94); **D.,** 36 C. 736=3 Ind. Cas. 185.]

[2] MITCHELL REID & Co. entered into a contract with Buldeo Doss Khettry, by which the latter agreed to buy, or acknowledged to have purchased from the said Company, " the goods or any part thereof that may be in a merchantable condition hereunder particularly specified at the price stated below, *viz.*, *ex* " City of Cambridge " or other vessel or vessels O ◇ C R H. 1191-95, 5 bales chrome orange twist No. 40, 5 lb. bundles horse tickets, each 500 lbs. at 0-9-9 per lb., 50 days G. delivery." It was further agreed between the parties that the goods should be paid for on or before delivery. Subsequently Buldeo Doss Khettry took delivery of only one bale and paid for it, but refused to take delivery of the remaining four bales. Mitchell Reid & Co., thereupon brought a suit in the Court of Small Causes at Calcutta to recover the price of the four bales refused. The defendant pleaded that the goods were not according to the description in the contract; but it was contended on behalf of the plaintiff that the goods in question being ascertained goods, the property in the goods had passed to the buyer, and no defence therefore could be raised to the suit. There was no evidence at the trial whether the goods were

* Small Cause Court Reference No. 3 of 1887, made by H. Millett, Esq., Chief Judge of the Calcutta Court of Small Causes, dated the 26th April 1887.

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or were not according to the description in the contract. The Court, upon a comparision of ss. 112, 113 and 117 of the Contract Act with s. 78, was of opinion that the goods in question were ascertained goods sold with a warranty, and inasmuch as the seller had failed to prove that the goods were according to warranty, dismissed the suit, subject, however, to the reference of the following questions to the High Court:—

(1) Is the defendant (the buyer) entitled to reject the goods under the circumstances stated?

(2) Is the defendant entitled to raise the defence raised by him in this suit?

Mr. *Bonnerjee* for the plaintiffs—The language of the contract passes the goods to the defendant. The property passed as soon as the contract was made. Moreover, there was a delivery of one bale—s. 78, para. 2 of the Contract Act. It was the duty of the defendant to ask for a sufficient examination of the goods; but he does not seem to have done so. The onus is upon the buyer to show [**3**] that the goods did not come up to the description. [WILSON, J.—Read s. 78 with s. 92 of the Contract Act.] Whether there has been delivery is a question of fact. The Legislature makes a distinction between ascertained and unascertained goods, that is, ascertained or unascertained at the date of the contract—*Heyworth* v. *Hutchinson* (1). The goods here are ascertained goods. There was a delivery of part of the goods, and the effect of the Judge's finding is that the property in the goods passed to the buyer, otherwise the Judge would not have referred to s. 78 of the Contract Act. The plaintiffs are entitled to the relief sued for.

Mr. *Garth* for the defendant.—There is no evidence on the part of the plaintiffs to show that the property in the goods passed; the suit therefore fails. Assume that the property in the goods passed, the goods have not been delivered, and therefore we are not bound to pay for them. There is nothing to show that the goods were delivered. [WILSON, J.—We must take it as found that the plaintiffs offered to deliver the bales.] The four bales were not identical with those mentioned in the contract [WILSON, J. —There is no evidence either way whether the goods were according to contract.] We had no opportunity to examine the goods, and the plaintiffs upon the contract were bound to show that the goods were in a merchantable condition.

Mr. *Bonnerjee* in reply.

JUDGMENT.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—The facts found in this case are these: That on the 9th June 1886, a contract was entered into between the plaintiffs and the defendant, by which the defendant agreed to buy, or in form acknowledged that he had bought, from the plaintiffs the goods described as follows, namely, "the goods or any part thereof that may be in a merchantable condition hereunder particularly specified, at the price stated below, *viz.*, ex 'City of Cambridge' or other vessel or vessels," with certain marks and then the numbers "1191/95, 5 bales chrome orange twist No. 40, 5 lb. bundles horse tickets, each 500 lbs. at 0-9-9 per lb., 50 days G. delivery." Then there are certain conditions below, the most important [**4**] of which are these: The purchaser agreed to pay for the goods before or on

(1) L. R. 2 Q. B. 447.

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delivery, deducting certain discount, or to grant promissory notes at the option of the sellers, and to take delivery within five days, which seems hardly consistent with what is stated above. There is a further clause expressly authorizing the sellers to resell in case of default. That document has been held to be, and I assume rightly, a document relating to the sale of five specified bales, described not only by their marks, but by the particular numbers on the bales; and that is the footing on which everybody apparenty has always treated the case. The learned Judge of the Small Cause Court speaks of the contract being one for ascertained goods. And when he comes to state the subsequent facts, he says: "Five bales had been previously sold, and the defendant took delivery of one bale and paid for it, but refused to take delivery of the remaining four bales." Those are the facts. The suit was brought by the sellers for the price of the four bales refused. The defendant sets up as his defence, to justify his having refused to take delivery of four bales, that the goods in the bales were not according to contract. Apparently the defect objected to was that they did not comply with the term of description "No. 40," and perhaps not in the description "5 lb. bundles." On that subject it is found that there is no evidence on either side; there is no evidence that the goods were according to the description, and none that they were not. Under those circumstances the learned Judge has dismissed the suit subject to a reference of the following questions:—

"1. Is the defendant (the buyer) entitled to reject the goods under the circumstances stated?

"2. Is the defendant entitled to raise the defence raised by him in this suit?"

It will be convenient to answer the second of these questions first—whether the defendant in this suit is entitled to raise the defence that the goods are not according to the contract. It is said that he is not, because it is contended that the property in the four bales, as well as in the bale which had been delivered to him, had passed to the buyer. To us it seems clear that whether the property in the goods passed to him or [5] not, he is entitled to reject the goods if they are not in accordance with the description in the contract, if that description forms, as it does here, an actual part of the conditions of the contract, and not something collateral to it. Even by the law of England the question of the right to reject does not necessarily always depend upon the question whether the property has passed or not. In this country it appears to us that the intention of the Legislature was to make the two things wholly independent of one another. It appears to us that, under the law in this country, a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for. If any statutory authority is necessary for that, we think the general principle laid down in s. 51 of the Contract Act applies to the case: "When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. That is to say, applying that to this case, we do not think that a man is bound to take, or can be compelled to pay for, goods unless the seller of the goods is ready and willing to deliver to him goods in accordance with the bargain entered into, so that we have no hesitation in answering the second question in the affirmative.

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The other question which the learned Judge asks us gives rise to more difficulty. The question is: "Is the defendant (the buyer) entitled to reject the goods under the circumstances stated? In order to make our answer to that question clear it is necessary to state in what sense we understand the question. We understand the question thus: "Is the plaintiff entitled to maintain this suit by reason of the defendant having rejected the goods under the circumstances stated?" If we did not understand it so we should not be able to answer the question.

With regard to this the first point discussed was, on whom the burden of proof properly lay in this case, whether upon the plaintiff to show that the bales which he tendered were according to contract, or upon the defendant to show that the bales which he rejected were so far not in accordance with contract as to justify him in rejecting them? We do not think it necessary [6] to answer that question in this case, and for this reason: It appears to us plain on the contract itself, and on the finding as to what has happened since, that the property in the four rejected bales has never passed to the defendant, the buyer. It is said for the plaintiff that the property did pass by reason of the operation of s. 78 of the Contract Act. That section says that, "where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered. It is argued here that, when the defendant took delivery of the one bale and paid for it, the effect was to pass the property in the other bales to him of which he did not take delivery.

In order to see the meaning of the words in s. 78 with regard to the delivery of part of the goods, it is necessary to go on to s. 92, which deals with the same subject and deals with it more in detail. It says: "A delivery of parts of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder." Two of the illustrations in that section may be usefully referred to. Illustration (*b*) is this: "*A* sells to *B* a stack of firewood, to be paid for by *B* on delivery. After the sale *B* applies for and obtains from *A* leave to take away some of the firewood. This has not the legal effect of delivery of the whole." Illustration (*c*) is this: "*A* sells 50 maunds of rice to *B*. The rice remains in *A*'s warehouse. After the sale *B* sells to *C* 10 maunds of the rice, and *A* at *B*'s desire sends the 10 maunds to *C*. This has not the legal effect of a delivery of the whole."

Now each of these cases, especially the illustration (*b*), is somewhat like the present case. But there are circumstances in this case which strengthen very much the inference that there has been no such part delivery as to pass the property in the whole goods. In the first place, when we turn to the contract itself, we find that it is for cash on delivery, and that the price is a separate and distinct price for each bale, because each bale is to contain a certain weight and the price is so much per pound. The only [7] possible construction is that each bale is to be paid for on or before the delivery of that bale; and in accordance with that the price was paid for the bale delivered.

There is another point in the contract. It is not an absolute contract for the purchase of 5 bales, but for the purchase "of the goods or any part thereof that may be in a merchantable condition." It seems to us

that the purchaser must have an opportunity, in the case of each bale, before he can be required to take delivery of it, to ascertain whether that particular bale is in that condition, showing therefore that the transaction with regard to each bale must be a separate transaction. The result is that, in our judgment, the case does not fall within the words of s. 78, under which it has been sought to bring it; and that the property has never passed to the purchaser except in the one bale delivered and taken.

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15 C. 1.

There being no evidence either way as to whether the bales were according to the contract or not, it is impossible to say on the evidence as it stands whether the case was one in which the buyer was justified by the terms of the contract in rejecting the four bales. If it were necessary to decide that question we should have to say on whom the burden lay, and to decide it against that party, whoever he might be. But we think it unnecessary to decide that, because, whether the bales were properly rejected or not, if, as we hold, the property has never passed to the defendant in the four bales of which he refused delivery, this suit cannot lie. This is a suit for the price of the four bales, whereas, if any suit could lie, it would be a suit for damages for refusing to accept the bales, the measure of damages being not the price, but the difference between the contract price and the market price.

Understanding, therefore, the question put by the learned Judge in the sense stated, namely, whether the plaintiffs are entitled to maintain this suit by reason of the defendant having rejected the goods under the circumstances stated, we answer that question in the negative.

Attorneys for the plaintiffs: Messrs. *Watkins & Co.*

Attorney for the defendant: Mr. *Hart.*

K. M. C.

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[8] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir R. Baggallay and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

WATSON & COMPANY (*Defendants*) *v.* SHAM LAL MITTER (*Plaintiff*). [30th June and 1st and 9th July, 1887.]

Guardian and Minor—Enhancement of rent. Effect of—Acts of mother and guardian how far binding on minor son—Kabuliyat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her—Admission not amounting to estoppel.

A putnidar obtained decrees for the enhancement of the rent of holdings in the possession of the widow of a deceased tenant, one decree being in respect of land formerly held by the latter, and the other in respect of a holding purchased by the widow on behalf of her minor son by the deceased, whilst the enhancement suits were pending. The widow also signed kabuliyats relating to both tenancies, agreeing, as mother of the minor, to pay enhanced rent.

Held, that as the putnidar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son; also as she had come to what she believed to be, and was, a proper arrangement, the son on his attaining full age and entering into possession of the tenancies was bound by the kabuliyats.

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The putnidar was not precluded by the fact that he had, after the son had attained full age, sued the mother as tenant, stating that she, and not the son, was tenant.

[Cited, 13 C.W.N. 167 (171, 175)=8 C.L.J. 135=4 Ind. Cas 495 (497); R., 36 C. 675=9 C.L.J. 523 (558)=1 Ind. Cas. 626; 18 B. 631 (635); 10 M.L.T. 490.]

APPEAL from a decree (12th September 1884) of the High Court, in part affirming, and in part reversing, on the appeal and cross-appeal of the plaintiff and the defendants, a decree (12th May 1882) of the Subordinate Judge of Midnapore.

The object of the suit, out of which this appeal arose, was to establish the plaintiff's right to hold, at their original rents, two tenancies, one paying Rs. 65-13-9 and the other Rs. 113-13, in two villages, called respectively Kuilibadi and Gilabani, situate within the defendants' putni taluk, Pergunnah Bogri, in the Midnapore District, unaffected by a decree for enhancement in respect of the rent of each. These decrees had been obtained by the defendants during the plaintiff's minority against his mother, and the issues at the hearing were, in effect, whether [9] the plaintiff was bound by the decrees, or by kabuliyats executed by his mother, agreeing to pay the enhanced rent.

It appeared that pottahs were granted by former zemindars of Pergunnah Bogri to former ryots of the tenancies in question at the above mentioned rents, and that the holdings had come by transfer to Gopinath Mitter and his sister, Pearimoni Dasi, who, although the names of the original jotedars were kept in the appellants' serishta, took receipts in their joint names for the rents paid by them. Gopinath died in 1858, leaving his wife Haimabati, then pregnant, who in 1859 bore a son to him. This son was Sham Lal Mitter, the present respondent. Haimabati had taken possession, and against her, on the 16th May 1859, a few days after Sham Lal Mitter was born, the present appellants commenced proceedings to enhance the rent payable by her; also against Pearimoni Dasi for the same purpose. While these suits were pending Pearimoni Dasi, on the 18th November 1860, executed a deed of sale to Haimabati as "mother and guardian of Sham Lal Mitter, minor," by which Peari Dasi, in consideration of Rs. 5,000, sold her moiety to her.

On the 26th January 1861, the Principal Sudder Amin held that these appellants, the plaintiffs in the enhancement suits, had a right to enhance, and on an enquiry by an Amin deputed for the purpose fixed the rent of the lands in Kuilibadi at Rs. 529-14-9, and of those in Gilabani at Rs. 675-13-2.

On the 3rd September 1865, Haimabati, describing herself as mother and guardian of Sham Lal Mitter, minor, executed two dowl settlements for the two holdings, with the rent fixed at the enhanced rate; and on the 28th January 1867, she, describing herself in like manner, executed kabuliyats to these appellants. The respondent attained the age of 18 years on 10th May 1877, and on 16th July 1877, he deposited in Court the rent of Gilabani at the original rate, and obtained the issue of a notice by the Court calling on the appellants to accept that rent. This they declined to accept, alleging in their petition of the 19th January 1878, that there was no settlement in the name of the respondent, but that the name of Haimabati was registered in their serishta in respect of the enhanced rent.

[10] They, about the same time, instituted two rent suits against Haimabati to recover the rents of the holdings at the rate fixed in the

kabuliyats for the years 1284 and 1285 (April 1876 to January 1878), and having proceeded to execute their rent decrees against the holding under s. 59 of the Bengal Rent Act, VIII of 1859, the respondent, under s. 63 of the same Act, made (16th August 1880) two deposits of Rs. 1,632-6-5 and Rs. 1,570-9, respectively, in payment of the two decrees against his mother Haimabati, but claiming all the money in excess over the original rents. Other payments he also alleged, and made similar claims in respect of them. The Court, however, refused to recognize these claims, referring him to a regular suit to establish them; and thereupon he brought the present suit, praying for a declaration that the holdings in Kuilibadi and Gilabani were mokurari, and not liable to enhancement of rent; also a declaration that he was not bound by the decrees for enhancement obtained in 1861, nor by the kabuliyats given by his mother to the putnidars in 1867. The plaint further asked that the defendants might be required to refund to him the sum of Rs. 7,800, the amount paid by him to save the estate from sale.

The Court of first instance held against the plaintiff as to the liability of the holdings to enhancement of rent; also that the plaintiff was not liable under the kabuliyats, but that he was bound by the decree in respect of the tenancy taken over from Pearimoni, as his mother had purchased on his behalf.

Against the above, as dealt with in the decree, the plaintiff appealed to the High Court.

The defendants appealed against that part of the decree by which the plaintiff was held not to be bound either by the decrees or by the kabuliyats, to which his mother Haimabati was a party.

The High Court (Tottenham and Norris, JJ.), observing that the suit was for a declaration of the plaintiff's right, his immediate cause of action being the rejection of his claim in the execution proceedings, confirmed the findings of the lower Court: first as to the liability to an enhancement of the rent of the tenancies; secondly, as to the plaintiff not being bound by any of the transactions to which his mother Haimabati was a party.

[11] But having come to that conclusion the High Court regarded it as impossible to say that the plaintiff was bound by the results of the litigation relating to the enhancement, he having been in existence before the litigation commenced, a fact within the knowledge of the putnidars, and they having omitted to make him a party to the suit, as they ought to have done. Nor could they hold that the plaintiff was bound, because he was virtually purchaser of Pearimoni's holding by the decree against her. They even doubted whether Pearimoni would have been bound by it. They held the plaintiff to be free from liability, either under the decrees of 1861, or the subsequent kabuliyats of 1865 and 1867, and maintained that he was liable only to pay the original rents. The appeal of the defendants was, therefore, dismissed (under the circumstances without costs); and on the appeal of the plaintiff, the High Court declared that the plaintiff was not liable to pay anything more than the rents existiing before 1861.

On this appeal,—

Sir *H. Davey*, Q. C., and Mr. *R. V. Doyne* appeared for the appellants. Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondent.

For the appellants it was argued that, as to the tenancies, the decrees obtained by the appellants against the actual rent-payers enhanced the rents, and that Sham Lal Mitter was bound by the kabuliyats given by Haimabati, his mother, who was, at the time when the decrees for

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enhancement were made, and at the date of the kabuliyats, acting as his natural guardian. Peari Dasi, had she retained her interest until decree, would have been bound by it; and the plaintiff was also bound.

As regards Haimabati's position as guardian, reference was made to Regulation V of 1799, s. 2; Act XL of 1858 (relating to minors); *Hunooman Persaud Panday* v. *Munraj Koonweree* (1); *Ramchunder Chuckerbutty* v. *Brojonath Mozumdar* (2).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondent, argued that he was not bound by the decrees for [12] enhancement or by the kabuliyats. Except as guardian to her son, Haimabati on his birth became disentitled to the estate; and therefore no decrees obtained against her, and no agreements entered into by her, in her personal capacity, could bind the estate. In fact, she did not profess to act, and was not supposed to be acting as guardian to her son in any of the dealings relating to the estate, which took place between her and the appellants subsequently to her son's birth. In reference to the widow's agency and the power of an agent to bind either himself or his principal, but not both, reference was made to the judgment in *Priestly* v. *Fernie* (3); and in regard to powers of a guardian *Waghela Raksanji* v. *Shekh Masludin* (4) was cited.

The appellants were estopped from asserting that Haimabati represented, or that they dealt with her as representing, Sham Lal Mitter, or that she was capable of binding him as being his agent. They had treated her as the tenant herself in the two rent suits of 1878.

Counsel for the appellants were not called upon to rely.

On a subsequent day (July 9th) their Lordships' judgment was delivered by:—

JUDGMENT.

Sir R. Couch.—The plaintiff in this suit and respondent in the appeal is a tenant of two mouzahs, named Kuilibadi and Gilabani, under the defendants and appellants, who are putnidars of Pergunnah Bogri. The principal object of the suit was to obtain a declaration that the plaintiff is not bound by two decrees for enhancement of the rent of those mouzahs obtained in January 1861 against Srimati Haimabati and Srimati Peari Dasi, and by kabuliyats given by Srimati Haimabati to the putnidars in January 1867. The plaintiff also asked for a declaration that the mouzahs were not liable to have the rent enhanced, and that the defendants might be required to refund to him the sum of Rs. 7,800-1-5 gundahs, the amount paid by him to prevent the sale of the mouzahs in execution of decrees obtained by the defendants against Srimati Haimabati. It has [13] been found by both the lower Courts that the mouzahs were liable to an enhanced rent, and so that question is no longer in dispute.

The mouzahs were originally held by Jaggut Mundul Saontal and Soonder Mundul Saontal, and by a succession of transfers they came into the possession of Kasi Nath Ghose. He, on the 17th of September, 1850, sold one moiety of them to the plaintiff's father, Gopinath Mitter, and about the same time made a gift of the other moiety to his wife, Srimati Peari Dasi. Gopinath died in October, 1858, leaving his widow Haimabati, who on the 10th of May, 1859, gave birth to the plaintiff. On the death of Gopinath, Haimabati appears to have entered into possession

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(1) 6 M. I. A. 393. (2) 4 C. 929.
(3) 3 H. and C. 977. (4) 14 I. A, 89=11 B. 559.

of his estate, and to have been recognized by the defendants as tenant. On the 16th of May, 1859, immediately after the birth of the plaintiff, the defendants caused notices of enhancement to be served upon Haimabati Dasi and Peari Dasi; and on the 17th June, 1859, they instituted two suits against them for enhancement of rent, one as to each mouzah. On the 18th of November, 1860, whilst the suits were pending, Peari Dasi sold her moiety to Haimabati, who is described in the deed of sale as "mother and guardian of Sham Lal Mitter, minor," and it is apparent, from the deed that the purchase was made on his behalf. No change, however, was made in the suits.

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On the 26th of January, 1861, the defendants obtained a decree in each suit against Haimabati Dasi and Peari Dasi, declaring that they had the right of enhancement, but the rate of enhancement was to be determined after local investigation. This was made, and by an order dated the 25th of June, 1861, the rent of Kuilibadi was fixed at Rs. 529-14-14 gundahs, and of Gilabani at Rs. 675-2-13-2 cowries. Soon after this, on the 26th of September, 1861, a compromise was made between the defendants and Haimabati for payment by instalments of what was due on account of Gilabani. In 1865 the defendants appear to have caused a re-survey to be made of the mouzahs, and Haimabati on the 3rd of September, 1865, executed two dowl settlements of land and jumma, one of each mouzah. In these the rents fixed by the decrees are stated, and also a rent for other lands which had apparently come under [14] cultivation, or for which rent might be claimed. The additional rent was Rs. 270-3 for Gilabani and Rs. 114-8 for Kuilibadi. These documents are both signed "Haimabati Dasi, mother of Sham Lal Mitter, minor." On the 28th of January 1867, Haimabati executed two kabuliyats, one for each mouzah, signed in the same way as the dowls in which the rent fixed by the decree for enhancement is stated, and also the additional rent named in the dowl, together with a small sum for other land, and she agreed to pay the rent by instalments, year by year. Probably there was some land which had become subject to pay rent since the dowls were executed.

The plaintiff attained his majority on the 10th of May 1877. On the 16th of July 1877, he deposited in Court Rs. 35-1-15 gundahs for rent of Gilabani, the defendants having refused to take it, and on the 19th January 1878 the defendants presented a petition in which they stated that the name of Sham Lal Mitter was not registered in their sherista, and he was not a tenant of Gilabani mouzah; that Haimabati Dasi held under them 3,579 bighas 17 cottahs 8 chittacks of land in Gilabani mouzah, on an annual rental of Rs. 946-13-13-2 cowries, and the name of Haimabati was registered in their sherista, and, therefore, they were not bound to take the money in deposit. About this time they appear to have brought suits against Haimabati for arrears of rent. They are numbered 2 and 3 of 1878, but the date of the filing of the plaints does not appear in the record of proceedings. The Judgment in each was given on the 2nd of December 1878, and it states that the defence of Haimabati was that she executed the kabuliyat upon which the suit was based, not in her personal capacity, but as guardian of her then minor son, Sham Lal Mitter, and, as he had become a major, the suit ought to be instituted against him, and not against her. An issue was settled on this allegation: and the Subordinate Judge adopting the translation of her signature which has been given, held that the words used in the kabuliyats did not themselves convey the meanng contended for by the defendant, *viz.*, that Haimabati executed the instrument as

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guardian of her minor son, and made a decree in both suits for the amount claimed.

[15] The defendants proceeded to execute the decrees and, the mouzahs having been attached, the plaintiff made a claim under s. 63 of Act VIII of 1869, which was rejected by the Subordinate Judge on the ground that the claimant's name was not registered in the sherista of the defendants, the Judge saying that he " ought to bring a suit in the usual way to find out whether he was bound to pay the former rent, and whether the payment of the enhanced rent of the jote was binding on him." The 10th of January, 1881, was fixed for the sale, and on that day the plaintiff paid into Court the whole amount due under the decrees, whereupon it was ordered that the sale be stayed. The present suit was instituted on the 11th of February, 1881, the sum so paid being what is sought to be refunded. The substantial question in the suit is whether the plaintiff is bound by the decrees for enhancement obtained against Haimabati and Peari, or by the kabuliyats. It was admitted by the learned counsel for the appellants that he is not bound by the decree as against Haimabati, but they contended that he is bound by it as against Peari, having purchased her moiety during the suit, and that it made him liable to pay the whole of the enhanced rent. Upon this question the lower Courts have differed. The learned counsel relied upon the kabuliyats as being executed by the plaintiff's mother, who was his natural guardian, and upon the absence of any suggestion that the enhancement of rent was otherwise than proper. At the close of the argument for the appellants their Lordships intimated to Mr. Mayne, who appeared for the respondent, their wish that they should first hear his argument upon the effect of the kabuliyats. Having done that they have come to a conclusion which makes it unnecessary to hear any further argument.

The addition to Haimabati's name of the words " mother of Sham Lal Mitter, minor," must, in their Lordships' opinion, be considered as meaning that she was contracting as the mother and guardian of her infant son. Undoubtedly, the statement of the appellants in their petition of the 19th of January, 1878, and their suing Haimabati after the plaintiff's coming of age for rent due partly before and partly after that time, are weighty evidence against their present contention, but the evidence [16] amounts only to admissions by them that Haimabati was the tenant, and no fact is proved which would make the admissions conclusive against them. The evidence of the dowls and kabuliyats has to be considered, and their Lordships think that outweighs the admissions. It is to be observed that this evidence is treated rather lightly by both the lower Courts. The Subordinate Judge does not notice the addition to the signature, and says: " These kabuliyats were executed by the plaintiff's mother not as his guardian, but for herself. They cannot, therefore, bind the plaintiff. It has been held in previous rent suits, based upon these kabuliyats, that the plaintiff's mother granted them in her personal capacity and was liable for rent." The judgment of the High Court in the statement of facts merely says: " Subsequently, in 1865 and 1867, Haimabati, not professedly as guardian of the plaintiff, but in her own name, gave kabuliyats to the putnidars."

It cannot be presumed that Haimabati claimed the estate adversely to her son, and the substance of the case is that the estate being under her management as his natural guardian, and the appellants being able to sue for an enhancement of the rent, she came to what appeared to be, and she was advised was, a proper arrangement with them. If there were

any doubt as to the capacity in which she acted, it should be presumed that she did so in her lawful capacity. As the other questions in the appeal have not been argued on behalf of the respondents, their Lordships give no opinion on them. They will humbly advise Her Majesty that the decrees of both the lower Courts should be reversed, and a decree be made dismissing the suit, with costs in both those Courts. The respondent will pay the costs of this appeal.

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Appeal allowed.

Solicitors for the appellants: Messrs. *Freshfield & Williams.*
Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*
C. B.

15 C. 17.

[17] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice O'Kinealy.

NILMONY DASSY FOR SELF AND AS GUARDIAN OF BISHU DOSHAYI AND ANOTHER (MINORS) (*Plaintiffs*) v. SONATUN DOSHAYI AND OTHERS (*Defendants*).* [5th August, 1887.]

Right of occupancy—Non-payment of rent—Relinquishment, Evidence of

Mere non-payment of rent does not extinguish or amount to a relinquishment of the right of occupancy

Hem Chundra Chowdhari v. *Chand Akund* (1) explained.

NILMONY DASSY, on behalf of herself and as guardian of Bishu Doshayi and another, brought a suit against the Secretary of State for India in Council and Sonatun Doshayi and others for recovery of possession of a certain holding in a *khas* mehal by establishment of the right of occupancy on the allegation that the plaintiffs had since the Bengal year 1290 (1883) been kept out of possession by the defendants Sonatun Doshayi and others who had obtained a lease from Government. The defendants raised the contention that the plaintiffs had prior to 1290 gone to live in another village and ceased to cultivate and pay rent for the lands in question, and were therefore not entitled to the relief prayed for on the authority of *Muneeruddeen* v. *Mahomed Ali* (2); *Nuddear Chand Poddar* v. *Modhoo Soodun Poddar* (3); *Haro Dass* v. *Gobind Bhuttacharjee* (4); *Ram Chung* v. *Gora Chand Chung* (5); *Gulam Ali Mundul* v. *Golap Soondery Dossee* (6).

The Munsif found that the right of occupancy had been established, that as a matter of fact there had been a failure in [18] the payment of rent for three or four years; but there was nothing to show that the plaintiffs had either gone to live in another village or ceased to cultivate their holding as contended by the defendants, and therefore, as there was no relinquishment, he gave the plaintiffs a decree.

On appeal the Subordinate Judge, relying upon the authority of *Hem Chundra Chowdhari* v. *Chand Akund* (1), held that the plaintiffs had no

* Appeal from Appellate Decree, No. 2658 of 1886, against the decree of Baboo Kedarnath Mozumdar, Subordinate Judge of Midnapore, dated the 24th of September 1886, reversing the decree of Baboo Jogendranath Bose, Munsif of that district, dated the 25th of February 1885.

(1) 12 C. 115. (2) 6 W. R. 67. (3) 7 W. R. 153.
(4) 3 B. L. R. Ap. 123=12 W. R. 304. (5) 24 W. R. 344. (6) 8 C. 612.

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APPELLATE CIVIL.

14 C. 17.

subsisting right of occupancy in the lands, inasmuch as they " had neglected or omitted to pay rent for some years before the institution of the suit," and set aside the decree of the Court below.

The plaintiffs appealed to the High Court.

Baboo *Girish Chunder Chowdhry*, for the appellants.

Baboo *Sharoda Churn Mitter*, for the respondents.

The judgment of the Court (NORRIS and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

The facts of this case appear to be these: One Gopal Dolai, the husband of the plaintiff No. 1 in this suit and the brother of the minor plaintiffs Nos. 2 and 3, had either in or previous to the year 1290 obtained an occupancy right in respect of certain paddy lands. The suit was brought by the plaintiffs for recovery of possession of these lands from the defendants Nos. 1 and 2 upon the establishment of the plaintiffs' title; and the title they claimed was that of an occupancy ryot. It appears that no rent had been paid by the plaintiffs or Gopal, their predecessor, for this land for some four or five years previous to the year 1290; and it was admitted by the plaintiffs that neither they nor their predecessor Gopal had cultivated the lands since the year 1290. There was no distinct finding by the lower appellate Court as to when the plaintiffs or their predecessor had ceased to cultivate the lands. Upon the facts, as we have stated them, the Subordinate Judge, upon the authority of the case of *Hem Chundra Chowdhari* v. *Chand Akund* (1), decided that the plaintiffs had at the time of bringing their suit no subsisting right of occupancy in [19] the lands, as they had neglected or omitted to pay rent for some years before the institution of this suit. If the case to which the Subordinate Judge has alluded decides, as a matter of law, that the mere non-payment of rent will be sufficient of itself to warrant the Court in finding that the occupancy right has been lost, we think that the decision goes too far. But, speaking for myself, I do not think that the judgment goes to that extent. The judgment must be read in the light of the facts of the case. But we think that the Subordinate Judge ought to find as a fact, whether at the time the suit was brought there was a subsisting right of occupancy, and for that purpose he ought to ascertain for what length of time the plaintiffs or their predecessor had ceased to cultivate the lands. As we have already pointed out, we think that the mere non-payment of rent taken by itself is not sufficient to warrant the Judge in coming to the conclusion, that there is no subsisting right of occupancy. But it may be that the fact that the plaintiffs had for so long a time ceased to cultivate the lands, coupled with the non-payment of rent, would be evidence upon which the Court might ultimately come to the conclusion that there had been a relinquishment of the right of occupancy. In the light of these remarks we remand the case to the lower appellate Court to find as a matter of fact whether at the time the suit was brought the plaintiffs had a subsisting right of occupancy.

We will keep the case on the file of this Court and direct the Subordinate Judge to return his finding within one week from the reopening of the Court after the ensuing vacation.

Costs will abide the result.

K. M. C. *Case remanded.*

(1) 12 C. 115.

15 C. 20 (P.C.)=14 I.A. 127=11 Ind. Jur. 474=5 Sar. P.C.J. 71=Rafique and Jackson's P.C. No. 98.

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[20] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir R. Baggallay, Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

UMAN PARSHAD (*Plaintiff*) v. GANDHARP SINGH (*Defendant.*)
[2nd, 5th and 6th July, 1887.]

Evidence—Validity of Transfer—Benami transaction—Wajib-ul-arz,

A transfer by registered deed, admitted to have been executed, but alleged to have been benami and merely colorable, was held, on the evidence, to have been valid and effective in the absence of evidence showing the contrary.

A settlement officer should not receive for entry in the *Wajib-ul-arz* of a village a mere expression of the views of a proprietor or enter it upon the records relating to the village, the *Wajib-ul-arz* being intended to be the official record of local customs.

[**R.**, 12 A. 234 (258) (**F.B.**); 12 A. 328 (335) (**F.B.**); 15 A. 147 (166); 18 A.W.N. 89; 25 A. 90 (103)=22 A.W.N. 207; 28 A. 488=3 C.L.J. 594=3 A.L.J. 415=10 C. W.N. 730=8 Bom. L.R. 402=1 M.L.T. 171=33 I.A. 97 (**P.C.**); 5 A.L.J. 79 (84); 1 O.C. 30 (32); 1 O.C. 301 (306); 4 O.C. 145 (156); 4 O.C. 71 (76); 7 O. C. 134 (135); 8 O. C. 94 (102).]

APPEAL from a decree (10th November 1884), of the Judicial Commissioner of Oudh, reversing a decree (17th April 1883) of the District Judge of Sitapur.

The suit out of which this appeal arose was to obtain possession of four villages in the Sitapur district, claimed by the present appellant, who was plaintiff, under two sale deeds, dated 29th May 1863 and 9th February 1864. It was the common case of both parties that before the execution of these deeds by Gulab Kunwar, widow of Tuskaran Singh, she was entitled to the villages in full proprietary right, and she purported to convey the latter by the sale deeds in question to Bissesur Baksh, her son-in-law, the deeds being duly registered.

The plaintiff alleged that the effect of these deeds was to pass the title in the villages to Bissesur Baksh, who died childless on the 7th November 1865, and that he was succeeded by his wodows, the survivor of whom died in October 1879, and that thereupon the plaintiff as the next heir of Bessesur Baksh, being his uncle, became entitled to succeed to the proprietary right.

The defendant contended that the sale deeds of 1863 and 1864 were benami transactions never acted upon, and not intended to pass the title, which remained in Gulab Kunwar till [21] her death, which took place on the 7th December 1866; that on her death her daughter Fatteh Kunwar succeeded her; and that Fatteh conveyed these four villages in 1876, by a deed of gift, to her daughter Munnia, who died in her mother's lifetime childless in March, 1879; and that thereupon the defendant, her husband, succeeded by right of inheritance, and had since, with the consent of Fatteh, been in possession.

The main questions on this appeal were whether these sale deeds were benami only, or operated to pass title; and whether there had been possession of the four villages by Gulab Kunwar continuously from the date of the transaction, there being no dispute as to the making of the instruments at their respective dates.

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The District Judge held that the deeds were executed for good consideration and valid, and that therefore Bissesur Baksh was entitled, on the death of Fatteh, to obtain possession. He was of opinion that the defendant had failed to prove that the sale by Gulab in 1864 was not real, and had failed to prove Fatteh's title as heir to the villages through her mother Gulab, they having been alienated by Gulab before her death; also that the villages were the subject of a gift from Fatteh to Munnia had not been proved.

The Judicial Commissioner on appeal was of the contrary opinion. He decided that Gulab did not, when she executed the deeds of 1863 and 1864, part with possession to Bissesur, but continued herself to hold the villages; and therefore, in his judgment, the suit was barred by limitation, not having been brought within twelve years from the dates of the deeds of sale. Another reason for deciding in favour of the defendant was, according to the Judicial Commissioner, that Bissesur's widows could not have taken more than an interest each for her life, one of the grounds on which the Judicial Commissioner so held being the evidence afforded by certain *wajib-ul-arz*, or records of rights, appertaining to the villages in suit, put in evidence by the defendant. These were considered by the Judicial Commissioner as affording proof that a widow, such as Fatteh, had, by custom, power to alienate absolutely her husband's estate, this showing, in the Judicial Commissioner's opinion, [22] that Fatteh's gift to her daughter Munnia was valid, his opinion on this point being opposed to that of the District Judge, the latter holding them to be valueless as evidence.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *J. Graham*, Q. C., and Mr. *H. Cowell*, for the defendant.

For the appellant it was argued that the defendant had failed to prove that the deed of 1863 and 1864 were merely colourable. They were followed by possession, and as to the estate supposed to be taken by the widow of Bessesur, she took no more than the ordinary estate of a Hindu widow. No sufficient evidence, if any, had been given by the respondent of a custom in derogation of the ordinary law on this point, which law would invalidate the alienation by the widow except for proved necessity. The *wajib-ul-arz* should not, under the circumstances, and with regard to what the entry was, be regarded as affording any evidence of the custom alleged for widows to transfer without restriction.

For the respondent it was contended that upon the evidence the deeds in question were benami and inoperative. Mutation of names in favour of Fatteh had taken place and she had made a valid gift to her daughter.

The following authorities were referred to: *Sreeman Chunder Day* v. *Gopal Chunder Chuckerbutty* (1); *Faez Buksh Chowdhry* v. *Fukeeroodeen Mohommed Ahussun Chowdhry* (2); *Kedhanath Mahatah* v. *Kadumbinee Dabea* (3); *Lakhraj Kuar* v. *Mahpal Singh* (4); Regulation VII of 1822; Act XVII of 1876 (the Oudh Land Revenue Act).

Counsel for the appellant were not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

Lord Hobhouse:—In this case only one question was argued, and that was whether the two transfers executed by Gulab in the years

(1) 11 M. I. A. 28. (2) 14 M. I. A. 234. (3) 10 W. R. 239.
(4) 7 I. A. 63=5 C. 744.

1863 and 1864 to Bissesur, the husband of her only daughter, [23] were real transfers, or benami. That question turned out to be a complicated one, and it was necessary to go into a good deal of evidence of a varied and rather voluminous nature. The plaintiff maintains that the substance of the transaction is the same as the form of it, and that the property, consisting of four villages, conveyed to him by deeds, duly attested registered immediately afterwards and subsequently proved and filed in a suit, was actually sold to him. As to the deeds there was no doubt. The only question is whether Bissesur, the grantee, was a benamidar.

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It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still such a tranfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

The first question here is, what are the probabilities of the case on consideration of the deeds themselves, and the position of the grantor? What motive had Gulab for putting the property into benami? She was not purchasing the property. It was vested in her in possession, and had been so for a considerable number of years. It is not suggested that she was in any difficulties, so that creditors might be baffled by the proceeding. On the contrary it appears that she was a woman of substance and position in her own country. The only suggestion is that, inasmuch as there was a suit between her and her brothers-in-law, represented by one Balbhadar, concerning these villages, she used this transaction in order to impede Baldhadar's proceedings. But whatever such a transfer might do to impede general creditors, it is difficult to see how it could impede Balbhadar, who was claiming the property by a title as directly available against a transferee from Gulab as against Gulab herself. Moreover the four villages were part of fifteen villages which were the subject of dispute between her and her brothers-in-law, and which he had received on a partition between them. With regard to some of [24] the fifteen villages she was out of possession. With regard to these four she was in possession. She was in possession of more; it requires a minute examination to tell how many, but certainly of five, and no reason can be assigned why she should have selected four villages out of those which were in dispute, and which were in her possession, and have placed those four in the name of a benamidar. There is no antecedent probability that this is a benami transaction.

Then their Lordships ask what is the direct evidence on the point—oral evidence given by witnesses who profess to speak to it. There are two witnesses called for the defendant—Hira Singh and Sitaram—who say that the transaction was a sham one, and that Gulab remained in possession; apparently they mean to say during the rest of her life. But they give no details; they speak to no acts of possession; even as to the time of possession their language is quite vague and general; and they tell, both of them, the most extraordinary story with respect to these deeds, namely, that when Balbhadar, the person against whom it was suggested that these deeds were to be a defence, appeared upon the scene, Gulab immediately told Balbhadar that the deeds were all sham deeds. Their

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Lordships have no hesitation in treating the evidence of those witnesses as worthless.

The only other witness who gives direct evidence on the subject is in rather a curious position. He was the patwari of one or more of these villages—certainly of the village of Turni—and he was called in this suit. His name is Sheo Sahai. In this suit he stated first that the transaction was a sham one, and that Gulab remained in possession, and received the rents. But then a document was put into his hands, which was a deposition made by him in a mutation proceeding sixteen years before and within three or four years of the date of the transactions, and he was asked whether it was true, and he said it was true. He was rather indignant at the truth of it being impugned, and he said: "Do you think I would tell a falsehood? Of course it is true." But that deposition shows that there was a sale by Gulab to Bissesur, and that Bissesur entered into possession and received the rents, and that when Fatteh, who was the common heir of the two, Gulab and Bissessur, applied for a mutation of [25] names, she applied for it on the footing of Sheo Sahai's evidence and as the heir of Bissesur. Therefore the evidence of Sheo Sahai must be taken as some evidence to show possession on behalf of Bissesur. There is actually no evidence the other way, and so the balance of testimony on that point inclines in favour of the plaintiff.

Their Lordships will now return to another branch of the case. It is said that there is no mutation of names; that no witnesses have been called to prove the deeds; that no proof has been given of payment of the money; no proof of the receipt of the rents; and no proof of the payment of the revenue by Bissesur. It is quite true that all that negation of evidence appears in the case with regard to mutation of names, the matter is explained in this way. It is said that, owing to the dispute between Gulab and her brothers-in-law, the application for mutation was delayed; and their Lordships certainly find it to be the case that, when a decree had been given in favour of Gulab in August, 1866, and when such a time had elapsed as, in the opinion of the patwari Sheo Sahai had precluded an appeal, the application is made, namely towards the end of 1866 or the beginning of 1867. That may be the true explanation. But, however that may be, the absence of any mutation of names hardly tells much in favour of the defendant's view, because, if this were a benami transaction entered into for the purpose of baffling somebody who was claiming the property, the mutation of names would be an important part of the proceeding; because without that mutation Gulab remained the ostensible owner in the Collector's records, and the process of baffling her adversary would be a very imperfect one. Indeed it is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone trough in order to throw a veil over the reality.

With regard to all the other points, it must be remembered that this is not the ordinary case of a benami dispute. In the ordinary case you have the benamidar or those claiming under him on the one side maintaining that the transaction is a real one; and you have the former owner and those claiming under him on the other [26] side maintaining that it is a sham and each party has in his own power such receipts, such evidence of payments, such connection with the agents concerned as should suffice to prove his own case if it is a true one. But the peculiarity of this case is that the title of benamidar, and the title of the original true owner,

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coalesced in the person of Fatteh Kunwar within four years of the first transaction and within three years of the second; and it was she—and it is the defendant who is her representative—who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one. Therefore the absence of evidence certainly does not tell against the plaintiff, but it rather tells against the defendant, who might have produced both witnesses and documents which would throw light upon the case.

Under these circumstances great importance is to be attached to assertions of title made, either by Gulab or Fatteh, from time to time, in legal proceedings. Let us follow them in chronological order. In the first place there was Balbhadar's suit, which was commenced in 1863, and in which a decree was made in 1866. The Judicial Commissioner has rested great weight upon the decree in that suit as against the plaintiff. What he says is " Seeing then that Gulab Kunwar continued in possession long after the sale deeds, and sued on her own title in her own name, and got a decree for this property in her own name for herself and her heirs, I can hardly imagine a clearer case of adverse possession as against Bissesur Baksh and his heirs." As to the possession, that has been dealt with; as to the suit, there is clearly an inaccurate statement by the Judicial Commissioner. The suit was instituted by Gulab for recovery of several villages which came to her under the partition, and of which, by a series of complicated proceedings, she had lost possession. She never sued for the five villages of which she was clearly in possession, and of which the four now in suit are part. The way in which those villages came in was on the plea of the defendant, who said that, so far from Gulab having the right to recover from him the villages for which she sued, he had the right to recover from her five villages of which she was in possession. How exactly that matter was dealt with in [27] Court before the Judge we do not know. It may have been that the parties agreed there should be a decree covering the whole matter in dispute, but those five villages were not regularly in suit at all. The decree does deal with them. It gives to Gulab the absolute proprietary right in them, and dismisses the defendant's claim—the counterclaim to recover from the plaintiff the five villages in her possession. Those words are relied upon as proving Gulab's possession. But it is obvious, independently of the fact that it was quite irregular to make a decree about these villages, that there was no question of possession as between Gulab and Bissesur in this suit. Such an issue never was raised or thought of. The only question of possession, if any, was as between Gulab and Balbhadar. Strictly and regularly there was no question whatever of possession, but if any were brought in, then it was only as between Gulab and Balbhadar and as between those two she was in possession. She was then recorded in the Collector's books, and it was quite sufficient for the determination of any question that could possibly be brought, even irregularly and by consent of the parties to that suit, to treat her as the party in possession. And in point of fact the decree uses the right language upon that point. It decrees to her a right against the defendant Balbhadar Singh, and against nobody else.

Then come the mutation proceedings on the 1st of January, 1867, in which the evidence of Sheo Sahai, which has been before observed upon, was given. In those proceedinbs Fatteh Kunwar, who was the heir both of Gulab and of Bissesur, claims to be registered as the heir of Bissesur. Why should she have made that claim? Her interest was all the other

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way. If she were heir of Gulab, she had absolute dominion ever the property. If she were heir of Bissesur, she had only the widow's estate, and we shall see presently what importance she attached to that distinction. Moreover it was more simple to claim as the heir of Gulab. She was the recorded owner, and, as far as the Collector's records went, Fatteh had only to show that she was Gulab's only child, and the mutation would be made as a matter of course. But she does not do that. She introduces that which is entirely new matter into the Collector's records—the conveyance [28] to Bissesur, and then makes out her claim as heir of Bissesur. That seems to their Lordships strong evidence that, in the opinion of Fatteh Kunwar, or of her advisers at that time, her true title was as heir of Bissesur.

Next comes Ratan Singh's suit in 1868. Ratan Singh after the death of Gulab revived the old dispute between Gulab and her brothers-in-law, with only this difference, that, whereas in Gulab's lifetime they contended that she was entitled only to maintenance, now after her death they contended that she was only entitled to the widow's estate. That dispute was raised in 1868. Fatteh Kunwar appears and puts in a plea by her agent in which she again sets up her title through Bissesur. The judgment proceeds on that footing. The judgment is to the effect that the plaintiff's claim is declared "not to lie against defendant, who holds as her husband's heir the property acquired by him by purchase from Gulab, who was possessed of the legal power to settle." Of course that is no decision binding the present parties, but it shows as distinctly as anything can show the position which Fatteh Kunwar thought it right to assume in the year 1868.

All these things are rather emphasized by the wajib-ul-arz, which was made at Fatteh Kunwar's instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A wajib-ul-arz has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited of *Lekraj Kuar* v. *Mahpal Singh* (1) it is stated that "these documents are entered on record in the office. They must be taken upon the evidence, which is general evidence, to have been regularly entered and kept there as authentic wajib-ul-arz papers." In that case effect was given to the wajib-ul-arz produced. In this case the Judicial Commissioner has treated the wajib-ul-arz in question as a document of weight, which must be taken as showing local customs until some proof to the [29] contrary is produced. But on looking at the evidence their Lordships find that this wajib-ul-arz was the concoction of Fatteh Kunwar herself, received by the settlement officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views; they are entered as the official record of a custom. And supposing 50 years had gone by, and then a dispute arose about the family or the local custom, this would probably have been produced from the office as an entry made 50 years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this wajib-ul-arz)

(1) 7 I. A. 63=5 C. 744.

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by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless—they are worse than useless—they are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the local Government to make rules under which these records shall be framed, such proceedings will not take place any more.

So much for the character of the document. Now for its effect. It is not now contended that, if Bissesur was entitled, the custom which the wajib-ul-arz asserts can prevail. In fact there is no evidence of it. Mr. Graham most properly abandoned that part of the case. But that does not get rid of the circumstance that in 1869 Fatteh Kunwar thought it to her interest to put this fictitious document on the village records, asserting her own power to alienate such estate as she had got from Bissesur. If she had taken everything as the heir of Gulab, there was no object in getting the entry made; but if she was the heir of Bissesur, [30] then she had a strong object, because otherwise she could not make a complete alienation of the estate.

That, in their Lordships' opinion, strengthens the circumstance that up to that time she had always been asserting herself to be the heir of Bissesur, and leads them to conclude that she could not have asserted it for any other reason than because it was the truth.

Then comes the gift by Fatteh Kunwar to her daughter in 1876; and again we find that, though it is not very precise as to the nature of her title, she states that Munnia is a naural heir " after me and my husband." Now that exactly accords with the position which Munnia would have if the property came from Bissesur, and it does not accord with the position which Munnia would have if the property came from Gulab. Therefore it appears again that Fatteh Kunwar considered herself as taking the property from Bissesur, and as conveying it to Munnia under that right which she alleged on the face of the wajib-ul-arz that she possessed, but which in fact she did not possess.

The only remaining proceeding is the declaratory suit by Uman Parshad in 1876. That raised the very question which has now to be decided in this suit. The suit was got rid of because it was declaratory only. But the parties had now come face to face. Uman Parshad, the very man, or representing the very family, against whom the benami transfer was said to be effected, comes and claims the property. Now clearly is the time when this benami title should be set up to embarrass the enemy. But it is not set up. Nothing is said about it except what may be gathered from a very obscure, and probably very imperfect, sentence taken down by the Judge as either the plea or the argument of Mr. Jackson, who was the Counsel for Fatteh Kunwar. It is difficult to gather any thing precise from it; but he seems to have suggested that Bissesur took as a benamidar, not for Gulab, but for his wife, Fatteh Kunwar—a totally different case from that which is made on the present occasion. That again is very strong evidence that Fatteh Kunwar, or her advisers, felt that they could not with truth and honesty declare that it was a sham transaction.

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Thus we find that Fatteh Kunwar had gone on from 1866 to [31] 1879 asserting herself to be in possession of this property as heir of Bissesur; and no assertion to the contrary was made during her lifetime. If she had made the contrary assertion, perhaps some proceedings might have been taken; but the lapse of time affords an additional reason why her grantee or representative should not be allowed to turn round and assert a directly contrary title.

The result is that all these lines of consideration point in favour of the plaintiff's contention; and inasmuch as he has the form of the transaction on his side, and everything points in favour of the substance of the transaction being with him too, his case should prevail.

Their Lordships will humbly advise Her Majesty to discharge the order of the Judicial Commissioner, and to dismiss the appeal to him with costs; and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *H. W. Payne.*

C. B.

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15 C. 31.

CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

KUTUHUL SINGH AND OTHERS (*Petitioners*) *v.* UMA SINGH AND OTHERS (*Opposite Parties*).* [9th August, 1887.]

Criminal Procedure Code (Act X of 1882), *s.* 145—*Joint hearing of the case of several claimants—Possession—Number of plots, Dispute as to—Practice.*

A Magistrate, proceeding under s. 145 of the Criminal Procedure Code, in a case in which one party (thirty-nine in number) claimed to be the tenants of 708 bighas of land belonging to one Tofuzul Hossein, and the members of the other party (seventeen in number) claimed to hold the same land in separate parcels as their maurasi jote, tried the question of possession as between the two parties in one case, notwithstanding the protest of the maurasi claimants to this mode of procedure, and decided that possession was with the party of thirty-nine, directing that they as a body should remain in possession until ousted by the order of a Civil Court.

[32] *Held* that the course pursued by the Magistrate at the hearing was prejudicial to the case of the maurasi claimants; and that the form of his order was open to the objection that it would render it necessary for the party out of possession, to make all the persons declared to be in possession defendants in any civil suits brought to recover possession of the land.

Azim Mollah v. *Satoo Poramanick* (1) distinguished.

[R., 6 C.W.N. 206.]

THIS case arose out of a claim made to the possession of 708 bighas of land, of which one Tofuzul Hossein was the zemindar, the party of Uma Singh, thirty-nine in number, claiming to be tenants under Tofuzul Hossein of the land in dispute, whilst the party of Kutuhul Singh, seventeen in number, claim to be interested in the land in dispute in various portions as their maurasi jote. On this state of facts the Magistrate, on

* Criminal Revision No. 214 of 1887, against the order passed by A. Leeds, Esq., Assistant Magistrate of Barh, dated 23rd June, 1887.

(1) 10 C. L. R. 523.

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the 11th February 1887, proceeding under s. 145 of the Criminal Procedure Code, directed the two parties to file their written statements, giving full particulars of the lands claimed by them. The members of the party of Kuthul Singh put in separate written statements with respect to the lands held by them separately, and objected to the Magistrate trying their cases together in one case. The Magistrate, however, overruled this objection, and passed an order, dated the 23rd June, 1887, to the effect that the party of Uma Singh were entitled to possession of the 708 bighas in dispute until evicted therefrom by due course of law.

The party of Kutuhul Singh obtained a rule in the High Court calling upon the party of Uma Singh to show cause why the order of the 23rd June should not be set aside on amongst others, the following grounds, *viz.*, (*a*) that the order did not specify the particular portions of land of which the several members of the party of Uma Singh were declared to be in possession, an omission which disenabled the separate members of the party of Kutuhul Singh from instituting suits in the Civil Courts against the parties who had been declared to be in possession of the land; and (*b*) that the Magistrate should not have tried the several claims to possession of the numerous parties on each side jointly, passing one joint and indiscriminate order thereon.

Mr. *M. Ghose*, Mr. *Abdul Hossein*, and Mr. *C. Gregory*, in showing cause, cited the case of *Azim Mollah* v. *Satoo Poramanick* (1).

[**33**] Baboo *Umbica Churn Bose* in support of the rule.

The order of the Court (Pigot and Macpherson, JJ.) was as follows:—

ORDER.

This matter before us turns upon a rule granted on the 20th July, 1887, calling upon the party in whose favour an order under s. 145 was passed to show cause why the order of the Assistant Magistrate of the 23rd June, 1887, should not be set aside. The order was one made under s. 145 of the Code of Criminal Procedure. The dispute, upon the allegation of the existence of which the Magistrate took action arose, between classes of persons each of whom claimed to be possessed of land of which Tofuzul Hossein was the zemindar. The persons for whom Mr. M. Ghose and Mr. Gregory appear, to the number of 39 individuals, claim to be interested as tenants under that zemindar in the property with reference to which the order is made. The persons against whom the order has been made, and for whom Baboo Umbica Churn Bose appears, are Kutuhul Singh and others, being seventeen in number, persons claiming to be interested in various portions of land with reference to which the order is passed as occupancy tenants holding lands in different quantities and under interests which appear to have been acquired at different times. Under these circumstances the Magistrate, by a notice dated the 11th February, served on the 19th February of this year, instituted proceedings under s. 145.

It is unnecessary now to see how it came to pass that those proceedings were initiated under that section. The matter having been gone into in detail, and, as we are informed, after minute examination on both sides of the title to the lands in question, the Magistrate came to a finding in these words: "I therefore order that the first party are entitled to possession of the 708 bighas of Gogi Kandah, mouzah Mokama, until evicted therefrom by due course of law, and I forbid all disturbance of such pos-

(1) 10 C. L. R. 523.

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session until such eviction." The petitioners Kutuhul Singh and others have obtained this rule, and they object in the first place that that order is bad, and that the investigation held which led up to it is bad on the ground that the several claims to possession of the numerous parties on each side were jointly, or at least indiscriminately, investigated, and have been jointly or indiscriminately [34] adjudicated upon. They raised that objection in the written statement filed by them in the proceedings so early as, I understand, the 15th April of this year, and they raised it, according to the translation of the Official Interpreter of this Court, in these words: "The case under s. 145, Code of Criminal Procedure, can by no means, jointly and individually, proceed unless it is shown what piece of land is claimed, by what tenants alleged by Tofuzul Hossein, proprietor. But no such fact exists on the record." We have been referred to the case of *Azim Mollah* v. *Sutoo Poramanick* (1) as showing that an order under s. 145 may well be made, although it does compendiously order that one set of persons are in possession as against another set of persons without attempting to specify which is entitled as against which to which portion of the land in question. The circumstances of that case appear to be sufficiently different from those of the present. Here the classes of persons claiming under the same zemindar assert, in respect of different parcels of land, different and independent rights, and the contest as in respect of each parcel of land claimed by Kutuhul Singh and any one of his party is plainly as between that person and any of the persons on the other side who claim that parcel of land. We think that, apart from any question of prejudice arising hereafter from the form of the order, the party of the persons who complain of the investigation being mixed up as it were are entitled to maintain that objection on the ground that the investigation into their case might well be, and probably was, prejudiced by that course being pursued. We think that they are also entitled to object to the form of the order on the ground stated by their learned pleader, that proceeding by civil suit would, in the face of an order in this form, render necessary the making as defendants of a multitude of persons who are by the terms of the order held to be in possession of the land in question. It is suggested that we should remit the case to the Magistrate for a finding which should cure that last defect, the defect of the order, by enabling him, or in truth directing him to make 39 separate orders under s. 145 declaring the 39 claimants entitled to possession of the several parcels claimed and, as we are told, set out in boundaries [35] by them in their written statement. Were it possible to do that it would not cure the objections to these proceedings on the other ground. But it appears that the Magistrate who heard the greater part of the case is no longer Magistrate in that district. We have no means of telling further whether, if he were there, he could do more than make the compendious order which is before us and which in effect is that these people (the party of Uma Singh) in a body are in possession of the entire land in dispute. But in any case it would be impossible now to cure the original defect of the proceedings that is pointed out in the paragraph of the written statement to which we have referred. Under these circumstances we think that the rule must be made absolute and the proceedings set aside.

Rule absolute.

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(1) 10 C. L. R. 523.

15 C. 35.

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ORIGINAL CIVIL.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

15 C. 35.

A. M. HUGHES (*Plaintiff*) v. DELHI AND LONDON BANK (*Defendant*).* [17th November, 1887.]

Parties—Practice—Wife having an English domicile suing without her husband—Representatives of mortgagors—Priorities of mortgagees.

Case in which it was held that a wife having an English domicile is capable of suing without joining her husband as a co-plaintiff; and in which the representatives of certain mortgagors were held to be necessary parties to the suit (which was one to determine the rights of mortgagees *inter se*) on the following grounds: (*a*) that the rights of the mortgagees could not be determined without at the same time determining the liability of the mortgagor; (*b*) to avoid multiplicity of suits; (*c*) to give them an opportunity of being present at the taking of any account that might be ordered as between the mortgagees; and (*d*) to entitle the plaintiff or defendant to obtain costs out of the proceeds of the sale of the mortgaged property.

THIS was a suit brought by Alice Mabel Hughes, wife of R. J. Hughes, against the Delhi and London Bank (the plaintiff and defendant being respectively second and first mortgagees of the business and stock in trade, &c., of Stewart & Co.) asking for a declaration that she was entitled to priority over all advances made by the said Bank on the security of the premises mortgaged to her subsequent to the 15th March, 1882 (being the [36] date of the notice to the defendant Bank of the plaintiff's mortgage), and for an order directing payment to her of certain sums appropriated by the defendant Bank out of the sale proceeds of the business and for an account.

The mortgage executed by Stewart & Co., to the defendant Bank was dated the 3rd of August 1881, and expressed to assign all the stock in trade, fixtures, etc., belonging to the business of Stewart & Co., and also all the good will and custom book and other debts due and outstanding to the firm to secure the repayment of all sums of money which then were, or should from time to time thereinafter become, due and owing from the said firm on their account current with the said Bank, with interest thereon at 10% per annum. At the time of the execution of this mortgage it had been arranged between the Bank and Stewart & Co., that all over-drafts and money to be secured by the mortgage of the 3rd of August 1881 should not exceed the principal sum of Rs. 60,000.

On the 7th March 1882, Stewart & Co., executed a mortgage to the plaintiff of the good will, stock in trade and custom of the firm, together with all outstanding debts, claims and demands accrued due and owing, and which should thereafter accrue due or owing to the firm, to secure the sum of Rs. 60,000 and interest at 10%. On the 15th March 1882, the plaintiff through her attorneys, Messrs. Barrow and Orr, gave notice to the Delhi Bank of her mortgage, pointing out in a letter covering this notice that it would be right that the Bank should not allow the balance against Stewart & Co., to exceed the Rs. 60,000 secured by their mortgage. At the date of the plaintiff's mortgage the amount due on the Bank's mortgage as shown by their accounts stood at Rs. 61,867-13-3 principal, and accrued interest from the 1st January, Rs. 1,307, making a total of Rs. 63,174-13-3, but on the day following Stewart & Co., paid in to the Bank

* Original Suit No. 400 of 1886.

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Rs. 40,000 out of the sum paid by the plaintiff; and on the 15th March 1882, the amount due to the Bank on their mortgage stood at Rs. 27,444-6-6, exclusive of interest from the 31st December 1881. Further advances were then made by the Bank to Stewart & Co.; and on the 30th June 1883 the balance due to the Bank stood at Rs. 64,523-9-11.

[37] On the 29th June, 1886 Stewart & Co. stopped payment, and on that day under an order of the Court their property vested in the Official Assignee. On the same day, but whether before or after the vesting order was made is uncertain, the defendant Bank took possession of the mortgaged premises comprised in the above indentures of mortgage, by reason of default having been made in payment of the principal and interest secured under their mortgage; and on the 1st July 1885, the plaintiff for the same reasons also took possession. On the 12th August 1885, in exercise of the power of sale under the above mortgages, the plaintiff and defendant put up for sale the mortgaged premises; and on the 14th August 1885 the same were purchased by Messrs. Bushby and Westropp for Rs. 96,500. On the 5th November 1885, the defendant represented to the plaintiff that a sum of Rs. 92,121-10-3 was due and owing to them under their mortgage; and on that day the assignment of Bushby and Westropp was duly executed by the plaintiff and the defendant, the purchase money being received by the defendant. Differences having arisen between the plaintiff and defendant as to the accounts presented by the Bank, the plaintiff, claiming to have priority as regards all sums advanced on the mortgaged premises after the 15th March 1882, and after admitting a realization by her of a sum of Rs. 26,271-5-10 from the outstandings of the firm, brought a suit against the Bank for the purposes above mentioned, claiming a balance of Rs. 45,395 as still remaining due to her from the defendant under her mortgage. The defendant (amongst other matters) pleaded that the plaintiff could not sue without her husband; that the representatives of the mortgagors were necessary parties to the suit; and that in the absence of the mortgagors' representatives, beyond determining and declaring the principles upon which the priorities between the plaintiff and the defendant in respect of the several advances to the mortgagors were to be ascertained, no decree or order ought to be made in the suit; and that in particular in the absence of such parties no decree or order ought to be made for an account between the plaintiff and the defendant, or between the plaintiff and the representatives of the mortgagors, or the defendant and the representatives of the mortgagors.

[38] The case came on for settlement of issues, and certain issues were duly settled. For the purposes of this report it is only necessary to state the two following issues:—

1. Is the plaintiff's husband a necessary party to the suit?

2. Are the representatives of the mortgagors necessary parties to the suit?

Mr. *Hill* and Mr. *Sale*, for the plaintiff.

Mr. *Bonnerjee* and Mr. *Stokoe*, for the defendant.

Mr. *Hill* having admitted that the argument on the first issue might proceed on the basis of the plaintiff having an English domicile, referred to *Stephen* v. *Stephen* (1).

Mr. *Bonnerjee* on the first issue referred to s. 369 of the Civil Procedure Code, and to *Allumuddy* v. *Braham* (2) and *Hippolite* v. *Stuart* (3);

(1) 10 C. L. R. 536. (2) 4 C. 140. (3) 12 C. 522.

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and on the second issue s. 32 of the Civil Procedure Code; Calvert on parties, p. 188 (Ed. 1847); and to Fisher on mortgage, chapter X, para. 1427.

Mr. *Hill* in reply referred to s. 4, of the Succession Act. He also contended that the representatives of the mortgagors were not necessary parties, inasmuch as the mortgaged premises had been sold and the sale proceeds had been realised by the defendant and were now in the possession of the Bank; moreover, to prove the mortgagors' liabilities, it was not necessary they should be represented in the suit.

ORDER.

TREVELYAN, J.—This case having come before me for settlement of issues, I have settled the issues, and have only now to decide two questions as to parties. The first is whether the representatives of the mortgagors are necessary parties to this suit; the second is whether the plaintiff's husband is a necessary party to this suit.

As to the first question, I think that the representatives of the mortgagors are necessary parties to the suit. The object of this suit is to determine the rights of the mortgagees *inter se;* but it seems to me that such rights cannot be determined without at the same time determining the liability of the mortgagors, a liability which unless the mortgagors be made parties to this suit, might have to be determined in other suits, a result which would entail an unnecessary multiplicity of actions. The mortgaged [**39**] property has been sold, and the proceeds are insufficient to pay off both mortgagees. Probably the mortgagors are not very much interested in the way in which these proceeds are distributed, but, as the accounts will have to be taken in this suit, I think they should have an opportunity of being present at the taking of such accounts, and moreover, should either of the parties seek to obtain their costs out of the fund, there is no doubt that they would not obtain such costs except by an order made in the presence of the mortgagors.

The representatives of the mortgagors must be made parties to this suit.

I do not think that the plaintiff's husband is a necessary party to this suit.

The plaintiff and her husband have both got an English domicile. It is contended that she is under disability and incapable of suing alone. This is a question of the capacity of a married woman. There is no doubt that in England she could bring a suit of this description, but as the statutes which have freed married women from disability have not been extended to this country, it is said that she cannot here sue alone.

The result, if this were the law, is a curious one. All married women domiciled here can sue without their husbands. English women can sue in England without joining their husbands, yet, when an English woman comes to India, it is said that she is thereby placed under disability.

I think that the answer to this question is clear. Section 4 of the Succession Act lays down, I think, the general law of this country with respect to the capacity of married persons other than those expressly excluded from the operation of the Act. Mrs. Hughes' capacity is governed either by the law of England, the place of her domicile, or by the law here, *i.e.*, s. 4 of the Succession Act. Both laws permit her to sue without joining her husband, and therefore she can, I think, sue without him. I

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hold that Mr. Hughes is not a necessary party to this suit. The suit will come on in due course for final disposal.

Attorneys for the plaintiff: Messrs. *Barrow & Orr.*

Attorneys for the defendant: Messrs. *Morgan & Co.*

T. A. P.

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15 C. 40=12 Ind. Jur. 220.

[40] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

HARENDRA NARAIN SINGH CHOWDHRY (*Plaintiff*) *v.* T. D. MORAN (*Defendant*).* [27th June, 1887.]

Act XL of 1858 *s.* 18—*Certificated guardian, power of, to grant lease—Unauthorised transfer, Effect of.*

A lease for a term of 12 years, but renewable at the pergunnah rate and transferable in its character, granted by a certificated guardian without the authority of the Court, is void *ab initio*, and will therefore, not avail the lessee, even for the period of five years for which such guardian is at liberty to grant the lease.

Held, accordingly, that in the case of *ijmali* property, whether such a lease was executed by the guardian conjointly with the co-sharers of the minor, or separately, the minor was entitled to eject the lessee as trespasser in respect of his own share without making his co-sharers parties to the suit.

Quaere, whether such a lease granted by a certificated guardian conjointly with the co-sharers of a minor and thus creating one and the same tenancy is not also void as against the co-sharers.

Held, also, that a transfer made by a person in the capacity of a certificated guardian before the actual issue of the certificate, but after the orders for its issue have been made in his favour, and after his recognition as a certificated guardian, is a transfer within s. 18 of Act XL of 1858.

[**R.**, 18 C. 259 (262); 29 M. 29 (34); 35 C. 807=7 C.L.J. 483; **D.**, 33 C. 273 (278)=10 C.W.N. 126; 36 C. 675=9 C.L.J. 523 (540)=1 Ind. Cas. 626.]

HARENDRA NARAIN SINGH brought a suit to eject T. D. Moran from certain lands by setting aside a pottah. The plaintiff alleged that during his minority his certificated guardian, Kalinarain Singh Barua, fraudulently granted a lease in favour of the defendant in respect of 400 bighas of land in a zemindari of which he (the plaintiff) was an eight-anna co-sharer. It appeared that the land was taken for the purposes of a tea garden, and the pottah, which was ostensibly for a period of twelve years, ran as follows: "After the expiration of the term of twelve years you shall have to take a fresh settlement by getting an assessment made at the rate paid by the tenants of the pergunnah, or at an enhanced rate if there be any enhancement. * * * If within the term of the lease you transfer the tea garden, or God forbid, if you die, then your representatives, or the person [41] to whom the transfer will be made, will by registration of his name in the serishta of the zemindar acquire the right which you have." The defendant resisted the claim on the grounds, among others, (*a*) that the disputed land was the *ijmali* undivided land of the plaintiff and his co-sharers, and therefore the plaintiff could not sue alone; (*b*) that the late Kalinarain Singh Barua was not a certificated guardian under Act XL of 1858, but granted the lease as the natural

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* Appeal from Original Decree No. 222 of 1886, against the decree of Captain M. A. Gray, Subordinate Judge of Goalpara, dated the 22nd of May 1886.

guardian, and sole manager of the estate, of the plaintiff, and the latter had sustained no loss on account of the said lease. 1887 JUNE 27.

The Subordinate Judge was of opinion that, upon the authority of *Alum Manjee* v. *Ashad Ali* (1) and *Chundee Chowdhry* v. *Macnaghten* (2) the plaintiff's suit was "barred by the fact that his co-sharers had not joined him in his suit for ejectment," and proceeded to observe:—"The plaintiff's pleader wishes to argue that defendant's occupancy was founded on pottahs granted him by the other two co-sharers, and also by the plaintiff's *quondam* guardian, separately, which were, it is alleged, issued not only collusively and fraudulently, but moreover as regards the guardian's pottah, without due power or authority, inasmuch as he never obtained the civil Court's permission to issue such a pottah, which under s. 18 of Act XL of 1858 he was bound to obtain before taking such a step. Now my view of the matter is that, under the special circumstances of the present case, I am not at all bound to look behind the pottahs issued. They were issued, and under them the defendant has been allowed to remain in peaceful, undisturbed occupancy for more than 12 years past. It would be, in my opinion, ridiculous to attempt to call him a 'trespasser' at this stage of affairs, as the plaintiff's pleader actually designates him." Accordingly the Court of first instance dismissed the suit. APPEL-LATE CIVIL. 15 C. 40 = 12 Ind. Jur. 220.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Hem Chunder Banerjee* and Baboo *Omakali Mukerjee*), for the appellant.

Mr. *Evans* (with him Mr. *Chakravarti*, Baboo *Girijasanker Mozumdar* and Baboo *Issur Chunder Chuckerbutty*), for the respondent.

[42] The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The plaintiff, who jointly with others holds a zemindari interest in certain lands cultivated as a tea garden, sues the defendant to set aside a pottah granted by Kalinarain Singh, his guardian under Act XL of 1858, while he was a minor, and for ejectment in respect of his eight-anna share. He states that his guardian, without authority obtained from the Court, granted to the defendant in Magh 1281 (January 1875) a lease for twelve years with a condition of renewal, his power to grant any lease under such circumstances being limited by s. 18 of the Act to granting a lease for the term of five years. He states further that he attained majority in Bhadro 1289 (September 1882), that is to say about 7½ years after the date of the lease, and he brings the present suit in August 1885 (Srabun 1292), after giving on the 23rd Joist 1290 (5th June 1883) notice to the defendant to relinquish possession of his share of the land within one month.

The Subordinate Judge has dismissed the suit on the preliminary ground that the plaintiff, as one of several co-sharers in the zemindari, is not entitled to maintain this suit in the absence of his co-sharers. He has held that the defendant is not a trespasser under the circumstances, seeing that he entered into possession of the land under a pottah granted by the plaintiff's guardian, and that pottahs were granted by the other co-sharers, and that he has held peaceful and undisturbed occupancy for more than twelve years.

In appeal it is contended that, as regards the plaintiff's eight-anna share of this property, the defendant is a trespasser, inasmuch as the pottah

(1) 16 W. R. 138. (2) 23 W. R. 386.

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which he sets up was granted under no legal authority and is therefore void, and that consequently the plaintiff is entitled to sue alone to recover joint possession of his share of the lands which have been leased to the defendant without his consent. It is admitted that since he attained majority the plaintiff has in no way recognised the defendant as his tenant and in lawful possession. It is also contended that, even if the lease granted by the certificated guardian of the plaintiff be held to be good for five years, it was a separate lease, and that therefore the plaintiff was competent to exercise, in respect to the [43] defendant, all the rights of a landlord so as to eject him, if necessary, without consulting the other co-sharers in the zemindari.

In respect to the first objection we are of opinion that this lease granted by the certificated guardian without authority from the District Judge cannot, under s. 18 of Act XL of 1858, be regarded as a valid instrument, even for the period of five years for which a certificated guardian is competent to grant a lease. We must hold that, under the circumstances of this case, that instrument is in all respects invalid. The lease in question is a lease for 12 years in the first instance, but renewable on the expiration of that period, apparently in perpetuity, on an assessment at the pergunnah rate of rent. It is moreover a transferable lease, and it was specially granted for the purpose of making a tea garden. We are unable to hold therefore that it was ever the intention of the parties that it should operate as a lease for a term of years, or that it could by any possibility operate as such. On the contrary it was evidently intended that it should operate as a permanent transferable lease, and such a lease a certificated guardian has no authority to grant without the permission of the Court. Section 18 of the Act (XL of 1858) says distinctly: " But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the civil Court previously obtained." It has been held in several cases cited (1) that a sale or mortgage made in contravention of this provision of the law is absolutely void. We have not been referred to any decision on this point in respect of a lease for a term exceeding five years, and it is possible that there may be circumstances under which a lease for more than five years, given by a certificated guardian without the sanction of the Court, might be held good and valid for the term of five years for which he was competent to grant it. In the present instance, however, the lease was not a lease for a term, but practically a permanent alienation of the landlord's estate subject to a rent [44] charge; and having regard to the stringent provisions of the statute, we are of opinion that it was a transfer of a character which the guardian was expressly forbidden to make without the previous sanction of the Court, and, that being so, that it is a nullity. It was made in direct contravention of the terms of the Act, and is therefore absolutely void. In support of this conclusion we may refer to the two cases of *Roe d. Brune* v. *Prideaux* (2) and *Doe d. Biggs* v. *White* (3) referred to in Woodfall's Landlord and Tenant, p. 184 (12th Ed.), in which leases granted in excess of the power vested in the lessor were declared to be void *ab initio*, and not void only as to the excess. The lease in the present case was in the nature of a permanent

(1) *Dabee Dutt Sahoo* v. *Subodra Bibee*, 2 C. 283=25 W. R. 449: *Sikher Chund* v. *Dulputty Singh*, 5 C. 363=5 C. L. R. 374: *Buckraj Ram* v. *Ram Kishen Singh*, 11 C. L. R. 345: *Mauji Ram* v. *Tara Singh*, 3 A. 852.

(2) 10 East 158. (3) 2 D. and R. 716.

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alienation of the property, and we have little hesitation in saying therefore that it was a transaction positively forbidden by the statute, and therefore void.

It has been argued by Mr. Chakravarti for the defendant-respondent that, Assam being a scheduled district, Act XL of 1858, was not in force in that province in February 1875, when the lease in question was executed. That objection is, in our opinion, untenable. Before the passing of Act VIII of 1874, Assam formed a portion of the Presidency of Fort William in Bengal, and the laws in force in that Presidency extended to Assam. Among these laws was Act XL of 1858. The province of Assam was separated from Bengal by Act VIII of 1874, and by Act XIV of 1874 it was declared to be what is described as a scheduled district. But as regards the laws then in force in Assam, they continued to be unaltered until, by a notification made under the provisions of s. 3 of Act XIV of 1874, a declaration was made (*a*) extending the Act itself to the province of Assam, under the provisions of s. 1, and (*b*) setting out what enactments were or were not actually in force in that province. There is nothing in the Act itself to show that any enactment previously in force in the scheduled districts ceased to be in operation merely by virtue of the passing of that Act. The Act itself was not to come into operation in any of the scheduled districts until it had been extended by a notification made under s. 3; and from an examination of the Government Gazette, we [45] find that no such notification was made until 3rd November 1877, *i.e.*, subsequent to the issue of the certificate in this case. This objection is therefore unsound. A further objection was raised by Mr. Chakravarti to the effect that, inasmuch as the certificate to Kalinarain Singh was not actually issued until after the execution of the lease, he was not at the time of granting that lease a certificated guardian under Act XL of 1858, and consequently was not restricted by the provisions of s. 18. But we think it is a sufficient answer to this argument to point out that the order for the issue of a certificate was made so far back as September 1868, and that from that date Kalinarain appears to have acted as a certificated guardian and to have been recognized by the Court as such. So far as regards the question now before us, the evidence on the record goes to show that Kalinarain granted the lease in question by virtue of the authority vested in him by Act XL of 1858.

It would appear that the day after the lease in question was executed by Kalinarain Singh, the guardian of the plaintiff, a similar lease was executed in favour of the defendant by the three annas co-sharers, and some two years and a half later, a third lease was executed by the five annas co-sharer. All these leases were in the same terms, and they were to operate contemporaneously. They are what are known as *jungleboori* leases, that is to say, clearing leases, carrying no rent for the first three years and then fixing a rent at one and the same rate for such lands as on measurement might be found to have been occupied by the defendant for purposes of cultivation. They provide for the payment of rent to each co-sharer separately, and authorize each co-sharer to sue separately for his share of the rent without joining as parties the other co-sharers. They give the lessee a right of renewal at the expiration of the 12 years, and are declared to be heritable and transferable. It has been contended before us that under these circumstances the three leases must be considered as creating one joint tenancy under all the co-sharers, and that being

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so, that one of the co-sharers alone is not entitled to sue to eject the defendant who had been let into tenancy by the joint action of all the co-sharers. It is [46] said that, the three leases being in identical terms and operating simultaneously, they must be taken to constitute one and the same tenancy. The reason why three separate documents were executed is, in this view, explained to be the facilitation of suing, if need be, for the co-sharers' separate share of the rent.

A large number of authorities have been cited to us on this point as follows:—

Alum Manjee v. *Ashad Ali* (1); *Hamilton* v. *Rughoo Nundun Singh* (2); *Hulodhur Sen* v. *Gooroo Doss Roy* (3); *Chundee Chowdhry* v. *Macnaghten* (4); *Dinobundhoo Ghose* v. *Drobo Moyee Dossia* (5); *Doli Sati* v. *Ikram Ali* (6); *Rasha Prosad* v. *Esuf* (7); *Tulsi Panday* v. *Bachu Lal* (8); *Reasut Hossein* v. *Chorwar Singh* (9); *Kali Chandra Singh* v. *Rajkishore Bhuddro* (10).

All these authorities go to establish this proposition generally that, although one of several co-sharers may sue to eject a trespasser so far as his interest in the land is concerned, he cannot alone eject a tenant who has been put upon the land by all the co-sharers and is still holding under them all.

The contention of the tenant-respondent in this case is that he was let into possession by the joint action of all the co-sharers, and that he cannot therefore be ejected at the suit of the plaintiff alone. We have, however, held that the lease granted on behalf of the plaintiff was a nullity, and the defendant cannot therefore derive any benefit from it. As regards the plaintiff's share at least, he must be regarded as a trespasser. This is in accordance with the case of *Hamilton* v. *Rugoo Nandun Singh* (2). If again the three leases are to be construed as one and the same, it might be a question whether the defendant could claim to hold even as against the other co-sharers. We think, however, that, having regard to the fact that three separate documents were executed, and that they were executed on three different dates, that they stipulated for the separate [47] payment of each co-sharer's share of the rent, and apparently gave to each co-sharer the right to measure and assess the rent in future independently of the others, the three leases must be held to constitute three separate tenancies, one of which might be avoided without affecting the others.

Holding, as we do, that the lease as regards the plaintiff appellant's share was absolutely void, it is unnecessary to consider whether or not the notice alleged to have been served on the defendant was actually served, and whether it was a reasonable notice. In the view we take of the case no notice was necessary.

There are however other points in the case, for the determination of which it must be remanded to the lower Court. It is contended on the authority of *Surut Chunder Chatterjee* v. *Ashutosh Chatterjee* (11) and *Girraj Baksh* v. *Kazi Hamid Ali* (12), that the appellant should only be allowed to recover possession upon certain terms as to reimbursing to the defendant the cost of laying out the tea garden, &c., no fraud or misconduct on the defendant's part having been alleged or proved. This matter formed the subject of the sixth issue, which has not been tried.

(1) 16 W.R. 158 (2) 20 W.R. 70. (3) 20 W.R. 126. (4) 23 W.R. 386.
(5) 24 W.R. 110 (6) 4 C.L.R. 63. (7) 7 C. 414=9 C.L.R. 76.
(8) 9 C. 596=12 C.L.R. 223. (9) 7 C. 470. (10) 11 C. 615.
(11) 24 W.R. 46. (12) 9 A. 340.

We therefore set aside the decree of the lower Court and remand the case under s. 562 of the Code for the trial of such of the remaining issues as may be found necessary, having regard to the remarks made by us in this judgment. The costs of this appeal will abide the result.

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K. M. C. *Case remanded.*

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15 C. 47.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

15 C. 40=12 Ind. Jur. 220.

JUGOBUNDHU PATTUCK (*Plaintiff*) v. JADU GHOSE ALKUSHI (*Defendant*).* [8th June, 1887.]

Bengal Tenancy Act (*VIII of* 1885) *s.* 188—*Suit for Rent—Co-sharers, Suit by—Joint undivided estate—Jurisdiction—Civil Procedure Code* (*Act XIV of* 1882), *s.* 622.

A District Judge, in deciding a rent suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form [48] in which it had been framed, and therefore dismissed the suit. *Held,* on an application under s. 622 of the Civil Procedure Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside.

Prem Chand Naskur v. *Mokshoda Debi* (1) and *Umesh Chander Roy* v. *Nasir Mullick* (2) followed; *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) distinguished.

[**Cons.**, 2 I.B.R. 333 (335); **R.**, 16 B. 708 (711); 1 C.W.N. 617 (625); 1 C.W.N. 626 (630); 25 A. 509 (524)=23 A.W.N. 104; 17 C. 538 (540); 11 C.P.L.R. 144 (146); 26 C. 727 (730)=3 C.W.N. 586; 4 C.W.N. 508 (513); 29 C. 54=5 C.W.N. 763; 7 C.W.N. 908 (910); 9 C.W.N. 34 (40); 2 N.L.R. 45 (47); 5 C.L.J. 235 (237) (**F.B.**)=2 M.L.T. 155; 35 C. 331 (**P.C.**)=7 C.L.J. 139; 10 C.L.J. 458=3 Ind Cas. 472; 13 M.L.T. 60 (66)=18 Ind. Cas. 555 (559)=24 M.L.J. 112 (123); 12 C.L.J. 1 (6)=14 C.W.N. 788=6 Ind. Cas. 193 (196).]

ONE Jugobundhu Pattuck, a proprietor of a one-third share in a certain joint undivided mehal, the rent of which said share was collected separately by him from his under-tenant, brought a suit on the 9th March 1886, against his under-tenant to recover arrears of rent which had fallen due both prior to and subsequently to the passing of the Bengal Tenancy Act of 1885. The Munsif, on the 27th May 1886, decreed the suit in favour of the plaintiff; but on appeal to the District Judge that officer reversed the Munsif's decision, holding that s. 188 of the Bengal Tenancy Act operated so as to put a stop to the former practice, whereby co-sharers were permitted to sue separately, in similar cases, for their rents; that there was no other section of that Act which preserved such a right of suit as regards rents which fell due before the 1st November 1885; and that s. 6 of Act I of 1868 did not operate in favour of suits instituted after that date. The plaintiff obtained a rule under s. 622 of the Code of Civil Procedure, calling upon the defendant to show cause why the judgment of the District Judge should not be set aside.

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* Civil Rule No. 486 of 1887, against the order of J. Crawford, Esq., District Judge of Nuddea, dated the 21st of December, 1886, reversing the order of Baboo Dwarka Nath Ghose, Munsif of Ranaghat, dated the 27th of May, 1886.

(1) 14 C. 201. (2) 14 C. 203 (note). (3) 11 C. 6=11 I. A. 237.

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Mr. *B. Chakravati*, to show cause, contended that the High Court had no authority, under s. 622 of the Code, to interfere with the judgment, there being no failure in the exercise of jurisdiction, citing *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and that the word " landlord " in s. 188 of the Bengal Tenancy Act must be taken to include the whole body of landlords, and that in any suit for rent since the passing of the Act, the whole of the proprietors must be joined as plaintiffs.

Babu *Ambica Churn Bose*, in support of the rule, was not called upon.

JUDGMENT.

[49] The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

GHOSE, J.—This rule was issued under s. 622 of the Civil Procedure Code, upon the defendant, the opposite party before us, to show cause why a judgment passed by the District Judge of Nuddea, holding that the suit of the plaintiff, who is one of several co-sharers in a joint undivided mehal, for the recovery of his share of the rent, cannot, by reason of s. 188 of the Bengal Tenancy Act, be maintained, should not be set aside.

Both the Munsif and the District Judge have, as we understand, held that, as a matter of fact, the plaintiff has, for some years back, been in the separate receipt and enjoyment of his share of the rent; but notwith standing that finding the Judge holds, as I have just said, that the suit which is for recovery of the plaintiff's share of the rent, does not lie by reason of s. 188 of the Tenancy Act.

A preliminary objection has been taken by the learned counsel for the opposite party, upon the ground that, in the circumstances of this case, this Court has no authority, under s. 622 of the Procedure Code, to interfere with the judgment of the District Judge.

It appears to me that what the judge has done in this case comes clearly within the scope of s. 622.

That section runs thus: " The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as the High Court thinks fit."

The District Judge had certainly jurisdiction to decide this case in appeal; but it is quite apparent that, while exercising that jurisdiction, he exercised it illegally, and with material irregularity, if the view we take of the law on the subject be correct; for what he has done is this: he holds that the suit does not lie at all; and he holds this because he considers a certain law applicable to the case, and which law, he thinks, prohibits such [50] an action being entertained. This appears to me to be a clear illegality on the part of the Judge, in the exercise of the jurisdiction, which, under the law, he was authorized to exercise; and, in this view of the matter, this case seems to me clearly distinguishable from the case of *Amir Hassain Khan* v. *Sheo Baksh Singh* (1), which was referred to by the learned counsel. The main question in that case was, whether the suit was barred by *res judicata;* and some other questions as to the right of the plaintiff, in connection with a mortgage transaction, were also raised. The District Judge in appeal held that the questions raised in the case should be decided for the plaintiff, and accordingly a decree was passed

(1) 11 C. 6=11 I. A. 237.

in his favour. Thereupon the Judicial Commissioner was moved under s. 622 of the Procedure Code; and he took a view of the matter contrary to that which had been taken by the District Judge, and dismissed the suit. What the Judicial Committee held in that case was that the District Judge had jurisdiction to decide the question before him one way or the other, and if he made a mistake in deciding it that was not a matter which could be rectified by an application under s. 622. But it appears to me that the matter is different, where a Judge, in dealing with a case, erroneously holds that a particular statute, or section of it, is applicable to the case, and that by reason of that statute or section the suit does not at all lie. In that case it would seem that, in the exercise of the jurisdiction vested in him by law, the Judge acts illegally and with material irregularity within the meaning of s. 622. I think, therefore, that in this instance the preliminary objection ought not to prevail, and that we are bound to decide the case on its merits.

As to the merits, it appears to me that we ought to follow the ruling that was laid down in two cases—one, that of *Prem Chand Nuskur* v. *Mokshoda Debi* (1), and the other, mentioned in the note to that case, *viz.*, *Umesh Chunder Roy* v. *Nasir Mullick* (2).

Section 188 of the Bengal Tenancy Act runs thus: "Where two or more persons are joint landlords, any thing which the landlord is, under this Act, required or authorized to do, must be [51] done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them."

The learned counsel contends, and I think rightly, that the word "the landlord" must be taken to mean the whole body of landlords. But then the question that arises upon the section is, whether there is anything in the Act that lays down that the whole body of landlords is required or authorized to bring a suit for rent; in other words, is there anything in this Act, to indicate that the whole body of landlords must join in bringing a suit for rent? We think that there is nothing in the Act to that effect.

According to the law which was in force before this Act came into operation, and according to the rulings of this Court under that law, if a co-sharer in a joint undivided mehal had been in previous years in the separate receipt and enjoyment of his share of the rent, it was competent to him to bring a suit for rent in respect of his own share. Is there anything in this Act to indicate that it was the intention of the Legislature to alter that law, and to lay it down that the whole body of shareholders must, if any rent be due to any one of them, bring a joint suit for the recovery of the same? It appears to me that there is nothing in the Act to indicate that this was ever the intention of the Legislature.

For these reasons we think that the District Judge was in error in his application of s. 188 of the Bengal Tenancy Act to the facts of this case, and therefore this rule must be made absolute with costs.

T. A. P. *Rule absolute.*

(1) 14 C. 201. (2) 14 C. 203, note.

1887 June 14.

Appellate Civil.

15 C. 51.

15 C. 51.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

Hanuman Kamut (*Plaintiff*) v. Hanuman Mandur and others (*Defendants*).* [14th June, 1887.]

Limitation Act, 1877, art. 62—Suit to recover purchase money—Failure of consideration—Cause of action, Accrual of.

Purchase money paid for a consideration which has wholly failed is money received for the use of the buyer, and a suit to recover back the money is thus governed by art. 62 of the second Schedule to the Limitation Act.

[52] A purchased a share of joint property from a member of a Mitakshara family, but his suit to recover possession of it was dismissed on the ground that the sale having been made without the consent of the other coparceners was void under the law. A then brought a suit to recover back the purchase money by reason of failure of consideration.

Held, that the failure of consideration, although it did not become apparent until the former suit was brought and failed, was a failure from the beginning, and time ran from the date when the purchase-money was paid.

[**Affirmed.** 19 C. 123 (**P.C.**); **R.,** 156 P.W.R. 1912=182 P.L.R. 1912=104 P.R. 1912 =16 Ind. Cas. 24.]

Dowlut Mandur, the father of a Mitakshara family, sold to Hanuman Kamut 2 annas 10 gundahs out of 8 annas of mouzah, Jaihut-su-bailu, in pergunnah Nisankpore Kodu, under a registered kobala, dated the 1st August 1879, on receipt of the full consideration of Rs. 3,600. Hanuman, being unable to obtain possession of the property, brought a suit for its recovery on the 27th February 1884. Upon the objection of the sons and grandsons of Dowlut Mandur, the suit, which ultimately came up to the High Court, was dismissed on the authority of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1). Hanuman then brought a suit against the heirs of Dowlut for the recovery of the purchase-money, Rs. 3,600, with interest. After a consideration of *shib Krishna Dah* v. *Abdool Sobhan Chowdhry* (2), *Lalji Mal* v. *Hulasi* (3), and *Jibanti Nath Khan* v. *Shib Nath Chuckerbutty* (4), the Subordinate Judge held that the suit was barred by s. 43 of the Civil Procedure Code.

Hanuman Kamut appealed to the High Court.

Mr. *Woodroffe* (with him Mr. *C. Gregory* and Babu *Abinash Chunder Banerjee*) for the appellant.

Mr. *Doss* (with him Babu *Jogesh Chunder Roy*), for the respondents.

JUDGMENT.

The judgment of the Court (Wilson and O'Kinealy, JJ.) was delivered by

Wilson, J.—The case in which this appeal has been brought arises in this way: The present plaintiff brought, or purported to buy, certain property from a person who was a father in a Mitakshara family. The plaintiff afterwards brought a suit, based upon that purchase and the title thence arising, to recover possession of the property. His claim was resisted and his suit **[53]** was dismissed, on the ground that one member of a Mitakshara family cannot, under the law as administered in this province,

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* Appeal from Original Decree, No. 144 of 1886, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Bhagulpore, dated the 22nd of March 1886.

(1) 3 B. L. R. F. B. 31.
(2) 15 W. R. 409.
(3) 3 A. 661.
(4) 8 C. 819=10 C. L. R. 541.

alienate by voluntary sale even his own share of the family property. He has now brought this suit against the heirs of the person from whom he purchased, and in it he seeks to recover back the purchase-money. The suit has been dismissed on the ground that it is barred by s. 43 of the Code of Civil Procedure, inasmuch as it is said that under that section this claim might have been, and ought to have been, inserted as an alternative claim in the former suit. What the section says is that the plaintiff shall include in his suit the whole of the claim which he is entitled to make in respect of the cause of action, and if he omits to do this he shall not be competent to bring another suit in respect of the portion omitted. It appears to me clear that the present claim is in respect of a totally different cause of action from that raised in the former suit. The former suit was based upon an alleged title to the land, and was a suit to recover possession of the land on the strength of that title. The present suit is based upon the fact that there was no title, and upon the fact that, for the consideration money paid by the plaintiff, he got nothing in return as it now turns out. So far, therefore, as concerns the ground upon which this suit has been dismissed, I cannot agree with the lower Court.

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But I think that the suit must nevertheless be dismissed on another ground, *viz.*, that it is barred by limitation. It appears to me clear that the case is governed by art. 62 of the 2nd Schedule to the Limitation Act, which deals with the case of money received by the defendant for the plaintiff's use. This was money received to the plaintiff's use by reason of the fact that the consideration for which he paid it wholly failed. And I cannot resist the conclusion that the failure of consideration was a failure from the beginning; that the money was, from the first, money paid without consideration, although no doubt the failure of consideration was not manifest at the time, and only became apparent when the former suit was brought and failed. I think that the suit is barred by limitation. I confess I come to this conclusion with regret, because I think this is a case of hardship.

K. M. C. *Appeal dismissed.*

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15 C 54.

[54] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

ROGHU NATH SHAHA (*Plaintiff*) *v.* PORESH NATH PUNDARI AND OTHERS (*Defendants Nos.* 1, 2, 3, 6, 7 *and* 8).*
[17th June, 1887.]

Act XXVII of 1860, *s.* 2—*Suit by representative of deceased creditor—Special defence when not put in issue, effect of—Want of Certificate under Act XXVII of* 1860, *Plea of.*

The want of a certificate under Act XXVII of 1860 is not of itself necessarily a bar to a suit by the representative of a deceased creditor, and such a special defence, unless insisted upon and put in issue in the Court of first instance, should not be entertained in appeal.

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* Appeal from Appellate Decree, No. 2297 of 1886, against the decree of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 10th of August 1886, reversing the decree of Baboo Wupendro Nath Ghose, Munsif of Maldah, dated the 18th of May 1885.

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15 C. 54.

Semble.—The Word "debtor" in s. 2 of Act XXVII of 1860 does not include the purchaser of a mortgaged property, who is in no sense a debtor; nor does that section contemplate a case of a decree other than a personal decree.

Janaki Ballav Sen v. *Hafiz Mahomed Ali* (1) doubted.

[**F.**, 26 C. 839=4 C.W.N. 558; **Appl.**, 19 C. 336 (339); **Appr.**, 22 C. 143 (149); **R.**, 12 C.W.N. 145 (149)=7 C.L.J. 658.]

Roghu Nath Shaha brought a suit upon a mortgage kistbundi (instalment), bond on the following allegations: that the late Sukul Pundari, the father of some of the defendants, had executed the bond on the 9th Aughran 1279 (1872) in favour of the late Kristo Shaha, the plaintiff's father, for the sum of Rs. 365-1-15, promising to repay the amount by monthly instalments at a stipulated rate of interest within five years; that the late Sukul Pundari had paid only Rs. 50 on the 15th Bysack 1280, and there was due on the bond on the date of the plaint, 18th Magh 1291 (1884), the sum of Rs. 1,073-2; but as the value of the mortgaged property was not likely to cover the full amount of the debt, the plaintiff relinquished the surplus, and prayed for a decree for the sum of Rs. 625 with costs from the said property. A portion of the property, it would seem, had been sold by the heirs of the mortgagor, to several persons, who were also made defendants in the suit. Two written statements were filed, one by the part purchasers of the mortgaged property and the other by some of the representatives of Sukul Pundari. The latter among other [**55**] things stated that, inasmuch as the plaintiff had not obtained a certificate under Act XXVII of 1860, the suit could not proceed. The purchasers did not take that plea, nor did any of the defendants call into question the plaintiff's heirship. Several issues were framed by the Munsiff; but there was none in respect of the want of a certificate. That Court decided in favour of the plaintiff on the merits and gave a decree in the terms of the prayer. On appeal the District Judge was of opinion that the want of a certificate under Act XXVII of 1860 was fatal to the plaintiff, and without more dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Jogesh Chunder Dey*, for the appellant.

Baboo *Kissori Lal Goswami*, for the respondents.

JUDGMENT.

The judgment of the Court (Wilson and O'Kinealy, JJ.) was delivered by

Wilson, J.—The circumstances out of which this suit arose are these: One Sukul Pundari executed a mortgage on the 9th Aughran 1279 in favour of Kristo Shaha, by which he charged certain property with money, and undertook to pay that money by instalments, the bond being what is described a kistbundi bond. The plaint sets out this, and shows that Kristo Shaha is now dead, and that the plaintiff is his heir which is not disputed. It shows that the mortgagor Sukul Pundari is also dead, and that certain instalments of the bond are due. The plaintiff made defendants, first three persons, sons and heirs of Sukul Pundari the mortgagor, and, secondly, other persons who have become purchasers of the property from the heirs of Sukul Pundari. The plaint then went on to pray in paragraph 4 " for a decree awarding payment of the above Rs. 625 with costs from the property entered in the kistbundi bond and specified below. The cause of action has accrued regularly from the 1st of Pous 1279.

(1) 13 C. 47.

Both groups of defendants, or some of them, entered appearance. The first three defendants, in their written statement, amongst other things, said in the second paragraph: "As the plaintiff has not obtained a certificate according to Act XXVII of 1860, he has no right by which to bring this action, and the suit cannot proceed." The other defendants raised no such point.

[**56**] The case came on for hearing before the Munsiff, and issues were settled. They were four in number; one was as to limitation, the second was whether the amount of the bond had been paid, the third was whether the mortgagor alone or any other person had title to the mortgaged properties, and the fourth was whether the purchaser defendants purchased with notice of the mortgage, and, if not, whether their properties were liable. No issue was raised as to any point connected with a certificate under Act XXVII, yet, if any defence based upon the want of a certificate were to be set up, an issue or issues should have been fixed in order to ascertain the facts necessary to determine whether there was any such defence. Assuming such a defence to be good, there is no finding as to when the plaintiff's father died; there is no finding whether the instalments now in question or any of them fell due in the lifetime of the plaintiff's father, therefore there is no finding whether the debt now in question if there be any debt in question, was a debt payable to the deceased or a debt which has fallen due since his death. And no issue was raised to determine any such question; and therefore the plaintiff had no warning that he had to call, nor any opportunity of calling, evidence upon the question. Accordingly, in the first Court, no further notice was taken of the matter. The presumption is that nobody intended to rely upon it. But when the case came before the District Judge on appeal, the point was apparently taken. His judgment is very short; he says: "The first objection taken on appeal, also taken below, but not noticed there, that plaintiff, being the representative of a deceased creditor, not having taken out a certificate under Act XXVII of 1860, cannot sue, is fatal to the suit." I have pointed out that there are no facts found which could enable the Court to say that the objection arises at all. In a case of this kind, with regard to a very special defence, as to which no issue had been raised, and no evidence given, and which apparently was never passed in the first Court, I do not think the lower appellate Court ought to have entertained the question. In the absence of the materials necessary to enable the Judge to adjudicate upon it, I think he ought to have left the matter as it was left by the lower Court.

[**57**] I would add this, that it was the duty of the Judge, before giving effect to an objection of this kind, to consider the last words of s. 2 of the Act. That section says: "No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate * * * * unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives and not from any reasonable doubt as to the party entitled." Before giving effect to the objection the Judge ought to have considered those last words of the section, and made up his mind as to how far they applied to the present case. That is sufficient to dispose of the appeal. It follows that the decree of the lower appellate Court must be set aside and the case must go back to him in order that he may hear the appeal on the merits.

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I think it right to say one thing more. We have been referred to the case of *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (1) as an authority for the proposition that the section in question applies so as to preclude a suit, not for a personal decree, but to enforce a mortgage against the mortgaged property. The case in question differs from this case in one respect. It was, as this is, a suit against the mortgagor and also against purchasers from him; but in that case the plaintiff asked not only for a decree against the mortgaged property in the hands of the purchasers. but also for a personal decree against the mortgagor for the mortgage money, and that decree was given by the lower Court. But in this Court the only persons appealing were the purchasers; who were affected only by so much of the decree as enforced the mortgage charge against the mortgaged property. The Court in that case reversed the decree and dismissed the suit for want of a certificate. That is said to be, and apparently is, an authority for the proposition that, under the section in question, a suit will not lie without a certificate by the representative of a deceased person to enforce a mortgage against the mortgaged property. If it be an authority for that proposition, I must say that I am not prepared to follow it. But for that decision I should [58] have thought it clear that the section does not apply to such a suit. The words of the section are that " no debtor of any deceased person shall be compelled in any Court to pay his debt to any person " without a certificate. It seems to me that this is limited to suits against a " debtor " and can have no application to a suit against a purchaser of a mortgaged property, who is in no sense a debtor. Secondly, it seems to me that the words are limited to cases in which a Court is asked to " compel " a debtor " to pay," that is to say, to make a personal decree against the debtor. To me it seems to have no application to a suit such as the present. If it were necessary to decide this question, I should not be prepared to follow the decision cited, and it would probably have been proper to refer the question to a Full Bench.

The case will go back to the lower appellate Court to be dealt with on the merits. Costs of this appeal will abide the result.

K. M. C. *Case remanded.*

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15 C. 58=14 I.A. 148=12 Ind. Jur. 9=5 Sar. P.C.J. 92=
Rafique and Jackson's P.C. No. 99.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir J. Hannen, Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh*].

JANKI KUNWAR (*Plaintiff*) *v.* AJIT SINGH (*Defendant*).
[20th July, 1887.]

Limitation Act (*XV of* 1877), *sch. II, art.* 94—*Suit to set aside deed—Fraud.*

In a suit instituted in 1884 by a husband and wife to have a deed granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence, the facts relied upon were known to the co-plaintiff husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside

(1) 13 C. 47.

in 1882, on the ground of his having been unduly influenced, he was not at the time of the previous transaction, nor for some years after it mentally incompetent or unable to allow that knowledge to operate on his mind. *Held* that, therefore, the suit, falling within s. 91 of schedule II of Act XV of 1877, was not maintainable by either of the plaintiffs.

1887 JULY 20.

PRIVY COUNCIL.

15 C. 58 (P.C.)=14 I.A. 148=12 Ind. Jur. 9=5 Sar. P.C. J. 92=Rafique & Jackson's P.C. No. 99.

[**F.**, 57 P.R. 1891; 29 M. 1 (12); **Expl.**, 16 M. 311; **R.**, 14 B. 222; 16 B. 186; 19 C. 629; 30 C. 433 (437); 30 C. 990 (996)=7 C.W.N. 864; 33 C. 257=1 C.L.J. 408 (415)=9 C.W.N. 636; 6 C.W.N. 863 (865); 1 O.C. 178 (180); 3 O.C. 105 (107). 84 P.R. 1902=116 P.L.R. 1902; 26 M. 291 (313)=13 M.L.J. 27; 28 M. 349 (350)=15 M.L.J. 228; 56 P.R. 1903=93 P.L.R. 1903 (**F.B.**); 32 M. 72=5 M. L.T. 99; 13 M.L.T 469 (483)=(1913) M.W.N. 453=19 Ind. Cas. (597); 13 C.L.J. 277=9 Ind. Cas. 377 (380); **D.**, 13 C.W.N. 815 (821)=1 Ind. Cas. 670; 16 A. 73= 14 A.W.N. 1; 8 A.W.N. 256; 14 M. 26; 23 C. 460; 20 M. 305 (311); 25 B. 78.]

APPEAL from a decree (24th April 1885) of the Judicial Commissioner, reversing a decree (30th June 1884) of the District Judge of Rae Bareli.

[**59**] The appellant and her late husband Raja Bijai Bahadur Singh, who died pending these proceedings, brought this suit on the 18th February 1884, to obtain cancellation of a deed of sale, dated 29th July 1872, on the ground that it had been obtained by fraud and undue influence. By that deed the Raja had conveyed forty-six villages with fifty-six hamlets in the Rae Bareli district to the defendant in this suit. The plaintiffs sought to have their property restored to them with mesne profits and costs upon their paying to the defendant so much of the consideration money as might be found to be justly due. The wife was joined with the husband in the suit, as she alleged that he had, on the 1st November 1879, made a gift to her of his estate. After the institution of the suit, and before the judgment of the first Court, Raja Bijai died, on 17th June 1884, and his widow continued the proceedings. Prior to this suit, another one had been instituted, by both the Raja and his wife, in 1880, to set aside a deed of sale executed by the husband in 1879. That suit, which alleged that the husband was of weak mind, was decided in their favour, ending with the judgment of the Judicial Committee, June 24th, 1884. (See *Ajit Singh* v. *Bijai Bahadur Singh*) (1). The plaint alleged that the wife had not, until the proceedings in the Oudh Courts relating to the later deeds, *viz.*, on the 25th August 1882, come to the knowledge of frauds stated to have been practised by the defendant in 1872.

The respondent denied any fraud and undue influence. The consideration paid was the proper value of the estate. He also relied upon limitation under arts. 91, 95 and 114 of sch. II of Act XV of 1877.

The issues fixed raised both the preliminary question and the substantial merits.

It appeared that Raja Bijai succeeded his father in the talukdari in 1854, and about the year 1865 an enquiry as to his capacity to manage his taluk instituted by the Deputy Commissioner, on behalf of the Court of Wards, resulted in his being found, on the 6th November 1871, to be capable of managing his affairs, and the estate was restored to him after a period of [**60**] direct managment by the District Officer to recover arrears of revenue.

The District Judge as to limitation held that the 91st article of the second schedule of Act XV of 1877, which prescribes in the case of a suit " to cancel or set aside an instrument not otherwise provided for " a

(1) 11 C. 61=11 I. A. 211.

1887 JULY 20.

PRIVY COUNCIL.

15 C. 58 (P.C.) = 14 I.A. 148 = 12 Ind. Jur. 9 = 5 Sar. P.C. J. 92 = Rafique & Jackson's P.C. No. 99.

period of three years from the time "when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to him" did not apply, and that the 95th article, which in the case of a suit to "set aside a decree obtained by fraud, or for other relief on the ground of fraud," prescribes a like period "running from the time the fraud becomes known to the party wronged," though more applicable, did not, however, bar the suit, as Raja Bijai, by reason of his defective intellect, was "entirely out of the question," and his wife's "assertion that she became aware of the fraud after May 1881," saved her from the bar of limitation.

On the issues relating to the merits, the Judge held in effect that at the time of the execution of the deed in question Raja Bijai was "not actually of unsound mind, but of extremely weak intellect, totally incapable of studying his own interests," and that this respondent was aware of those defects. That though Raja Bijai was at that time "heavily involved," the only creditor who was pressing him was this respondent, who had at that time sued out execution of a decree for Rs. 6,400, and that there was therefore "no immediate necessity to sell such a large portion of his estate," and that with an ordinary amount of intelligence he might easily have raised a loan on mortgage sufficient to have paid this amount. As to the sufficiency of the consideration money (Rs. 1,25,000), the Judge threw on this respondent the burthen of proving that he paid full value, and finding that the real value was somewhat higher, decided that the respondent had obtained the execution of the deed by fraud and undue influence.

The Judge, accordingly, ordered that the deed of sale in question should be set aside as an absolute conveyance, and that on Janki Kunwar paying into Court within six months the sum of Rs. 1,25,000, the properties in suit should [**61**] be reconveyed to her, and in default of her so doing, her suit should be dismissed, and he declared her right to receive mesne profits from the date of the institution of the suit to that of obtaining possession, and otherwise allowed no interest or mesne profits on either side.

On appeal, the Judicial Commissioner on the merits held that the Judge had fallen into error in supposing that there was no pressure on Raja Bijai's estate except this respondent's execution. There were large outstanding arrears of Government revenue at the time when the sale was made. The affairs of the Raja were so embarrassed that it might have been to his advantage, failing the assistance of the Revenue authorities, which, it was plain, did fail him, to part with a portion of his estate, and secure the rest. The Judicial Commissioner found no proof of undue influence or fraud; and on the question whether evidence of fraud was afforded by the purchase money being unconscionably small, taken in connection with the low business capacity of the Raja, the Court found no such evidence. Reversing the decree of the District Judge, the Court dismissed the suit.

On this appeal,—

Mr. *J. D. Mayne*, Mr. *C. W. Arathoon* and Mr. *M. A. Jalil*, appeared for the appellant.

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, for the respondent.

For the appellant it was argued that the Courts in India should have decreed restoration of the property in suit with mesne profits, on the widow's paying so much of the consideration money stated in the deed of 1872, executed by the late Raja, as represented what had been properly taken on his behalf, with interest thereon. The Judicial Commissioner

had rightly disposed of the question of limitation—see *Uma Shankar* v. *Kalka Prasad* (1), but had not correctly disposed of the question of undue influence said to have been exercised over the Raja, who was incompetent to manage his affairs.

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For the respondent it was argued that the suit should have been held barred by limitation under art. 91 of sch. II of Act XI of 1877. Also, that there was no evidence to show that, at the time of the transaction in 1872, the Raja, was too weak-minded to contract, or was subjected to undue influence.

[62] At the conclusion of the arguments their Lordships' judgment was given by

JUDGMENT.

SIR R. COUCH.—The appellant in this appeal is the widow of Raja Bijai Bahadur Singh, one of the talukdars of Oudh, who died on the 17th of June 1884. The question in the suit relates to the validity of a deed of sale executed by him on the 29th July 1872. By that deed he professed, on account of the exigency of payment of debts to bankers and decree-holders, and of revenue, to sell to the respondent, Raja Ajit Singh, 46 villages with 56 hamlets in consideration of Rs. 1,25,000. Before this transaction took place, proceedings in lunacy, under the law for that purpose in India, had been taken against him, which originated in a letter of the Deputy Commissioner of the 7th of January 1871. An inquiry was made into the state of his mind, which ended in an order being made on the 6th of November 1871, by which he was found not to be of unsound mind and incapable of managing his affairs, and upon that he was put into the management of his affairs.

Now it is important to observe that this was not long before the making of the deed of sale, being in November 1871, and the deed of sale being dated on the 29th of July 1872. So that, although he was, and has been, found in some subsequent suits to be a man of weak intellect, he was at that time considered by the proper authorities, who had made inquiries, to be capable of managing his affairs, and therefore he must be taken to have been capable of entering into contracts, and of knowing the nature of the contracts which he entered into. In 1878 he executed a deed of mortgage to the respondent, Ajit Singh, and in 1879 he also executed a deed of sale to the same person. In 1880 two suits were brought—one by Ajit Singh against Bijai and the appellant to recover the principal and interest due upon the mortgage, and the other by Bijai and the appellant to set aside the deed of sale on the ground of fraud, undue influence, and want of consideration. It should be mentioned that shortly before those suits were brought, Bijai had made a deed of gift, dated the 1st of November 1879, to his wife, the present appellant, and it is a matter of remark that she relies upon that deed, and has relied upon it all through the proceedings, at the same time setting up that her husband [63] was a man incapable of entering into the other transaction, and of executing the deed of sale of the 29th July 1872. These suits went through a considerable course of litigation, and were finally determined in favour of Bijai and the appellant on the 24th of June 1884, by the judgment of this Committee.

The only material date to be noticed in regard to the different proceedings is that of the first judgment, which was given by the District Judge on the 31st May 1881, and the final decision was that the deeds should

(1) 6 A. 75.

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have effect only as securities for such sums advanced or paid by Ajit Singh as should be proved to have been paid to and received by Bijai Singh personally, or as Wahaj-ud-deen the manager of the estate would have been justified in borrowing in the course of a prudent management of it. That was in 1884.

The present suit was brought on the 16th of February 1884, by Rani Janki Kunwar and Bijai, who had not then died, against Ajit Singh, and the plaint stated that the defendant Ajit Singh knew that Bijai was a person afflicted with mental and bodily infirmities, and had procured him to execute the deed of the 29th July 1872, at a considerably low price, namely Rs. 1,25,000, and sought to have that deed set aside on the ground of his being incompetent to execute it, and that it had been obtained by fraud. The plaint also contains this allegation, which is important: "That plaintiff No. 1 "—that is the wife—" then "—That is after the decision of the District Judge, dated the 31st of May 1881, and that of the Judicial Commissioner, dated 17th of January 1882—" commenced to inquire about other matters relating to her husband's property, and on the 25th of August 1882, she came to know of the real facts of fraud, flattery, undue influence, and other matters relating to the deed of sale of the 29th July 1872 "—the object of that statement being evidently to show that the suit was not barred by the law of limitation.

Now, the Act XV of 1877, art. 91, provides that a suit to set aside an instrument not otherwise provided for, and this is such a suit, must be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

It is necessary then to see whether the suit has been brought within that period. The suit was brought by Bijai in conjunction [64] with Janki Kunwar, and the facts which are mainly relied upon are these. It is not alleged that the state of his mind was such that it alone would have been a ground for setting aside the deed of sale, and that he was so incapable of entering into any contract that it must be set aside. The case of the appellant is that the value of the property was such that, having regard to the amount that was given for it (Rs. 1,25,000), it was an unconscionable bargain on the part of Ajit Singh, affording evidence that the transaction was a fraudulent one on his part, and was brought about by the exercise of undue influence by him, and that in fact he procured Bijai Singh to be surrounded by persons in his, Ajit Singh's, interest, and acting for him, and Bijai was not in a condition to have and had not the advice which he ought to have had.

Now these were facts which must have been known long before the date which the plaintiff gives as the date of the fraud having come to her knowledge. It is not alleged that any new matter was then discovered. The state of things which existed when the deed of sale was given continued up to the time when the other suits were finally decided. The suit to set this deed of sale aside was originally brought by Bijai himself as well as his wife. They do not seem to have thought that the deed of gift could be solely relied upon. Bijai brings the suit himself and therefore, when considering whether it is barred by the law of limitation, their Lordships have to see what was the state of Bijai's knowledge, because if all the facts were known to Bijai, and he was a man not incapable of having that knowledge and of allowing it to operate on his mind, the case would come within what is stated in this article. Much more than

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three years would have elapsed after the facts which are said to constitute the fraud were known to him, and so the period of three years had expired before the suit was brought. That would be sufficient to decide the suit.

Both the lower Courts seem to have treated this question in a manner which cannot be regarded as satisfactory. The District Judge, having stated the previous proceedings, says: " Under these circumstances I think it but just that she " that is, the present appellant—"should be allowed to count her limitation from the 31st of May 1881, the date on which the District Judge decided her husband had been defrauded in the cases then before him." [65] He takes no notice of the fact that Bijai was also a party to the suit, and that his knowledge was a material matter to be regarded, and he fixes, apparently in a somewhat arbitrary manner, on the 31st of May 1881, the date of the decision of the District Judge in the former suits, as that from which the period of limitation would run. That ground cannot be supported. The District Judge has not directed his mind to the real question, which is when the circumstances that are said to constitute the fraud became known to Bijai. Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immoveable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within art. 91 of the Act XV of 1877, and is therefore barred.

Upon the other question, which is the main question in the suit, whether upon the facts which have been proved, there was a case entitling the appellant to have the deed of sale set aside, their Lordships have not had any matter laid before them which would lead them to the conclusion that the decision of the Judicial Commissioner that the deed ought not to be set aside should not be allowed to stand. They see no ground for thinking that on that matter he came to a wrong conclusion.

The result, therefore, is that their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Judicial Commissioner. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Lawford, Waterhouse & Lawford.*

C. B.

1887 JULY 15.

PRIVY COUNCIL.

15 C. 66 (P.C.)=14 I.A. 139=12 Ind. Jur. 432=5 Sar. P.C. J. 78.

15 C. 66 (P.C.)=14 I.A. 137=11 Ind. Jur. 432=5 Sar. P.C.J. 78.

[66] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

GIRISH CHUNDER MAITI (*Defendant*) *v.* ANUNDOMOYI DEBI AND ANOTHER (*Plaintiffs*). [15th July, 1887.]

Limitation Act (XV of 1877), *art.* 132—*Construction of will—Charge on immoveable property.*

A will devising immoveables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immoveables, and it was held that a suit, brought by the auction-purchaser of the creditor's claim, to recover the above-mentioned debt, was within art 132 of the second Schedule of Act XV of 1877; and having been brought within twelve years from the date when the debt was so charged was barred by time.

APPEAL from a decree (10th August 1881) of the High Court (1) reversing a decree (5th March 1880) of the District Judge of Midnapore.

The question raised by this appeal was what was the period of limitation applicable under Act XV of 1877, the Indian Limitation Act, to the recovery of a debt due by a deceased testator, who in his will had directed a relation, to whom he devised all his property, moveable and immoveable, to pay this debt—a question dependent on whether the will validly charged the debt on the immoveable property, or created a valid trust for its payment, or did neither.

The suit out of which this appeal arose was filed on the 5th May 1879, by Anundomoyi Debi against Goluck Chunder, guardian, manager, and father of Girish Chunder Maiti, to recover Rs. 15,000 lent by Goluck Chunder to Shib Pershad Giri in 1867. In 1872 Shib Pershad Giri died, having left all his property to Girish Chunder, and having directed him by the same will to pay the above-mentioned debt. The plaint stated these circumstances, and that another person, Jogendro, as execution-creditor of Goluck Chunder, had obtained satisfaction of part of a claim against the latter to the extent of Rs. 10,200, and that Jogendro had, at the execution sale, [67] purchased all that was unpaid of Goluck Chunder's claim against Girish Chunder. The plaint then stated the death of Jogendro, and the representative character of his widow, Anundomoyi Debi, the plaintiff, as residuary legatee and executrix of the will of her deceased husband. She prayed by her plaint payment of her claim out of the estate of Girish Chunder, that claim being the money stated above to have been lent by Goluck Chunder, and interest thereon, with the deduction of Rs. 10,200, which had been already paid.

The defendant Girish Chunder, among other defences, set up limitation.

The arguments in the Court of first instance related only to the question of limitation. The Court decreed in favour of the defendant, dismissing the suit with costs. The grounds of this decision were that art. 57 of the second Schedule of Act XV of 1877 being applicable, inasmuch as no lien was created by the will in the plaintiff's favour by the will of

(1) 7 C. 772.

Shib Pershad Giri, art. 132 was therefore inapplicable; and the suit was barred by lapse of time.

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On appeal, this decision was reversed by the High Court, (CUNNINGHAM, PRINSEP and WILSON, JJ.). The judgment of the last-named Judge, with which the other Judges agreed, was to the following effect, and it is reported at p. 774 of I. L. R. 7 Cal., when the cases cited in argument and referred to by the Court, are given. The opinion of the Court was that the charge in the will of 1872 differed from a general charge of a debt by a testator upon his property. For here, particular property was given upon trust to pay a particular debt, the result being that a trust arose. That was a trust within the meaning of s. 10 of the Limitation Act; and, although the cases showed that a general charge of debts, upon a testator's property, did not add to the legal liabilities of executors, yet here, for the above reason, the case was different. The suit was accordingly remanded to the first Court for trial on the merits.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. D. Mayne*, for the respondents.

[**68**] For the appellant it was argued that the will of Shib Pershad Giri neither varied the legal liabilities of the parties so as to charge the loan of Rs. 15,000 therein mentioned upon the property therein devised, nor invested the appellant with any trust as regards that property for the purpose of repaying the loan.

Counsel for the respondents was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The only question which has been decided in this suit is whether it is barred by the law of limitation. The Subordinate Judge, before whom the case came in the first instance, was of opinion that the claim was a claim for money lent, and by art. 57 of Act XV of 1877 a term of three years only was given for bringing the suit, and that time had expired before the suit was brought.

When the case came before the High Court the learned Judges there were of opinion that s. 10 of that Act applied on the ground that there was a valid trust for the payment of the money which was claimed in the suit. That section says: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives, or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property shall be barred by any length of time." It does not clearly appear whether the learned Judges intended to deal with the other question, that it was a charge, and so came within the 132nd article of the second schedule of the Act, in which case a period of 12 years is given for bringing the suit. They appear to have rested their judgment upon its being a trust for the payment of the money.

Their Lordships consider that the case may be disposed of upon the question whether the money is charged upon immoveable property; and in order to see whether that is so or not, they have to look at the terms of the will. The will was made by Shib Pershad, and purports to be addressed to the present appellant, who was the defendant in the suit. It states that the father of the appellant, Goluck Chunder, had supplied the maker of it, Shib Pershad, with money to sue for the recovery [**69**] of property of which he had been dispossessed by his cousin, Jai

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Narain Giri, and that a suit had been carried on in the different Courts which had been successful, and that a decree had been obtained for the recovery of the property; and after stating that fact, and also that Goluck Chunder had shown great kindness to Shib Pershad, it contains these words: "Therefore you being my nephew (sister's son), and competent to give the *pind* (funeral cake) to my ancestors, I give you under this will the whole of my moveable and immoveable properties specified in the decrees I have obtained in the original suit, No. 17 of the District Court, and the appeals Nos. 167 and 168 of the High Court, under these conditions, *viz.*, that you will perform, and cause to be performed *antim-kria* (cremation) and rites and ceremonies in the proper manner at a reasonable cost, and that you will cause the said *kria* to be performed. The loan of Rs. 15,000 which I took from your father, the aforesaid Maiti, and by means of which I carried on the cases aforesaid from the Zillah Court up to the Sudder Court, in which I have been successful, you will repay with interest from the properties specified in the decrees, and so set me free from liability for that debt." Now if by that will a charge was created upon the property which had been recovered, and which was specified in the decrees, the case clearly came within the 132nd article; and their Lordships think there can be no doubt that there was such a charge. It is a charge upon specific property, namely, the property specified in the decrees. On that ground their Lordships are of opinion that the decision of the High Court ought to be affirmed, and the appeal dismissed, and they will therefore humbly advise Her Majesty accordingly. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lambert, Petch & Shakespear.*

Solicitor for the respondents: Mr. *H. Treasure.*

C. B.

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15 C. 70 (P.C.)=14 I.A. 187=11 Ind. Jur. 435=5 Sar. P.C.J. 84=1 P.R. 1888.

[70] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir James Hannen, and Sir R. Couch.

[*On appeal from the Chief Court of the Punjab in* 70 *P. R.* 1883, *Note.*]

DAULAT RAM (*Plaintiff*) *v.* MEHR CHAND AND OTHERS (*Defendants*) [19th July, 1887.]

Hindu law, Joint family—Mitakshara Law—Sale of joint-family property in execution of decree, as the result of a mortgage by managing member—Liability of shares of members of family not parties to the decree.

Although some of the members of a joint family had not been made parties to a suit upon a mortgage effected by the managing members, the entire family estate was bound by the act of the latter, and passed at the sale in execution of a decree upon the mortgage.

Whether the shares of all were bound depended on the authority of those who executed the mortgage. This authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm.

The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm, were sued upon it by the

mortgagee, who afterwards purchased the property at the execution sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that, not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution.

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Held, that as the defence was substantially on the latter ground only, though there was every opportunity given to the defendant to raise the former ground also, the suit need not be remanded; and that the whole estate had passed to the purchaser. *Nanomi Babuasin* v. *Modhun Mohun* (1) referred to and followed; *Pursid Narain Singh* v. *Hunoomun Sahay* (2) referred to and approved.

[**F.**, 2 C.P.L.R. 234; 14 B. 597 (601); 18 C.W.N. 42 (43); 12 Bom. L.R. 811 (818)=7 Ind. Cas. 990 (991); **Appl.**, 19 B. 680 (692); **Cons.**, 10 C.P.L.R. 67 (69); 16 C. P.L.R. 19 (22); **Expl.**, 15 Bom. L.R. 36(38)=18 Ind. Cas. 385 (386); **R.**, 2 C. P.L.R. 221 (222); 12 A. 99 (100); 21 A. 71 (83)=25 I.A. 183 (**P.C.**); 20 C. 453 (462); 27 C. 724; 29 C. 583 (586); 3 C.L.J. 12 (14); 12 M. 434 (437); 22 M. 49 (**F.B.**)=8 M.L.J. 312; 26 M. 28; 20 B. 338; 22 B. 825; 23 B. 372; 3 Bom. L. R. 322 (348); 1 O.C. 53 (55); 32 M. 429=19 M.L.J. 401=2 Ind. Cas 18; 34 M. 188=8 Ind. Cas. 1072=21 M.L.J. 320=9 M.L.T. 235=(1910) M.W.N. 799; 32 B. 577=10 Bom. L.R. 927; 8 M.L.T. 253 (258)=(1910) M.W.N. 325=7 Ind. Cas. 108 (112); 9 N.L.R. 1 (3)=18 Ind. Cas. 848 (849); 33 A. 7 (14)=7 A.L. J. 852 (860)=7 Ind. Cas. 112 (115); 34 A. 549 (570)=9 A.L.J. 819=15 Ind. Cas. 126 (130); **D.**, 12 M. 325 (329).]

APPEAL from a decree (4th April 1883) of the Chief Court of the Punjab, affirming a decree (28th March 1881) of the Commissioner of the Delhi Division, which affirmed a decree (22nd July 1880) of the Judicial Assistant Commissioner of Delhi, dismissing the suit with costs.

The suit out of which this appeal arose related to a mortgage executed by two members of a joint family of Jains, their law on this point agreeing with that of the Mitakshara. The family carried on an ancestral business as a firm trading in Delhi [71] managed by the two members. The mortgagee, having obtained a decree against the latter on the mortgage, issued execution, and attached and brought to sale the mortgaged property, becoming himself the purchaser of it.

The question now raised was whether the shares of the members of the family other than those who were parties to the decree, or those only of the parties to the decree, had passed to the purchaser.

The mortgage was of nine shops and six houses in Delhi, for Rs. 20,000, executed in favour of the plaintiff by Rattan Chand and Jiwan Mul on 11th January, 1871. The deed described the property as solely belonging to the abovenamed, but stated that the money was borrowed in order to pay the debts of their firm, *viz.*, Nanak Chand, Sarup Chand. Of this firm the other members, *viz.*, Mehr Chand and Hazuri Mul, sons of Sarup Chand and Sumer Chand, son of Kastur Chand, were minors in 1871, and were not mentioned in the mortgage-deed.

In July, 1878, the mortgagee sued Jewan Mul and Lal Chand, son of Rattan Chand who had died, and obtained a decree (11th November 1878), making the mortgaged property primarily liable, with power, if necessary, to recover from the other property of Jiwan Mul, and from the estate of Rattan Chand, deceased. In execution of that decree he brought the mortgaged property to sale, and himself purchased it for Rs. 44,100. On his applying for possession the present defendants, Mehr Chand, Hazuri Mul and Sumer Chand objected, and (23rd July 1879) succeeded in establishing their title to three-eighths of the property.

(1) 13 C. 21=13 I. A. 1. (2) 5 C. 845.

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The mortgagee threupon brought the present suit (11th June, 1880) for a declaration that the shares of the defendants in the family property had been validly mortgaged to him, and had passed under the execution sale; also claiming possession. Amongst other defences it was contended that, as the defendants were not parties to the decree, it did not affect their interests. Issues were fixed as to what the purchase had covered, and as to whether the defendants, having recited in a subsequent mortgage effected in 1878, to another mortgagee, that their property was already mortgaged to the present plaintiffs, were estopped [72] in this way or otherwise from denying it to have been so mortgaged.

The Judicial Assistant Commissioner, Delhi, who heard the suit in the first instance, found that there was nothing on the face of the record of the previous suit showing that the present defendants were liable; and held that the plaintiff could not, by his purchase at the execution sale, have acquired more than the rights of the actual mortgagors and judgment-debtors. On the authority of *Loki Mahto* v. *Aghoree Ajail Lal* (1) and *Deendyal* v. *Jugdeep Narain Singh* (2), he held that the plaintiff was bound by the proceedings in the suit of 1878, and could not go behind the decision in that case. The evidence that the plaintiff desired to offer, implicating the defendants' shares, he held to be inadmissible, and dismissed the suit.

On an appeal by the plaintiff to the Commissioner, the suit was remanded to give the plaintiff the opportunity of proving that the defendants were estopped from objecting to their being made liable, as it was alleged that the plaintiff was induced, by information obtained from the defendants and their agents, to buy the property.

The Commissioner, in the end, found that there was no evidence of anything to constitute an estoppel against the defendants, pointing out that the plaintiff himself had not come forward to state that he had been misled by any conduct on their part. He agreed with the Court of first instance that the plaintiff could not be allowed to go behind the record of the previous case to ascertain whether the defendants had been sued in their representative capacity, and dismissed the appeal.

A second appeal was preferred to the Chief Court, mainly on the ground that the defendants were bound by the acts of Rattan Chand and Jiwan Mul as managing members of a joint trading family; that they derived benefit from the mortgage; and that the rights of the defendants in the property passed at the auction sale to the plaintiff.

The Chief Court (BARKLEY and BURNEY, JJ.), taking the facts to be that the mortgagors were the managers of an ancestral [73] business belonging to a family of which the defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into in order to pay the debts of that business, held that there had been a valid mortgage of the entire property, including the rights of the defendants, though the deed erroneously stated the parties to the mortgage to be the sole owners. They held that the property sold was the mortgaged property, and not merely the right of the judgment-debtors therein. The Judges then held the question to be whether the suit of July, 1878, was so framed as to entitle the plaintiff to a decree which would bind the interests of all the members of the family, and whether the defendants were so bound.

(1) 5 C. 144. (2) 3 C. 198=4 I. A. 247.

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In connection with this they referred to *Subramaniyayyan* v. *Subramaniyayyan* (1); *Maruti Narayan* v. *Lilachand* (2); *Dasaradhi Ravulo* v. *Jaddumoni Ravulo* (3): *Gangulu* v. *Ancha Bapulu* (4); *Suraj Bansi Koer* v. *Sheo Pershad Singh* (5); *Ramnarain Lal* v. *Bhawani Prasad* (6); *Deva Singh* v. *Ram Manohar* (7); *Pursid Narain Singh* v. *Honooman Sahay* (8); *Ramphul Singh* v. *Deg Narain Singh* (9); *Bemola Dassee* v. *Mohun Dossee* (10); *Laljee Sahoy* v. *Fakeer Chand* (11); *Upooroop Tewary* v. *Lalla Bandjhee Sahay* (12); *Luchmun Dass* v. *Giridhur Chowdhry* (13): *Ganesh Pande* v. *Dabi Dyal Singh* (14) holding the general rule to be correctly given in the [74] judgment in the last case (in which both *Muddun Thakoor* v. *Kantoo Lall* (15) and *Suraj Bansi Koer* v. *Sheo Pershad Singh* (5) were cited). In conclusion, on the ground that the defendants were not parties to the decree, or represented in the proceedings in which it was passed, the appeal was dismissed, affirming the dismissal of the suit.

On this appeal,—

Mr. *J. Graham* Q. C., and Mr. *J. H. A. Branson*, for the appellant, contended that the Cheif Court ought to have held that the appellant had, by his purchase at the execution sale, acquired a title to the whole property mortgaged, including the shares of the respondents. The appellant had alleged, and was prepared to prove the facts of the case, which were sufficient to show that the two managing members had executed a mortgage under circumstances legally empowering them to make a valid and binding mortgage of the interests of the entire family. This allegation had not in effect been contradicted. The defence had been put on the ground that the defendants were not personally parties to the mortgage, or to the suit thereupon, or to the decree. It was, in effect, the defence that, for the above reasons, the sale was ineffective to pass the defendants' interests in the family property. For the appellant, however, the case was that the defendants being made parties to any of the above was not essential. The managing members had authority to bind their interests. They had exercised this authority by mortgaging the family property to raise money for the purpose of paying a debt due by the joint-family.

Reference was made to *Hunoomanpershad Panday* v. *Munraj Koonwaree* (16); *Bhaishankar Narbheram* v. *Harivallabh* (17); *Deendyal Lal* v. *Jugdeep Narain Singh* (18); *Pettachi Chettiar* v. *Sangili Vera Pandia Chinnatambiar* (19); *Nanomi* [75] *Babuasin* v. *Modhun Mohun* (20); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (21); *Ramphul Singh* v. *Deg Narain Singh* (9); *Umbica Prosad Tewari* v. *Ram Sahai Lal* (22); *Suraj Bansi Koer* v. *Sheo Pershad Singh* (5).

Mr. *C. W. Arathoon*, for the respondents, contended that only the interest of the parties to the decree were affected by the execution sale. The defendants were neither directly, nor indirectly, parties to the mortgage-deed; and they had not been made parties to the suit, having on their part no right to redeem. The decree-holder having himself become the

(1) 5 M. 125. (2) 6 B. 564. (3) 5 M. 193. (4) 4 M. 73 (87).
(5) 5 C. 148 (165)=6 I. A. 88=nom. *Ramsahai* v. *Sheo Prosad Singh*, 4 C. L. R. 226.
(6) 3 A. 443. (7) 2 A. 746. (8) 5 C. 845 (852). (9) 8 C. 517 (525)
(10) 5 C. 792. (11) 6 C. 135. (12) 6 C. 749. (13) 5 C. 855.
(14) 5 C. L. R. 36. (15) 14 B. L. R. 187=1 I. A. 321. (16) 6 M. I. A. 393.
(17) 1 B. H. C. R. 20 (18) 4 I. A. 247=3 C. 198. (19) 14 I. A. 84=10 M. 241.
(20) 13 C. 21=13 I. A. 1. (21) 6 I. A. 233. (22) 8 C. 898.

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purchaser, he was especially bound to make it clear that the decree bound the mortgagors as representing the entire family. But omitting to make the co-sharers parties to the suit he had, however, given intending purchasers to understand that only the interests of the judgment-debtors were sold. Reference was made to the judgments in *Deendyal Lal* v. *Jugdeep Narain Singh* (1), and in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (2).

Counsel for the appellant were not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from the decision of the Chief Court of the Punjab in a suit brought by Daulat Ram against Mehr Chand and others. in order to have it declared that under a purchase, which he had made under an execution, he acquired not only a 10-annas share, but also the other 6-annas share which the defendants dispute, and also to recover possession of that six-annas share. In his plaint he says: "That on the 11th January, 1871, Jiwan Mulland Rattan Chand mortgaged the property to plaintiff for Rs. 20,000, under the necessity of paying a debt due to the firm known as Nanak Chand, Sarup Chand, of which defendants are also the proprietors." There seems to be a mistake in stating that the debt was due to the firm instead of a debt by the firm. He then [76] states "that on the 11th November 1878 plaintiff brought a suit by virtue of the mortgage deed and obtained a decree against Jiwan Mul and Lal Chand, son of Rattan Chand: that in execution of the aforesaid decree, plaintiff purchased the said property for Rs. 44,100 at an auction sale; but when he wanted to take possession, defendants, who were minors at the time of the mortgage, set up an objection, and on the 23rd July 1879 prevented plaintiff from taking possession of six out of 16 annas of the property, the value of which is Rs. 16,537-8." Then the plaintiff prayed for a declaration to the effect "that the share of the property regarding which the defendants set up the objection was held in mortgage by plaintiff in a lawful manner; and that the plaintiff purchased the same in execution of the decree."

Now the circumstances of the case are these: by a mortgage executed by Ratan Chand and Jiwan Mul the property in question, with some other property, was mortgaged to the plaintiff. In their mortgage the two mortgagors, who were members of a joint family, including the present defendants, stated that they held ancestral possession of the property, that it was purchased and built by them, and that they owned it to the exclusion of every one else. Then, having stated that the old title deeds were destroyed during the Mutiny, they proceeded. "In these days we have pledged and given in mortgage this property with all its rights, internal and external, to Seth Daulat Ram, son of Lala Nanu Ram"—that is the plaintiff—"proprietor of the firm known as Daulat Ram and Sri Ram, bankers." Then they say in consideration of Rs. 20,000 Queen's coin "under the necessity of paying a debt due to"—it is there also said "due to," but it should be "due by"—"the firm known as Nanak Chand, Sarup Chand, the proprietors of which are the two of us (promisors), mortgagors (*viz.*, Ratan Chand, son of Nanak Chand, and Jiwan Mul, son of Sarup Chand), and also Mehr Chand," and the other defendants. Then they say "we have given up possession of the mortgaged property in question, and given it into the possession of the mortgagee after the execution of a separate lease containing our promise in regard to the interest. Our agreement

(1) 4 I. A. 247=3 C. 198. (2) 10 C. 626=11 I. A. 26.

is that we will pay the interest month by month, and the principal sum in a period of three years." 1887 July 19.

[77] It appears to their Lordships that, although the mortgagors stated that they were the sole proprietors, the statement that they were in ancestral possession showed that they intended to mortgage the whole of what they held as ancestral property, and that the mortgage passed the whole 16 annas of the property which they professed to mortgage, and they mortgaged it, stating that they did so for the purpose of paying the debt due from their firm. The defendants stated that they were not members of that firm, and they relied upon that fact. They did not state that no debt was due from the firm, but merely that they were not members of it. If they had intended to say that the motrgage being executed by the managers of the joint family was executed by them for their own private purposes, and not for such as would benefit the whole joint family, they ought to have said so, and they would have said so. But instead of saying there was no necessity for the mortgage, they say it was a mortgage for a debt of a firm of which they were not members.

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Then there was a second mortgage afterwards executed, to which the defendants were parties, which is to be found at page 9 of the record, in which it was stated that, " whereas the whole of our property, consisting of shops and houses situated in the city of Delhi, being ancestral property belonging to our common ancestor Nanak Chand, is already mortgaged to Lala Daulat Ram and Sri Ram, bankers of Delhi." To some extent that might be evidence against the defendants, that the first mortgage was binding upon them, and that it included the whole 16-annas, but their Lordships do not think it necessary to place any great reliance upon it.

Now the mortgage having been executed and the debt not being paid, the mortgagee brought an action, not against the whole joint family, but against the two members of the joint family who were managers of it, and who had executed the mortgage. The plaint in that suit is not set out in the record before their Lordships, but it has been brought before them during the course of the argument, it having been sent up under the seal of the Court in another appeal, and consequently their Lordships cannot hesitate to accept it as being a correct copy of the plaint in the suit which was instituted by the mortgagee [78] against the two mortgagors under that mortgage. In that plaint the mortgagee claims not only to recover against the mortgagors the amount of the mortgage debt and interest, but asks that he may have execution and be satisfied out of the mortgaged property. He obtained a decree in that suit, and issued an execution and applied for an attachment of the property. Unfortunately the application for execution of the decree, like the decree itself, is not before their Lordships in this record, but they have it in a manner similar to that in which they have the plaint, and from that application it appears that the mortgagee asked to execute his judgment, not by seizing the right, title, and interest of the two mortgagors under the execution, but that he might be satisfied by seizing and selling that portion of the mortgaged property which was the subject of the suit, and if anything further remained due, that he might levy it upon the separate property of the two defendants. That application was granted, and their Lordships find by the certificate of sale that the whole property was sold. It should be stated that the plaintiff in this suit was not only the mortgagee of the property and the plaintiff in the suit upon the mortgage, but the himself purchased, as he

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had a right to do, the property under the execution. The certificate of sale says: "It is hereby certified that on the 27th March 1879, by means of a sale by public auction, Lala Daulat Ram, proprietor of the firm of Daulat Ram and Sri Ram, was declared to be the purchaser of six houses and nine shops immediately adjoining one another, situated in the Sukhanand Lane, and the Jozri Bazar, the property of the judgment-debtors, for the sum of Rs. 44,100, in execution of a decree in this case, and that the said auction sale was formally sanctioned by the Court." It was contended on the part of the defendants, that, although the plaintiff purchased the property under execution, he was not entitled to the 6-annas share that belonged to the defendants, inasmuch as they had not been made parties to the suit upon the mortgage deed, and the learned Judges in the Courts below seem to have acted upon the principle that, inasmuch as that suit was brought against the two mortgagors alone, and not against the defendants, all that could be sold, and all that was sold, in execution of the decree, [79] was the right, title, and interest of the two mortgagors, namely, their shares in the property, excluding the 6-annais share which belonged to the defendants.

It appears to their Lordships that the decree cannot stand. The Senior Judge of the Chief Court, Mr. Barkley, says: "For the purposes of this appeal it may be assumed, though there is no finding on this point by the Courts below, that the mortgagors were the managers of an ancestral business belonging to a family of which the defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into, in order to pay the debts of that business. If this were so, the mortgage would be a valid mortgage of the entire property, including the rights of the defendants, though it was erroneously stated that the mortgagors were the sole owners, and had no co-sharers. It may also be assumed that the property brought to sale was the mortgaged property, and not merely the rights of the judgment-debtors therein." Their Lordships think that the learned Judge was correct in making those assumptions. It appears from the record that the plaintiff proposed to prove those facts, but the defendants rested their defence upon the ground that they had not been made parties to the suit, and consequently that their share in the property had not been sold, and could not be sold under the execution. The plaintiff's counsel stated: "We propose to call evidence to prove (1) that the defendants were a joint Hindu family with Jiwan Mul and Lal Chund."—those were the two mortgagors—"and that the two last-named were the managers of this firm of defendants. The transactions were carried out in the name of 'Nanak Chund, Sarup Chand.'"—the name of the banking firm. Then "(2) the rents of this property were credited in the books of this firm; the expenses of this family were debited in their books; (3) the money we advanced on the mortgage was expended in paying debts, &c., of the joint Hindu family; (4) this family had dealings with Kesri Chand Balmokand when we brought our suit on the mortgage; the defendants joined with the managers Jiwan Mul and Lal Chand, and mortgaged the equity of redemption of the whole property to Kesri Chand Balmokand, [80] reciting in that deed that the property was already in mortgage to us." That is the second mortgage to which allusion has already been made, and upon which their Lordships have not placed much reliance. Then "(5) after we attached the property Jiwan Mul, in virtue of a certificate under s. 305, tried to sell the whole property per Ganga Pershad, auctioneer. The property was twice put up

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for auction after being advertised, and the defendants took no steps to make any objections. These sales fell through. (6) Subsequently at the sale in execution of decree, Kesri Chand Balmokand bid for us up to Rs. 44,000, and we eventually purchased for Rs. 44,000." That is the plaintiff's purchase at that sale. Then in another part of the record it appears that they also proposed to prove that, after the sale had taken place, the defendants received a portion of the purchase money which was more than sufficient to pay off the mortgage, but the defendants objected, and refused to allow the plaintiff to go into evidence of those facts. Again, Jiwan Mul in his, evidence stated that the business was managed by Rattan and himself; that it was an ancestral business; that there had been no partition; and that the debt for which the mortgage was executed was due from the business in which the defendants had a beneficial interest.

Under those circumstances their Lordships think that the learned Judge of the Chief Court was perfactly justified in making the assumptions which he did make, but that he was in error in deciding as he did the question upon the point upon which the defendants have made their stand, namely, that as they had not been made parties to the action, their shares in the property had not been sold.

It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title, and interest of the two parties who were made defendants. In the case cited from volume 5 of the Indian Law Reports, Mr. Justice Pontifex in giving his [81] decision says, at page 852: (1) "It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16-annas of the ancestral property, then, in a suit by the mortgagee, the sale under the decree would pass the whole 16-annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is that the 16-annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right, validly acquired, to have the whole 16-annas sold."

The present case was first heard before the Assistant Judicial Commissioner, who held the same opinion as that at which the Chief Court arrived. Then it was appealed to the Commissioner, and he came to the same conclusion; but at the time of these decisions the Courts certainly had not before them a recent decision which is reported in the 13th volume of the Indian Law Reports, page 1—*Nanomi Babuasin* v. *Modhun Mohun* (2). There, their Lordships, after very full consideration of the whole case, said: "Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that,

(1) 5 C. 845.

(2) 13 C. 21=13 I. A. 1.

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not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He thereupon brought this suit, and the defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding[82] upon them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and that the two mortgagors alone had been sued. But that ground falls from under them. Then, when they stood upon that ground, and objected to have the evidence gone into at the proper time for going into it, can they now ask their Lordships to remit the case? Their Lordships at first had some little doubt as to whether the case ought not to be remanded; but considering the evidence of Jiwan Mull, and that the plaintiff offered to go into the whole evidence, and to prove that a portion of the purchase money was made over and received by the defendants and that the defendants refused to meet the case upon that ground, their Lordships have come to the conclusion that the case ought not to be remanded, and that the decision of the Chief Court must be reversed, as also the decree of the first Court and that of the Commissioner.

It is, therefore, necessary that the decree be made which the Chief Court ought to have made, and their Lordships will therefore humbly advise Her Majesty that the decrees of all the Courts below be reversed, and that it be decreed that the plaintiff is entitled to the six-anna share for which he sues, and that he is entitled to recover possession thereof, and further that the respondents do pay the costs in all the lower Courts.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

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15 C. 83.

[83] ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

PROSONO COOMAR GHOSE (*Plaintiff*) *v.* ADMINISTRATOR-GENERAL OF BENGAL (*Defendant*).* [12th August, 1887.]

Will—Legacy to person appointed executor—Rebuttal of presumption—Parol evidence—Succession Act (*X of* 1865), *s.* 128—*Hindu Wills Act* (*XXI* of 1870), *s.* 2.

The language of s. 128 of the Succession Act is peremptory and leaves no room for a presumption, and it is not left to the Court to decide whether the legacy is given to the person in his character as executor or not. The rule as to the admissibility of parol evidence to rebut the presumption, which may possibly upon the decisions obtain in England, has no force in this country where such evidence is inadmissible.

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* Original Civil Suit No. 158 of 1887.

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Original Civil.

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The plaintiff sought in this suit to recover from the defendant the sum of Rs. 5,000, being a legacy left to him by one Monmothonath Dey, under the following circumstances:—

Monmothonath Dey died on the 3rd December, 1881, without issue, leaving a widow Lukhemoni Dassi, aged about 22 years, and having duly made and published his will in the Bengalee language and character. The will, which began by giving his wife authority to adopt with the consent of the two executors thereby appointed, went on as follows: "I appoint my wife Sreemutty Lukhemoni Dassi and my friend Sreejoot Baboo Prosono Coomar Ghose" (the plaintiff) "executrix and executor of the whole of the moveable and immoveable properties standing in my own name or in benami left by me." It then continued with a number of directions with reference to the disposal of the testator's property immaterial for the purpose of this suit, and towards the end contained the following clause: "The executor and executrix appointed by me by this will shall in all matters act under the advice and counsel of my nearest relative and well-wisher Sreejoot Baboo Preonath Bose, the son of my father's sister. Should there be no mutual agreement between the said executor and executrix in carrying on the work in terms of this will, then the Administrator-General of Bengal shall be the executor in their place. My friend, the said [**84**] Prosono Coomar Ghose, whom I appoint executor, shall get five thousand rupees from my estate."

The plaintiff alleged in his plaint that after the death of the testator he, as executor, caused the cremation and *shradh* ceremonies of the testator to be performed, and thereafter endeavoured to get the widow to join him in taking out probate of the will; that he was all along ready, willing and anxious to administer the estate, but that he anticipated that if he alone took out probate difficulties would be caused, as disagreements had already taken place between him and the widow, and he anticipated that in administering the estate himself he would be harassed in every way by the widow, who had no business experience whatsoever and was under the control of her own relations. He also alleged that the widow was desirous of acting alone, but that he considered, if she was allowed to do so, it would be equally detrimental to the interests of the estate. A lengthy correspondence took place between the plaintiff and the widow and their respective attorneys, the nature of which, as proved in the case, is sufficiently stated in the judgment of Mr. Justice Macpherson.

As neither the plaintiff nor the widow could agree upon a course of action, the Administrator-General, at the instance of the plaintiff took out probate of the will on the 16th August, 1883, his application for such grant, which was made on the 23rd day of May 1882, being opposed by the widow. After the Administrator-General had received possession of the estate, the plaintiff demanded payment of his legacy, but the Administrator-General, having regard to the provisions of s. 128 of the Indian Succession Act, 1865, and s. 2 of the Hindu Wills Act, did not consider himself justified in paying it, and refused payment. The plaintiff therefore brought this suit, after serving notice of action on the defendant, for a declaration that he was entitled to the legacy, for payment of the same out of the estate, and if necessary for administration of the estate.

The defendant did not deny the main facts of the case, and submitted to the Court as to whether the legacy was payable under the circumstances. The following issues were settled:—

[**85**] 1. Did the testator intend to give the legacy apart from the appointment of the legatee as executor?

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2. Is the plaintiff under the terms of the will entitled to the legacy, even if he has not taken out probate or manifested an intention to act?

3. Is the plaintiff under the circumstances mentioned in the plaint entitled to the legacy?

The suit came on for hearing before Mr. Justice Macpherson on the 25th July, 1887.

Mr. *Bonnerjee* and Mr. *O'Kinealy*, for the plaintiff.

Mr. *Pugh*, *Mr. Sale* and *Mr. Garth*, for the defendant.

Evidence was given by the plaintiff to show that he was in the employment of the testator and looked after his affairs without remuneration, and whilst he was under examination by Mr. *O'Kinealy* evidence was tendered to show that the legacy was given to him for past services, and not to him as executor, the nature of the evidence being conversations between him and the testator shortly before the death of the latter.

Mr. *Sale* for the defendant objected to such evidence being received.

Mr. *O'Kinealy* for the plaintiff contended that the evidence was admissible, and cited *Tussaud* v. *Tussaud* (1). *In re Appleton*, *Barber* v. *Tebbit* (2), and *Harrison* v. *Rowley* (3), as supporting his contention.

Mr. *Sale*.—No parol evidence can be received, the question being one arising on the construction of the will itself and not one of a legal presumption. The Courts in England have held that there is a so-called presumption with regard to a person who is named in a will as executor and also as legatee that the legacy is given for services as executor; but it is not a legal presumption, but merely a construction put on the will. The evidence admissible is only that regarding the circumstance connected with the will. *Tussaud* v. *Tussaud* (1) was a question of election—a legal presumption and not a question of the construction of the will. *Harrison* v. *Rowley* (3) was a case [**86**] similar to the present, and there the question was treated as one of construction and not of presumption. (See also Taylor on Evidence, p. 1045.) *In re Appleton Barber* v. *Tebbit* (2) expressly leaves the question open.

In addition the words of s. 128 of the Sucession Act are peremptory: "He *shall* not take the legacy unless he proves the will or otherwise manifest an intention to act as executor."

Mr. *O'Kinealy* (in reply):—This is a question of presumption and not of construction merely, and the evidence is admissible upon the authorities. If the words of the section are to be taken as peremptory, it would have the effect of depriving a person of a legacy whom the testator had named as executor, although the testator might expressly declare by his will that, whether the person acted or not as executor, he was to take the legacy.

Macpherson, J.—I will admit the evidence, but reserve the question whether it is admissible and relevant or not.

The evidence was then proceeded with, and the nature of the facts deposed to and proved will be found sufficiently stated in the judgment of the Court for the purpose of this report.

Mr. *Pugh*, on behalf of the defendant, contended that s. 128 of the Succession Act applied to the case, and that upon the facts proved the plaintiff was not entitled to take the legacy. He also contended that upon the construction of the will itself the testator never intended that the plaintiff should take the legacy unless he acted as executor.

(1) L. R. 9 Ch. Div. 363. (2) L. R. 29 Ch. Div. 893. (3) 4 Ves. 212.

The judgment of the Court (MACPHERSON, J.) was delivered on the 12th August, and was as follows:— 1887 Aug. 12.

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15 C. 83.

JUDGMENT.

Monmothonath Dey died in December 1881, leaving a will of which he appointed his wife Lakhemoni Dassi and the plaintiff Prosono Coomar Ghose, executrix and executor.

The will after the appointment of the executors provides for a legacy to the plaintiff in the following terms: "My friend Prosono Coomar Ghose, whom I appoint executor, shall get Rs. 5,000 from my estate." The plaintiff has not proved the will, and the question is whether, having regard to the provisions of s. 128 of the Succession Act, which is made applicable to the wills of Hindus by the Hindu Wills Act, he can take the legacy.

[87] Section 128 enacts that, "if a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will, or otherwise manifests an intention to act as executor." It is contended that the will itself shows that the legacy was not given to the plaintiff in his character as executor, and that it was the testator's intention that he should take the legacy, whether he acted or not. It is also contended that the plaintiff, though he has not taken out probate, has sufficiently manifested an intention to act.

The section in question follows the English rule that, if a legacy is given to an executor, he must accept the office or manifest an intention of acting; but the rule is there based upon a presumption that a legacy to a person appointed executor is given to him in that character, and this presumption can be rebutted by "something in the nature of the legacy or other circumstances arising on the will." Whether it can be rebutted by parol evidence is more questionable. In *In re Appleton, Barber* v. *Tebbit* (1), Lord Justice Cotton considered that parol evidence was admissible, but the question was not decided, and Lord Justice Fry declined to express an opinion without further time for consideration. I admitted parol evidence in the present case subject to the objection which was taken and without deciding as to its admissibility.

I am of opinion that the evidence is not admissible in this country, and for this reason, that s. 128 leaves no room for a presumption. The language is peremptory; it is not left to the Court to decide whether the legacy was given to the person named in his character as executor. It is assumed that it was so given and the prohibition follows.

As the plaintiff has not proved the will, the question arises whether he has manifested an intention to act as executor. The proving of the will, when a person is in a position to prove it, is of course the best manifestation of his intention, and, if he failed to prove it, the Court would require a very strong reason for the omission before finding that the intention existed.

The will is a peculiar one. It seems to have been clearly [88] the intention of the testator that the two executors should act together, if they could do so, or not at all.

It gives permission to his wife to adopt a son, and he then directs that if she fails to adopt, the executors (she being one of them) are to compel her to do so. The executors are to act on all matters under the advice of Preonath Bose, and then comes this clause: "Should there be

(1) L. R. 29 Ch. D. 893.

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no mutual agreement between the said executor and executrix in carrying on the work in terms of this will, then the Administrator-General of Bengal shall be the executor in their place."

It seems to me that this last provision applies equally to disagreement before or after probate. It could not have been the intention of the testator that, if the executors disagreed so as to render a proper administration of his estate impossible, they were to go through the form of obtaining probate, and then incur the expense of getting this probate cancelled, so that the Administrator-General might be put in their place.

As a matter of fact, they did disagree. The plaintiff was at first willing to join Lukhemoni Dassi in taking out probate, and wrote to this effect through his attorney, but got no answer. In a subsequent letter he alludes to the disagreement, and suggests that the best course under the circumstances would be for the Administrator-General to take out probate. To this Lukhemoni objects, and intimates her intention of applying for probate on her own account. The plaintiff did not approve of this, and again, on the 1st of April 1882, asks if she is willing to join him in an application, intimating that if she did not not he would proceed to prove the will. To this Lukhemoni's attorney replies on the 14th April that, if the plaintiff "will not agree to my client alone taking out probate, he had better apply for probate to be granted to himself, and my client will take such steps as she may be advised; she is not willing to join your client in the application for probate."

Subsequently probate was granted to the Administrator-General.

Having regard to the terms of the will, I think the plaintiff has manifested an intention to act sufficient to entitle him to the legacy. I have no doubt that he was always ready and [89] willing to act, and it is proved that after the testator's death he made arrangements for the cremation and shradh, or borrowed or advanced the money which was necessary for those purposes. The action of Lukhemoni prevented him from carrying out his intention, and such action on the part of one or other of the executors was contemplated and provided for by the testator; provided for in this way, that they were to be relieved altogether from the responsibility of acting as his executors. I think the plaintiff was quite justified in not attempting to take out probate alone, and that it was not desirable in the interests of the estate or consistent with the intention of the testator that he should make the attempt. It might be open to argument that the plaintiff was not appointed an executor within the meaning of s. 128, his appointment being contingent on certain conditions, failing which the Administrator-General was to act; but on the other grounds stated I think he is entitled to the legacy.

There will be a decree declaring him entitled to the legacy and directing the Administrator-General to pay the same with interest and costs out of the assets of the estate. If he does not admit assets within one week from date there will be the usual administration decree.

The costs of the Administrator-General as between attorney and client to come out of the estate.

Suit decreed.

Attorney for the plaintiff: Mr. *H. H. Remfry.*

Attorneys for the defendant: Messrs. *Beeby & Rutter.*

H. T. H.

15 C. 89.

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Appellate Civil.

15 C. 89.

APPELLATE CIVIL.

Before Mr. Justice Mitter, Officiating Chief Justice and Mr. Justice Ghose.

KRIPAMOYI DABIA AND OTHERS (*Plaintiffs*) *v.* DURGA GOVIND SIRKAR AND OTHERS (*Defendants*).* [18th August, 1887.]

Onus of proof—Transferability of tenures.

In a suit brought to recover possession of certain lands forming part of the Putni estate of the plaintiffs and constituting the ryoti holding of one Mongola Akund, which lands were sold in execution of a money decree [**90**] against Mongola Akund, and purchased by the defendant, the defendant set up that the tenure held by Mongola Akund was of a permanent and transferable nature. *Held,* that the onus of proving the transferability of this tenure was upon the defendant. *Doya Chand Shahu* v. *Annand Chander Sen* (1) not followed.

[**R.**, 13 M. 60 (64); 25 C. 896 (907) (**F.B.**); 9 C.W.N. 144 (146); 1 C.L.J. 557 (559).]

THE question raised in this appeal was one of onus of proof arising under the following circumstances. The lands, the subject-matter of this suit, formed part of a putni belonging to the plaintiffs, and constituted the ryoti holding of one Mongola Akund. In execution of a money decree against the said Mongola Akund, the lands were sold, and purchased by the defendant Durga Govind Sirkar, who, in due course, took possession through the Court. The plaintiffs thereupon brought this suit to recover khas possession, upon the ground that the holding of Mongola Akund was a non-transferable one, and that, therefore, Durga Govind Sirkar acquired no title under his purchase; that in fact he was a trespasser and was liable to be evicted. The defendant, Durga Govind's case was that the holding of Mongola Akund was of a permanent and transferable character, and that, therefore, he acquired a valid title by his purchase.

The Court of first instance held that the onus of proof lay on the defendant, Durga Govind Sirkar, and being of opinion that the latter had given no evidence to prove that the holding was transferable, decreed the suit in favour of the plaintiffs. On appeal by Durga Govind, the District Judge held that the burden of proof was on the plaintiffs, and accordingly remanded the case to the Court of first instance for re-trial. The plaintiff appealed to the High Court against this order of remand.

Babu *Grija Sunker Mozumdar* and Babu *Hari Mohun Chuckerbutti* for the appellants cited *Perhlad Sein* v. *Doorgapershad Tewaree* (2), *Sohodwa* v. *Smith* (3); *Ram Monee Mohurir* v. *Alleemodeen* (4); *Rajkishen Mookerjee v. Pearee Mohun Mookerjee* (5); *Beharee Sahoo* v. *Puryag Mahtoon* (6); *Hyes* v. *Mooneerooddeen Ahung* (7); *Batai Ahir* v. *Bhogobutty Koer* (8).

[**91**] Baboo *Doorga Mohun Das* and Baboo *Bhubun Mohun Das* for the respondents cited *Doya Chand Shaha* v. *Anund Chunder Sen* (1); *Sumbhoolall Girdhurlall* v. *Collector of Surat.* (9).

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* Appeal from Order No 84 of 1887 against the order of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 17th of December, 1886, reversing an order of Baboo Mohendro Nath Mitter, Munsif of Natore, dated the 25th of March, 1886.

(1) 14 C. 382. (2) 12 M. I. A. 322 (331). (3) 12 B. L. R. 82=20 W. R. 138.
(4) 20 W. R. 374. (5) 20 W.R. 421. (6) 23 W. R. 291.
(7) 24 W. R. 6. (8) 11 C. L. R. 476. (9) 8 M. I. A. 1 (39).

1887
AUG. 18.

APPELLATE CIVIL.

15 C. 89.

JUDGMENT.

The judgment of the Court (MITTER, Offg. C. J., and GHOSE, J.) was, omitting the facts as above set out, as follows:—

The question arises, upon the respective allegations made by the plaintiffs and the defendants, whether the plaintiffs are bound to prove, before they can succeed, that the holding is of a non-transferable character, or whether they are entitled to recover, if the defendant Durga Govind fails to prove that the holding is transferable.

It seems to us, upon the admitted facts of the case, that the onus lies upon the defendant, and that he cannot succeed in his defence unless it be proved that he has a title to hold the land as a tenant under the plaintiffs, or in other words that the holding is of a transferable character.

The land in suit is admittedly a part of the plaintiffs' putni; and as such, they are *prima facie* entitled to the possession of it, and it is for the person who questions their right to possession, by setting up a subordinate tenure, to establish his title. The defendant, Durga Govind, in the present case, sets up as against the plaintiffs a permanent and transferable tenure, and if he proves it, and not otherwise, he would be entitled to be in possession. One test which may well be applied in a case like this is, who would win if no evidence were given on either side, and it seems to us that, upon the facts admitted, the plaintiffs must win if the defendant does not prove the case set up by him.

The question appears to us to be concluded by the authority of the Privy Council in the case of *Perhlad Sein* v. *Doorgapershad Tewaree* (1); as also by *Suhodwa* v. *Smith* (2); *Ram Monee Mohurir* v. *Aleemooddeen* (3); *Rajkishen Mookerjee* v. *Peare Mohun Mookerjee* (4); *Beharee Sahoo* v. *Puryag Mahtoon* (5); *Hyes* v. *Moneeroodeen Ahung* (6); and *Batai Ahir* v. *Bhuggobutty Koer* (7).

[92] The learned vakeel for the respondent, in the course of his argument, relied very strongly upon a ruling by a Division Bench of this Court, *viz.*, *Doya Chand Shaha* v. *Anund Chunder Sen* (8). That case is no doubt in his favour, but it seems to us that we are bound to follow the principle of law laid down by the Judicial Committee in the case referred to above. There the plaintiff, as zamindar of Ramnuggur, sued the defendant to evict him from two mouzahs forming part of his zamindari, on the allegation that they had been made over to the defendant's father in lieu of allowance for rendering service; that the service tenure had been determined by the dismissal of the grantee from service; and that the mokurari set up by defendant was untrue. The defendant claimed to hold it as a mokurari granted to his father. The Courts in India found that the plaintiff had failed to prove the precise case set up by him, and that there was no proof of any lease other than the mokurari pottah, and then upon the evidence held that the mokurari was genuine. The Judicial Committee on appeal were also of opinion that the evidence adduced by the plaintiff was weak and defective, but notwithstanding this finding, they did not agree in the decision of the High Court. They observed: "But even if it be admitted that the appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion that the respondents had established their right to hold the lands under their mokurari tenure. It is possible that the reward to Muddun Mohun

(1) 12 M. I. A. 322. (2) 12 B.L.R. 82=20 W.R. 138. (3) 20 W. R. 374.
(4) 20 W. R. 421. (5) 23 W.R. 291. (6) 24 W. R. 6.
(7) 11 C.L.R. 476. (8) 14 C. 382.

Tewarree may have been an assignment of the rent of the villages to him for his life or other life interest. The appellant is the zamindar; as such he has a *prima facie* title to the gross collections from all the mouzahs within his zamindari. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion there is, in the record before them, no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond at most the lifetime of Muddun Mohun Tewarree."

No doubt what was set up by the defendant in that case was the grant of an *intermediate* tenure, but this circumstance does [93] not make any difference in the principle which their Lordships laid down, and which we are bound to apply in this case.

And applying that principle, it seems to us that, unless the defendant can prove the tenure set up by him, *viz.*, a permanent and transferable tenure, the plaintiff, the admitted landlord, is entitled to enter into possession. And this view has been almost uniformly taken by this Court, as would appear from an examination of the cases quoted above.

The learned vakeel for the respondent also relied upon the remarks of the Judicial Committee in the case of *Sumbhoo Lall* v. *The Collector of Surat* (1), the said remarks being in p. 39. But it will be observed on examination that they are based entirely upon the facts as found by the Judicial Committee on pp. 38 and 39.

Upon all these considerations we are of opinion that the onus of proof in this case is upon the defendant.

The Court of first instance, as already mentioned, held, as we understand its judgment, that the defendant had failed to prove that the tenure was of a permanent and transferable character, he having given no evidence in support of his allegation. There is no finding by the Appellate Court upon this part of the case, and we accordingly called upon the vakeel for the respondent to state what evidence there was supporting the case for the defendant, and he frankly admitted that, beyond the fact that upon a former occasion the property had been sold in execution of a decree, there was no evidence showing that the tenure was transferable. The landlord was no party to this sale, and there is nothing to show that he accepted the purchaser as his tenant. That being so, it seems to be perfectly clear that the defendant has not given any evidence to establish that he has acquired a title by his purchase.

The next question that arises is, whether the plaintiffs are entitled to recover khas possession. It is said that the tenant Mongola Akund has not abandond the holding, but that he is in occupation under a sub-lease granted by Durga Govind Sirkar, the purchaser. We do not propose to decide any question that [94] may hereafter arise as between Mongola Akund and the plaintiffs, he being no party to this suit.

It is sufficient for the purposes of this case to say that the defendant Durga Gobind has no right to retain possession of the land in suit, and to resist the claim for possession on the part of the plaintiff. This view is supported by the Full Bench decision in the case of *Narendra Narayan Roy* v. *Ishan Chundra Sen* (2).

The result is that the order of the lower Appellate Court must be reversed, and the decree of the Court of first instance restored with all costs.

T. A. P. *Appeal allowed.*

(1) 8 M.I.A. 1. (2) 13 B.L.R. 274=22 W. R. 22.

1887
Nov. 9.

APPELLATE CIVIL.

15 C. 94.

15 C. 94.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

GOBIND CHUNDER ROY (*Plaintiff*) *v.* GURU CHURN KURMOKAR (*Defendant*).* [9th November, 1887.]

Lis pendens—*Auction purchaser bound by* Lis pendens.

K brought a suit against *P* to recover possession of certain land. Whilst that suit was pending in the Court of first instance, the right, title, and interest of *P* in the land were sold in execution of a decree against him at the instance of a judgment-creditor and purchased by *G*. Subsequent to *G*'s purchase *K*'s suit was dismissed by the Court of first instance; but *K* appealed, and the Appellate Court reversed the decree of the Court below and gave judgment in *K*'s favour. *G*, who was not made a party to the appeal, thereupon instituted a suit against *K* to eject him and obtain possession of the land.

Held that the doctrine of *lis pendens* applied, and that *G* was not entitled to maintain the suit.

Held, further, that it made no difference to the application of the doctrine that the decree of the Court of first instance was in favour of *G*'s predecessor in title, for that decree was open to appeal, and the decree in the suit was that passed by the Appellate Court, the proceedings in the Appeal Court being merely a continuation of those in the suit; and as *G*'s purchase was made whilst that suit was pending, *G* was still bound by the decree of the Appellate Court.

Anundo Moyee Dossee v. *Dhonendro Chunder Mookerji* (1) distinguished.

[**F.**, 28 C. 23=4 C.W.N. 740; **Cons.**, 19 P.L.R. 1904=80 P.R. 1903 (**F.B.**); **R.** 18 C. 188 (194); 4 M.L.T. 172=A.W.N. (1908) 211.]

[95] THE facts of the case were as follow:—

The principal defendant, Guru Churn Kurmokar, instituted a suit in the year 1882 against Pran Gour Mozumdar, defendant No. 3 in the present suit, for the purpose of recovering possession of the lands, the subject of the present suit, alleging that they were lakhiraj, and that he had got them by purchase. Whilst that suit was pending in the Court of first instance, the right, title and interest of Pran Gour Mozumdar in the lands were put up to sale at the instance of one Moharani Sarut Sunduri Debi, who held a decree against him, and on the 20th June, 1882, purchased by the present plaintiff in the name of Srinath Dutt, one of his servants. On the 13th December, 1882, Guru Churn Kurmokar's suit was dismissed, but he appealed, and on the 26th September, 1883, the decree of the lower Court was reversed and the suit decreed. The present plaintiff was not made a party to that suit in the Court of first instance, or whilst it was pending on appeal, and in the present suit it was found as a fact that Pran Gour Mozumdar did not appear on the appeal which was heard and decreed *ex parte*. The present suit was instituted by the plaintiff on the 10th August, 1885, to obtain possession of the lands and for mesne profits, and he alleged that the decree obtained by the defendant in his suit against Pran Gour Mozumdar was fraudulent, and, being obtained *ex parte* in a suit to which he had not been made a party, was not binding on him.

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* Appeal from Appellate Decree No. 648 of 1887 against the decree of Babu Promotho Nath Banerjee, Rai Bahadur, Subordinate Judge of Mymensingh, dated the 11th of January 1887, reversing the decree of Babu Lall Gopal Sen, Munsiff of Attiah dated the 4th of May 1886.

(1) 14 M.I.A. 101=8 B.L.R. 122=16 W.R. P.C. 19.

The principal defendant, Guru Churn Kurmokar, appeared and filed a written statement, pleading amongst other things that the suit was barred under s. 13 of the Civil Procedure Code, and that, as the plaintiff had admittedly purchased the right, title and interest of Pran Gour whilst his suit was pending, he was bound by the decree in his suit. The defendant further denied all knowledge of the plaintiff's auction-purchase. The other matters pleaded in the written statement are immaterial for the purpose of this report.

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The Munsif gave the plaintiff a decree, holding that he was not bound by the proceedings in Guru Churn's suit, but the lower appellate Court reversed that decree, holding that the doctrine of *lis pendens* applied, and relied upon the following authoritizes [96] in support of its decision: *Umamoyi Burmoneea* v. *Tarini Prasad Ghose* (1); *Manual Fruval* v. *Sangapalli Latchmidevamma* (2); *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (3); *Jharoo* v. *Raj Chunder Doss* (4).

The plaintiff accordingly now preferred this second appeal to the High Court.

Baboos *Rash Behari Ghose*, *Durgamohun Das* and *Mohiney Mohun Chuckerbutty*, for the appellant.

Baboo *Grish Chunder Chowdhry*, for the respondent.

The nature of the contentions urged on behalf of the appellant at the hearing of the appeal appears sufficiently in the judgment of the High Court (NORRIS and GHOSE, JJ.), which was delivered by—

JUDGMENT.

GHOSE, J.—The facts out of which this appeal arises are shortly as follow: The present defendant brought a suit in the year 1882 against one Pran Gour for the recovery of possession of certain lands. Pending the suit in the Court of first instance, the right, title and interest of Pran Gour were sold in execution of a decree passed against him, and were purchased by the present plaintiff on the 20th of June 1882. Subsequently to this, that is, on the 13th December 1882, the abovementioned suit against Pran Gour was dismissed by the Court of first instance. The present defendant thereupon appealed. The purchaser at the execution sale, namely, the present plaintiff, was not made a party to the appeal; but there is no evidence to show that the defendant knew of the plaintiff's purchase. On the 26th of September 1883 the appellate Court reversed the decree of the Court of first instance, and gave judgment in favour of the present defendant. The present suit is by the plaintiff, as auction-purchaser of the right, title and interest of Pran Gour, against the defendant for ejectment: and the question that was raised in the Courts below was whether the doctrine of *lis pendens* was applicable to this case. The lower appellate Court has held that it is applicable, and has accordingly dismissed the suit. For the appellant it has been contended [97] by Dr. Rashbehari Ghose that the doctrine of *lis pendens* does not apply to this case: *first*, because the sale at which the present plaintiff purchased was a sale by a Court in execution of a decree, and not a voluntary sale by the judgment-debtor; and, *second*, because the decree of the Court of first instance, passed in the previous suit on the 13th of December 1882, was to all intents and purposes a final decree in the said suit until it was reversed on appeal; and as the plaintiff was not made a party to the appeal preferred by the defendant against that decree, it

(1) 7 W.R. 225. (2) 7 M.H.C. 104. (3) 21 W.R. 349. (4) 12 C. 299.

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ought to be taken that the decree now relied upon by the defendant, *viz.*, the decree of the appellate Court, is not binding on the plaintiff.

As to the first branch of this argument it appears to us that, so far as the decisions of this Court are concerned, it has almost invariably been held that the doctrine of *lis pendens* does apply even to the case of an auction-purchaser; and we do not see any reason to differ from those decisions. The learned vakeel for the appellant has, however, very stronglv relied upon the decision of the Privy Council in the case of *Anundo Moyee dossee* v. *Dhonendro Chunder Mookerjee* (1); and he has contended that the observations made by the Judicial Committee in their decision indicate that in a case like the present the doctrine of *lis pendens* cannot, and ought not, to apply. It will, however, be observed, upon a consideration of that case, that the facts upon which the observations relied upon by Dr. Rashbehari Ghose were made were wholly different from the facts of the case which we have now to deal with; and it seems to me that their Lordships of the Privy Council were in no way called upon to express, nor did they express, any opinion whatever on that occasion upon the question with which we are now concerned. On turning to the report of the case as is given in Moore's Indian Appeals, it would appear that a decree for sale was passed by the Supreme Court at Calcutta upon a mortgage deed by which certain properties in the mofussil were mortgaged; that in execution of this decree the said properties were sold, and the plaintiff became the purchaser. While the suit in which the said decree was passed was pending, in execution of [98] another decree against the mortgagor, which was a money decree, his right, title and interest in those properties were sold and were purchased by the defendant; and the question that came up before the Judicial Committee was a question that was raised between these two purchasers. It was contended before the Judicial Committee that the sale to the plaintiffs was a sale in a suit for foreclosure of a mortgage, and that the suit for foreclosure having been instituted prior to the sale at which the defendant made his purchase, the latter was bound by the decree for foreclosure in exactly the same manner as if he were a party to the foreclosure suit. With reference to this contention, their Lordships of the Privy Council say: "There is no foundation whatever for the claim so put, that the case to which they have been referred.—*The Bishop of Winchester* v. *Paine* (2)—has really no relation to any case of this kind. That case merely determines this—that where there is a suit for foreclosure, and the mortgagor, a defendant to that suit makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, a purchaser will not be allowed afterwards to institute a new suit for a new foreclosure, the ground being that, if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that was simply a foreclosure suit and the subsequent mortgagee would be barred from instituting any new suit in the Court of Chancery for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. That case simply decides that subsequent mortgagees of an equity of redemption are bound by a foreclosure suit. This, however, was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Supreme Court at Calcutta had no effect whatever *in rem*, as it had no effect whatever over

(1) 14 M.I.A. 101=8 B.L.R. 122=16 W.R.P.C. 19. (2) 11 Ves. 194.

the property in the *mofussil*. The decree for sale was merely a decree in substance that the parties to the suit should concur in conveying and selling the property to a purchaser, and no such decree for sale could have [**99**] any operation whatever upon the title of persons in the *mofussil* who were no parties to the suit. Therefore it appears to their Lordships that the view of the case presented to them based upon the case of *The Bishop of Winchester* v. *Paine*, has really no application to the subject-matter of this suit."

Reading these observations by the light of the facts of the case, it appears to me that they have really no application whatever to the question we are now called upon to determine, that question being whether the doctrine of *lis pendens* applies to the present plaintiff, who, according to the contention of the present defendant, made his purchase during the pendency of the suit, in the course of which the decree, awarding possession of the lands to the defendant, was eventually made. The view that we now take, namely, that the doctrine of *lis pendens* does apply, has been taken, as I have already said, in several cases in this Court, that is, in the cases of *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (1); *Jharoo* v. *Raj Chunder Dass* (2); and a recent case, namely *Kally Dass Mookerjee* v. *Sheik Arshad* (3) decided on the 7th December 1886, by the present Chief Justice and Mr. Justice Beverley. We think we ought to follow these rulings, and hold that the doctrine of *lis pendens* does apply to an auction-purchaser such as the plaintiff is.

As to the second branch of the argument pressed before us, we had at first some doubts, but after hearing the respondent's vakeel we think we ought to hold that the appellant must fail. The decree passed in the suit was the final decree pronounced on the 20th of September 1883. The proceedings in the appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against, we ought to take it that the decree of the appellate Court was the decree in the suit, and the sale at which the plaintiff purchased having taken place pending the suit in which that [**100**] decree was pronounced, we think that the doctrine of *lis pendens* does apply to the case.

The result is that this appeal must be dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 100.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

DINABUNDHU SURMA AND OTHERS (*Plaintiffs*) v. BODIA KOCH (*Defendant*).* [17th August, 1887.]

Right of occupancy in Assam—Pykes, their rights and privileges.

The plaintiff who held land in Assam under a settlement from Government sued to eject the defendant from certain lands within his holding. It was

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*Appeal from Appellate Decree, No. 2444 of 1886, against the decree of H. Luttman-Johnson, Esq., Judge of the Assam Valley Districts, dated the 15th of August 1886, reversing the decree of Babu Shibo Pershad Chuckerbutty, Extra Assistant Commissioner of Gauhati, dated the 9th of June 1886.

(1) 21 W.R. 349. (2) 12 C. 299.

(3) Appeals from Appellate Decrees Nos 54 to 57 of 1886, unreported.

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proved that the defendant was a descendant from one of the *pykes* who held lands under the Assam Rajahs; that the Assam Rajahs granted the *pyke* to a certain *lakherajdar;* that the *pyke* held the lands in suit as before under the *lakherajdar;* that the *lakheraj* was subsequently resumed by Government; and that the defendant had his house and gardens on the land for a long time, and had paid rent for many years at Government rates.

Held, that the defendant was not liable to ejectment.

The rights of such tenants explained and discussed.

THIS was a suit to eject the defendant from certain lands which he held under the plaintiffs who were the holders of the settlement under Government.

The defendant, amongst other things, pleaded that he had acquired a right of occupancy, having long held possession of the land in suit, and that he was therefore not liable to be ejected.

The first Court considered that, as there was no law or custom in force in Assam, or special contract, by virtue of which the under-tenant could acquire a right of occupancy, there was no reason why the plaintiffs were not entitled to obtain *khas* possession. It found on the evidence that the defendant was formerly the tenant of the Borooahs of Chand Kaithi, whose *maliki* rights had been acquired by the Government, but that upon that taking place, any rights the defendant might have had became [**101**] extinct, and thus the plaintiffs were not bound to recognize him. That Court accordingly gave the plaintiffs a decree for *khas* possession.

The defendant appealed, and the lower appellate Court reversed the decree of the first Court upon grounds which sufficiently appear in the judgment of the High Court, and dismissed the suit with costs.

The plaintiffs now preferred this second appeal to the High Court.

Baboo *Jusoda Nundan Poramanick*, for the appellants.

No one appeared for the respondent.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

In this case, the plaintiff, as the settlement holder from Government, sued to eject the defendent from certain lands held by him as tenant. The plaintiff's allegation was that the defendant was but a *chookanee* tenant, liable to be ejected at his pleasure; while the case for the defendant was that the land was held by his family from generation to generation as *pyker* lands, and that he had a permanent right of occupancy and was not liable to be ejected.

It was not proved that the defendant was a tenant of the description alleged by the plaintiff; and in fact the lower appellate Court holds this to be the case.

The facts that have been found in the case by Mr. L. Johnson, the Judge of the Assam Valley Districts, are (1) that the defendant is a descendant from one of the *pykes* who held lands under the Assam Rajahs; (2) that the Assam Rajahs granted the *pyke* to a certain *lakherajdar;* (3) that the *pyke* held the land in suit as before under the *lakherajdar;* (4) that the *lakheraj* was subsequently resumed by Government; (5) that the defendant has his house and gardens upon the land for a long time and has paid for many years at "Government revenue rates." The Judge is further of opinion that, although upon resumption of the *lakheraj*, the defendant lost all the rights he may have had under the *lakherajdar*, he did not lose the rights he held under the Assam Rajahs.

[102] The Judge then says that Act X of 1859 does not apply to Assam, and therefore the right of occupancy as conferred upon ryots by s. 9 of the Act cannot be claimed; and he holds that there is no statute law of landlord and tenant in Assam; still having regard to the laws in force in other parts of India, and regard being also had to the facts of the case, the defendant is not liable to be summarily ejected.

We do not agree with the Judge in thinking that the case should be determined by the laws in force in other parts of India; and it appears to us that he should have confined himself to such laws as might be found to obtain in Assam.

It is not necessary in this case to discuss whether Act X of 1859, or the occupancy sections of that Act, are applicable to Assam; for we think that the case may well be decided upon the facts as found by the Judge and upon the common law of the country.

What may be the common law of the country is to be found in the "Selections from the records of the Bengal Government" No. XI, published by authority in 1853. And it appears from the report of Major Jenkins, Commissioner of Revenue, Assam, dated the 13th November 1849, that under the ancient Government of the country, the *pyke* system prevailed in Assam; that the *pykes* had lands assigned to them in lieu of service; that latterly, they had "generally to serve for one-third of the year, or such as were not field-labourers, had to give so much cloth or gold or other article which they were employed to produce;" that besides the lands granted in lieu of service, the *pykes* "were allowed to hold the village barri lands, without limitation as to extent and free from all direct imposts," "and that these lands descended from father to son, divisible amongst the children according to the custom of the country;" that they could give the lands away by "gift, or will, or by mortgage, but all the *pykes* throughout the country paid a capitation tax in lieu of, or as equivalent to a rent for these lands;" that when personal service was not required from a *pyke*, he paid certain rent; that in consequence of the exemption of slaves from taxation, and "the plague of poll-tax" and personal service, many *pykes* were content to call themselves slaves, and concealed themselves amongst the families of slaves [103] who could protect them; and this resulted in extensive cancelment of *pykes;* and that Mr. Scott who held the office of Commissioner under the English Government instituted enquiry, and the result was that a very large number of persons were restored to the rank of *pykes*. The report further states "that the ryots are now considered to have full proprietary rights in all their lands of all descriptions, and the *pykes* are no longer liable to arbitrary interference of any Revenue Officer, and no ryot could be dispossessed of any portion of his land except by the regular process of the Civil Court. They can, of course, sell any portion of their lands, for, though the Government withheld from yielding to them a proprietary right in the *pyke* land, yet the ryot can dispose of his right of occupancy; the Government have foregone their right to interfere, and no other authority has any power."

Major Jenkins then says that he considers that "the estates in Assam, of all descriptions and sizes, are more or less freehold, and held subject to the only one condition of paying the Government tax on the land, and all the occupants are with little exception free-holders." Referring to the tenants of *lakherajdars*, he says that they are, "to all intents, free-holders also, for they were transferred by the Government of the country with their lands, and all that the Government surrendered was the right to the

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services of the *pykes*. The lands they occupy are as much their own as if they were held under Government, and they are not restrained from throwing up these lands and leaving the *lakherajdars* whenever they choose, but the abandoned lands would belong to the *lakherajdars*, or, if sold to other ryots, these would have to pay rent to the *lakherajdars*."

We think that we may well accept the above report of Major Jenkins as giving what the customary law of the country was under the old Government; and what has been understood since the English conquest to be the law and the rights and privileges of the *pykes*.

The plaintiff in the present case, as above mentioned, is but a settlement-holder from Government. The written lease, as we understand it, does not confer upon him any permanent right; and yet he seeks to eject arbitrarily a person who has, as declared [**104**] by the Chief Revenue Officer of the district in 1849, a substantial interest in the land he occupies.

It is found by the Judge that the defendant is a descendant of an old *pyke* who held the lands under the Assam Rajahs; that the *pyke* was granted by the Rajah to a *lakherajdar*, but that neither this circumstance nor the subsequent resumption by Government of the *lakkeraj* interfered with or disturbed his right; that he held on as before as *pyke*, and that since the resumption he has been paying a certain rent.

Applying the common law of the country as described above, to the facts found, we are of opinion that the defendant is not liable to be turned out at the will and pleasure of the plaintiff, and that this suit should therefore fail.

The appeal will be dismissed without costs, no one appearing for the respondent.

H. T. H. *Appeal dismissed.*

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15 C. 104.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

MODHUSUDDUN KOER AND ANOTHER (*Defendants*) *v.* RAKHAL CHUNDER ROY AND ANOTHER (*Plaintiffs*).* [31st October, 1887.]

Munsif, Jurisdiction of—Bengal Civil Courts' Act (VI of 1871), s. 20—Value of the subject-matter in dispute—Civil Procedure Code (Act XIV of 1882), s. 283—Attached property, Suit to establish right to—Valuation of suit.

A Munsif has jurisdiction to try a suit brought under s. 283 of the Civil Procedure Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over one thousand rupees, but the amount of the debt being less than that sum.

In such suits the amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him, and not the value of the property attached, unless the two amounts happen to be identical.

[**105**] *Janki Das* v. *Badri Nath* (1), *Gulzari Lal* v. *Jadaun Rai* (2), *Krishnama Chariar* v. *Srinivasa Ayyangar* (3), and *Dayachand Nem Chand* v. *Hemchand Dharamchand* (4), followed.

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* Appeal from Order No. 238 of 1887, against the order of R. H. Anderson, Esq., Judge of Burdwan, dated the 13th of May 1887, reversing the order of Baboo Aditya Chunder Chuckerbutty, Munsif of Katwa, dated the 21st of December 1886.

(1) 2 A. 698. (2) 2 A. 799. (3) 4 M. 339. (4) 4 B. 515.

[F., 50 P.R. 1890; 1 L.B.R. 1 (2); 42 P.R. 1901; 15 C.P.L.R. 161 (162); 31 C. 511 (515); 5 L.B.R. 208 (F.B.)=8 Ind. Cas. 973 (975); Cons., 2 N.L.R. 87 (88); 94 P.R. 1908 (F.B.)=74 P.W.R. 1908; R., U.B.R. (1897-1901), Vol. II, 355 (359); U.B.R. 1903, C.P.C. p. 19; 30 M. 335=2 M.L.T. 116=17 M.L.J. 95 (F.B.); D, 17 A 69 (73).]

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APPELLATE CIVIL.

15 C. 104.

In this case Satish Chunder Roy and Rakhal Chunder Roy, having obtained a decree against one Radhabullubh Koer for the sum of Rs. 400, attached certain immoveable property in execution of this decree. Modhusuddun Koer, a son of the judgment-debtor, put in a claim to the property attached, asserting that he had purchased it form his father; this claim was allowed, and the property released from attachment.

The decree-holders thereupon brought a suit in the Court of the Munsif of Cutwa against the judgment-debtors for a declaration that the property attached did not belong to the son but to the father, and that the conveyance to the son was a collusive one in fraud of the decree-holders.

The judgment-debtors contended that the Munsif had no jurisdiction to hear the case, inasmuch as the value of the property in suit was more than Rs. 1,000. The Munsif held that the actual value of the suit being Rs. 1,435 he had no jurisdiction to try the case, and returned the plaint for presentation to the proper Court.

The decree-holders appealed against this order on the ground that the meaning of the words " value of the subject-matter in dispute," in s. 20 of Act VI of 1871, referred, in the case before the Court, to the amount of the decree sought to be executed, and not to the market value of the property itself.

The District Judge held that the amount which settled the jurisdiction of the Munsif was the amount of the debt, and not the value of the property attached; and remanded the case to the Munsif for trial.

The judgment-debtors appealed.

Baboo *Jogendra Nath Bose*, for the appellants, contended that the Munsif had no jurisdiction in suits involving a question of title to land of a value higher than Rs. 1,000, that the plaint in the suit showed that the suit was of that nature, for it prayed that the property refered to might be [**106**] declared to belong to the father and for a declaration that the property might be held liable to be sold in execution of the decree; that the principle of the case of *Ahmed Mirza Saheb* v. *Thomas* (1) was applicable, and cited *Mufti Jalaluddeen Mahomed* v. *Shohorullah* (2).

Babu *Trailokhya Nath Mitter*, for the respondents, contended that they did not claim possession of the property attached, but only an interest therein to the amount of the decree; and cited *Janki Das* v. *Badri Nath* (3); *Gulzari Lal* v. *Jadaun Rai* (4); *Krishnama Chariar* v. *Srinivasa Ayyangar* (5); *Dayachand Nemchand* v. *Hemchand Dharamchand* (6); and *Durga Prasad* v. *Rachla Kuar* (7).

JUDGMENT.

The judgment of the Court (Petheram, C. J., and Tottenham, J.) was delivered by

Petheram, C. J.—We think that this appeal must be dismissed.

(1) 13 C. 162. (2) 15 B.L.R. Ap. 1. (3) 2 A. 698. (4) 2 A. 799.
(5) 4 M. 339. (6) 4 B. 515. (7) 9 A. 140.

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The question which is raised before us is whether the Munsif has jurisdiction to try the suit which is brought to test the question, whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over one thousand rupees, but the amount of the debt being less than one thousand rupees.

The question has never been actually before this Court so far as appears from the books, but it has been before the Courts of Bombay, Madras, and Allahabad, and these Courts have decided that the amount which is to settle the jurisdiction is the amount of the debt and not the value of the property. We think that, even if we had any doubt upon the point, it would be right to follow those decisions as they all appear to be uniform; but beyond that, and speaking for myself, I agree entirely with those decisions. The amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and the amount which is in dispute is the amount which the execution-creditor will recover if he is successful, and the only amount which he would recover, if he is successful, would be the amount of his debt and [107] not the value of the property attached, unless the two amounts happen to be identical.

For these reasons we think that the decisions in Madras, Bombay and Allahabad are correct, and they must be followed.

Some cases have been cited which were decided by this Court, but those cases are not in point. The only question decided in those cases is, whether in a suit of this kind, where only declaratory relief is sought for, a fixed Court fee or an *ad valorem* fee is to be paid; but they do not deal with the amount of the *ad valorem* fee if such a fee is payable; therefore those decisions have no bearing on this case, and need not be further noticed. The appeal is dismissed with costs.

T. A. P. *Appeal dismissed.*

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15 C. 107.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

SATGURI (*Defendant*) *v.* MUJIDAN (*Plaintiff*).*
[31st October, 1887.]

Second Appeal—Rent suit—Bengal Act VIII of 1869, *s.* 102—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 153—*General Clauses Act* (*II of* 1868) *s.* 6.

The word "proceedings" in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety, that is, down to the final decree.

A second appeal, therefore, to the High Court, on a question of the amount due as rent, will not lie when the suit was instituted previous to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act.

Hurrosundari Debi v. *Bhojohari Das Manji* (1) approved.

[**Rel. on,** 7 A.L.J. 1070 (1073)=8 Ind. Cas. 8; **R.**, 16 C. 267 (274) (**F.B.**).]

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*Appeal from Appellate Decree, No. 233 of 1887, against the decree of F. Peterson, Esq., Judge of Purneah, dated the 2nd of November 1886, reversing the decree of Baboo Lal Singh, Rai Bahadoor, Munsif of Kissengunge, dated the 17th of March 1886.

(1) 13 C. 86.

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THIS was a suit brought by a landlord against his tenant on the 15th October, 1885, for arrears of rent. The only question raised in the suit was whether the annual jumma payable by the defendant was Rs. 15 as claimed by the plaintiff, or Rs. 11 as alleged by the defendant.

On the 17th March, 1886, the Munsif decided the case in favour of the plaintiff on the jumma alleged to be payable by the defendant.

[**108**] The plaintiff appealed to the District Judge who, after remanding the case to the Munsif for a further examination of some of the witnesses already examined, gave his final decision on the 2nd November 1886, reversing the decision of the Munsif, giving the plaintiff a decree at the annual jumma claimed by him.

The defendant appealed to the High Court.

Babu *Jogendra Nath Bose*, for the appellant, contended that the Judge had been in error in remanding the case, and that he had also overlooked important documentary evidence.

Babu *Taruck Nath Palit*, for the respondent, contended that under s. 102 of Bengal Act VIII of 1869 no appeal would lie, s. 6 of the General Clauses Act preventing Act VIII of 1885, which repealed Bengal Act VIII of 1869, from applying.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

PETHERAM, C.J.—We think that no appeal lies in this case, and that the question is really concluded by the authority of the case of *Hurrosundari Debi* v. *Bhojohari Das Manji* (1).

The suit is a rent suit which was brought by the landlord against his tenant to recover a sum of rent. During the time that such suits were governed by Bengal Act VIII of 1869, no second appeal lay to this Court by reason of there being a question involved in the suit as to the amount of the rent. After the suit was commenced, and before the decree, Act VIII of 1885 was passed. That act, amongst other things, repeals Bengal Act VIII of 1869, and provides that in cases of this kind, where this peculiar kind of dispute arises, an appeal shall lie. It may be that at first sight it would look as if that was intended to relate to all suits that were then pending; but when one comes to look at s. 6 of the General Clauses Act of 1868, it will be seen that it provides that the repeal of any Statute, Act, or Regulation shall not affect any *proceedings* commenced before the repealing Act shall have come into operation. The word "proceedings" there, as applied to a suit [**109**] means, I think, the suit as an entirety, that is to say, down to the final decree, and, inasmuch as the other ground of appeal can only be let in by the repeal of s. 102 of the older Act, this appeal is, we think, prohibited by the effect of s. 6 of the General Clauses Act, which says that the proceedings shall not be affected by the repeal of the Statute. As I said before, I think that the matter is concluded by the decision of *Hurrosundari Debi* v. *Bhojohari Das Manji* (1), and that it is not necessary for us to say anything more than that with that decision we entirely agree. Under the circumstances we dismiss the appeal with costs on the ground that no appeal lies.

T. A P. *Appeal dismissed.*

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(1) 13 C. 86.

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CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF AHMED MAHOMED.
MAHOMED JACKARIAH & CO. *v.* AHMED MAHOMED.*
[13th October, 1887.]

Inspection of Documents in Criminal Case—Discovery—Power of Court to order inspection—Criminal Procedure Code, 1882, *ss.* 94-99—*Search Warrant, Form and validity of.*

A and *T*, the latter of whom was the book-keeper in the firm of *J. M. & Co.*, were charged, on the complaint of that firm, with cheating by having dishonestly induced them to deliver to *A* certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by *T* omitting to make entries in the account books of sums due by *A* to the firm, and by making false entries therein of payments by *A*. Whilst the charge was pending the Presidency Magistrate, before whom the charge had been made, granted a search warrant in the following terms: "To Inspector M.—Whereas *A* and another have been charged before me with the commission or suspected commission of the offence of cheating, and it has been made to appear to me that the production of khatta books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence, or suspected offence, this is to authorize and require you to search for the said property in the house of *A*, No. 13, Pollock Street, and if found to produce the same forthwith before this Court." **[110]** In execution of this warrant certain books and papers found in the house of *A* were seized and taken possession of by the police, and of those books and papers the Magistrate, on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search warrant had been granted without proper judicial inquiry and upon insufficient materials; that it was bad on the face of it, as it did not "specify clearly," as directed in Form VIII, sch. V of the Criminal Procedure Code, whose khatta books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of documents by the prosecution in a criminal case *Held per Norris, J.*, that assuming the contention as to the search warrant arose on the rule as granted, the warrant must be looked at as a whole, and so looked at it sufficiently clearly showed that it was the khatta books of *A* which were referred to as being essential to the inquiry, and the objects of the directed search; nor was there anything to show that the warrant was issued otherwise than regularly and in due course.

Per Norris, J.—Though the Courts in England have constantly refused to compel discovery in criminal cases. on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorised the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search warrant issued under the provisions of s. 96 of the Criminal Procedure Code, there is no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of or subsequent to, his arrest. and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dillon* v. *O'Brien* (1), the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanour, rests "upon the interest which the State has in a person justly or reasonably believed to be guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law," a right to inspect such property must exist as well as a right to seize and detain it, and the

* Criminal Revision No. 258 of 1887, against the order passed by Syud Ameer Hossein, Prosidency Magistrate of Calcutta, Northern Division, dated the 23rd of August 1887.

(1) 20 Irish L.R. 300.

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proper persons to inspect it are those conducting the prosecution. It would, moreover, be unreasonable that the police or those conducing the prosecution should not have an opportunity of inspecting and examining documents, &c., found on a prisoner when arrested, or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence.

Per Ghose, J.—The contention as to the validity of the search warrant did not arise on the rule as granted, but *semble,* that the search warrant was bad in law, no summons under s. 94 of the Criminal Procedure Code [111] having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons only; that although the warrant was not specific, still, inasmuch as no objection was raised to the form of the warrant before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed.

Per Ghose, J.—There is no doubt that by the criminal law of this country, as laid down in the Criminal Procedure Codes since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine, at the time when he makes an order under s. 94 of the Criminal Procedure Code, or issues a search warrant under s. 96, whether the documents are necessary for the inquiry; but when they are brought into Court the inspection should not rest with the Magistrate who does not prosecute and has no interest one way or the other in the result of the prosecution. It is reasonable that those who conduct the prosecution should have such inspection, for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the Police under Chapter XIV of the Criminal Procedure Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular document or other thing is seized under a search warrant, and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while providing for the seizure and production in Court of documents, &c., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them, and determine whether they should go in as evidence.

Held, per Curiam—For the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search warrant.

[**F.**, 5 Bom. L.R. 980 (982); **Rel. upon,** 17 C.W.N. 1209 (1212)=14 Cr. L.J. 405 (406)=20 Ind. Cas. 229 (230); **R.**, Rat. Unrep. Cr. Cases, 891; 5 Bom. L.R. 978; 13 Cr. L.J. 493=15 Ind. Cas. 493; 36 C. 433=9 C.L.J. 298=13 C.W.N. 458=5 M.L.T. 367=2 Ind. Cas. 436.]

The petitioner and one Topun Ramchore were charged on the complaint of Jackariah Mahomed & Co., under ss. 418, 420, and 109 of the Penal Code, with having cheated the complainants by having dishonestly induced them to deliver to the petitioner certain sums of money on various specified occasions between 1882 and 1887 in Calcutta, and with having abetted each other in the commission of the said offence. The accused Topun Ramchore was the book-keeper in the complainants' firm, [**112**] and the cheating was carried on, in accordance with an agreement to that effect between the two accused persons by his omitting to make entries of sums due by the petitioner, and by making false entries of payments by him in the books of the complainants' firm.

The charges were made before the Presidency Magistrate for the Northern Division of Calcutta, and warrants issued, and on an application made on behalf of the complainants, the Magistrate, on 20th August, issued a search warrant for the premises No. 13, Pollock Street, the place of business of the petitioner, to search for and produce the khatta books of the petitioner's business for the years 1882 to 1887 inclusive, as being

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essential to the enquiry into the above charges; and in execution of this warrant certain books and papers found in the house of the petitioner were seized and taken possession of by the police. Various applications to set aside the search warrant were refused by the Magistrate, who eventually made an order on 23rd August for the inspection by the prosecution of the books found by the police at the petitioner's place of business, such inspection to take place in the Court House in the presence of the petitioner and an officer of the Court.

The petitioner, after applying to the Magistrate to set aside the order for inspection, applied, on petition, to the High Court, and a rule was issued calling on the prosecutors to show cause why the order granting inspection should not be set aside, and an order made that, pending the hearing of the rule, there should be no inspection by the prosecutors of the books and papers of the accused.

The Advocate-General (Mr. *Paul*), Mr. *Garth* and Mr. *Adkin* appeared to show cause.

Mr. *Hill*, Mr. *Palit*, and Babu *Kally Nath Mitter*, in support of the rule.

The facts of the case and the arguments are fully stated in the judgment.

The following judgments were delivered by the Court (NORRIS and GHOSE, JJ.).

JUDGMENTS.

NORRIS, J.—On the 20th August, Hadjee Jackariah Mahomed & Co., through Mr. Hume, their attorney, applied to the Presidency [113] Magistrate of the Northern Division of Calcutta for warrants for the arrest of Ahmed Mahomed and Topun Ramchore on charges of cheating and abetment thereof.

In support of the application, Noor Mahomed, a member of the prosecutor's firm, was examined on solemn affirmation. His deposition was as follows:—

"I am a member of Hadjee Jackariah and Co. I have been a member of that firm since 1874. I know the first defendant Ahmed Mahomed. He is a boat owner. He has had business with us since 1879. He kept a floating account with us. The first defendant's ledger was kept by Topun Ramchore in my office. He used to make entries in the cash-book occasionally. When defendant No. 1 came to my office for money I used to ask defendant No. 2 to look at the ledger and say whether No. 1 had a credit balance. No. 2 always said he had credit balance. Day before yesterday No. 1 came to my office and asked for Rs. 300. We sent for his ledger. After examining it we found Rs. 800 on the debit side. No. 1 said "this is not correct; I have to get money from you." We got suspicious and examined his accounts from 1882 up to date. The result was that the first defendant had overdrawn upwards of a lac of rupees. On the 30th April 1887, the ledger, as written up by Topun the defendant No. 2, showed a balance of nearly Rs. 5,000 in favor of the first defendant, but this was not correct. The correct account showed nearly Rs. 8,000 against him. On the 13th of May 1887, we paid him (first defendant) Rs. 1,200. This is the entry for the Rs. 1,200. On the 19th May 1887, we paid him Rs. 800. On the 28th June last we paid him Rs. 3,000 in notes. These first and third payments were made in Topun's presence. I handed over the money to Topun, and he paid them to the first defendant. I made these

payments on the belief that there was a balance in his favour. If I knew that there was no balance in his favour I would not have made any payment. Defendant No. 2 made a statement to Mr. Hume. This is it (produced and marked A)."

Topun Ramchore's statement to Mr. Hume was made in answer to questions put by that gentleman. The statement, question and answer, is as follows:—

[**114**] " *Q.*—I am going to ask you some questions; you can answer them or not as you like.

" *A.*—Whatever you ask I will give truthful answers to.

" *Q.*—Whose servant were you?

" *A.*—Hadjee Jackariah Mahomed & Co's. I was their writer.

" *Q.*—What books did you keep?

" *A.*—I kept the nund, the ledger, and sometimes the cash-book; the ledger for 1887 is all in my writing.

" *Q.*—Messrs. Hadjee Jackariah Mahomed & Co. have examined the ledger for five years past from which they have discovered that much cheating has been going on. Do you know anything about the cheating, and are you willing to tell me about it?

" *A.*—I am willing to tell you what I know about it, and the whole truth. I know everything about it.

" *Q.*—Very good, what you know tell me.

" *A.*—In 1882 Ahmed Mahomed said to me I will give you Rs. 20 in every Rs. 100 if you will make a *goolmal* in my account with the firm, so that I can get (*zaida*) more money. I agreed to this, and I commenced to make a *goolmal*.

" *Q.*—What sort of a *goolmal*?

" *A.*—If he took Rs. 2,000 from cash, I omitted to write it in ledger, and out of the Rs. 2,000 I will get Rs. 400 from Ahmed Mahomed at his house. I used also to do as follows (*asia bhee kia*). If he took Rs. 2,000 from the cash, I used to credit him with this sum in the ledger. In February 13th 1887, Ahmed Mahomed took from the cash in my presence from the hands of Noor Mahomed Rs. 1,500. This Rs. 1,500 I never entered in the khatyon, but I did in the cash-book. On the 6th March 1887, he took Rs. 1,500. I entered this in the cash-book, but not in the ledger. I did this intentionally (*sumuj ke chordia*). On the 7th April 1887, he took from cash Rs. 2,000. This amount I credited him within the khatyon. On the 24th April 1887, he took Rs. 4,000, and I wrote in the khatyon Rs. 400. On the 10th January 1887, I credited in the khatyon Rs. 1,500 in the name of Ahmed Mahomed, but I received from him that day only Rs. 500, which I credited in cash-book. On the 30th January 1887, I received from Ahmed Mahomed Rs. 900, but in the khatyon I credited Rs. 1,900. On the 30th April I credited him [**115**] with Rs. 1,000, but on that day I received nothing from him. When Ahmed Mahomed used to come for money a man used to come with him. Ahmed Mahomed is blind for the last two years. He used to ask Noor Mahomed for money, and he, Noor Mahomed, used to ask me. " Ahmed Mahomed *ke hisab kaisa hai;*" and I used to say " *Usko juma hai.*" I always used to say there was a credit, but it was not true. When I used to be asked about the account of Ahmed Mahomed by Noor Mahomed, I used always to tell him from the khatyon. I have been falsifying the account of Ahmed Mahomed since 1882 till now (*abhee tuk*)," then says " till 30th April, 1887."

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"*Q.*—According to your khatyon in what state is Ahmed Mahomed's account for 1887 on 30th April 1887, that is, from January to 30th April 1887?

"*A.*—He has to receive a little more than Rs. 5,000, but this account is false. Hadjee Jackariah Mahomed & Co. in truth ought to receive from Ahmed Mahomed Rs. 8,500.

"Since 1882 up to 30th April 1887, I have falsified Ahmed Mahomed's account to the extent of Rs. 70,000.

"At 2 P.M. to-day I went to Hadjee Jackariah Mahomed's office and asked the servants for the books of 1886-1887; they said the books were upstairs. I said bring them down. They said *saheb logue* have gone out; the books (*duftur bund hai*). I asked where the *sahebs* were. By *sahebs* I mean my masters. I went upstairs and saw the books being looked at by one Tyub. He is a writer. I saw him looking at the account of Ahmed Mahomed. I then got suspicious (*humara dil mai shuk paida hua*) that whatever *goolmal* was in the account would be discovered (*khubber malum hoba*). I went to Ahmed Mahomed at his house at Nibbotollah Gully. He was asleep. I asked his wife to wake him. She did so. I went and said to him: The *saheb logue* are looking at your account, on that account (*yih subab se*), you go to them and tell them you have taken all the money, and that whatever money you have got you will give them and ask them to forgive you. He then said to me, don't take or mention my name (*humara nam mut lo*); you take it all upon yourself (*tumara oopar sub lo*) and say you did it all, and if afterwards they do [**116**] anything I will spend money to defend you (*rupia khuruch karage tumko bhachane ke waste*); you say the cash was with Noor Mahomed, and that if you made mistakes (*bhool kya*) Noor Mahomed knows it all. I then said I will not tell all these lies. If you don't go, they will be angry, and will take out warrants against us and arrest us, and then your *izzut* (respect) will not remain. He then said you go; I am getting fever; go home and lie down and say you are not well (*tubeeat accha nahi*). I said I would not tell these lies; that I was going to the *sahebs*. I left Ahmed Mahomed, and as I was going to office I met with Hadjee Vydanath, one of my masters, in the street and told him everything, and he took me to you (Mr. Hume.) I have got Rs. 1,500 or Rs. 1,600 in notes, and Rs. 700 or 800 in jewellery left from this fraud, and if my masters will take this property, I will give it up. I have received in this fraud from Ahmed Mahomed about Rs. 9,000."

After hearing the application the Magistrate granted a summons against the defendant No. 1, Ahmed Mahomed, and a warrant against defendant No. 2, Topun Ramchore.

On the same day, after grant of process against the defendants Mr. Hume, upon the same materials upon which he had applied for warrants, applied "for a search warrant to search the premises No. 13, Pollock Street, Calcutta, the place of the business of the accused Ahmed Mahomed for the books of his business for the years 1882 to 1887 inclusive." This application was made in the presence of Ahmed Mahomed who happened to be in the Magistrate's Court as a complainant in a case, and the Magistrate called his attention to the fact that such application was being made.

The Magistrate's order upon this application was "issue search warrants." The search warrant was in the following terms:—

"To Inspector Merriman—

" Whereas Ahmed Mahomed and another has been charged before me of the commission, or suspected commission, of the offence of cheating, and it has been made to appear to me that the production of khatta books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence or suspected offence;

[117] " This is to authorize and require you to search for the said property in the house of Ahmed Mahomed, No. 13, Pollock Street, and if found to produce the same forthwith before this Court; returning this warrant with an endorsement certifying what you have done under it immediately upon its execution.

" Given under my hand and seal of the Court, dated this 20th day of August 1887.

(Sd.) SYUD AMEER HOSSEIN,
Presidency Magistrate,
CALCUTTA, N. DIVISION."

The search warrant was executed on the 21st August. What was done in pursuance of the search warrant appears by an endorsement thereon, which is as follows:

" Warrant executed in the presence of the following gentlemen by Inspectors Merriman and Hefferman on the 21st August 1887, *viz.*:—Mr. Upton, Attorney-at-law, Mr. Manuel, Attorney-at-law, Hadjee Yusuff Mahomed, Hadjee Abdoola Dagma, Hadjee Noor Mahomed, Hadjee Abdoola Zackariah Solyman, Mahomed Moosa and defendant Ahmed Mahomed.

" The following books and papers were found at No. 13, Pollock Street.

Room on ground floor.

" 1. Nine khattas, one marble paper cover book, and some loose papers.

" 2. On a wooden almirah, 11 khattas, four marble paper cover books.

" 3. Inside the same almirah, three khattas.

" 4. On a wooden tucktapose, one khatta.

" 5. On the wall, three files of papers.

" 6. One wooden box, locked, containing some khattas and papers. The box after being locked is taken over by the Police, and the key kept with Moosa, defendant's son.

" 7. Inside a large wooden box, three small bundles of manuscript.

" 8. In an adjoining godown in a wooden box with brass clamps some loose papers.

" 9. In an inner godown, the door of which was locked, inside a roll of canvas, six khattas.

[118] " At this stage Hadjee Osman arrived.

" 10. In a wooden chest on a table, one khatta and four press copy letter books.

Upstairs bed room.

" 11. In an almirah, glass panes, two envelopes containing manuscript.

" 12. On the top of a box, nine khattas and 1 torn khatta.

" 13. On the top of another almirah, four small khattas.

" 14. Three files of papers.

" 15. On an iron safe, eight English bound books.

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"16. On the top of another almirah, one khatta and one bundle of papers.

"17. Inside a Bombay carved almirah, six small khattas. In the drawer thereof, two khattas, one bundle of papers. In another drawer thereof, one bundle of papers.

"18. In a wooden almirah a bundle of letters.

"19. One wooden box, locked, containing papers, the key with Hadjee Mahomed Yusuff.

"20. Inside the small iron safe opened by Hadjee Yusuff Mahomed, 3 G. C. notes of Rs. 100 each, R/91 26200, 26199, 26198 *not taken*. One Bengali document on Re. 1 stamp paper which is kept inside wooden box No. 19.

"21. In a glass case adjoining, two small khattas and two letters.

"At this stage Babu Mohendro Nath Dutt, pleader for defendant, came in. In the adjoining room Hadjee Ahmed Ismail here comes with the keys of the two safes.

"The one in this room is opened; only jewellery found. In the large safe opened in the first room nothing found except some title-deeds, &c., *not taken*.

"22. In the office room, in a tiled shed outside the house, a large chest full of books.

"23. In the upper shed, over the coach-house, two khatta books, one file of old papers, one account book.

"All the above are contained in three wooden boxes and two gunny-bags which were sealed by defendant's people before taken away by the police."

On 22nd August, Mr. Pittar, an attorney, appeared before the Magistrate on behalf of Ahmed Mahomed and [119] applied that the warrant might be set aside, and that the prosecutors might not be allowed to inspect the books found by the Police on the premises No. 13, Pollock Street, on the previous day. Mr. Hume opposed the application, and it was refused.

On Mr. Hume's application the Magistrate ordered that the prosecutors should have inspection of the books on notice to the accused Ahmed Mahomed.

On the same day the following notice was served upon Ahmed Mahomed:—

"Take notice that we, on behalf of the prosecutors abovenamed, propose to-morrow, Tuesday, the 23rd day of August instant, at 12 o'clock, at noon, with the permission of the Magistrate of the Northern Division of Calcutta, and in company with a member of prosecutor's firm, to inspect in the Court of the said Magistrate the several books and documents, now lying there and belonging to you. This notice is given you in order that you may, if so advised, attend at the said inspection either personally or by solicitor or some other representative."

On 23rd August, Mr. Wheeler, an attorney, appeared before the Magistrate on behalf of Ahmed Mahomed, and applied to have the search warrant set aside; the Magistrate refused the application. Mr. Wheeler then applied for a postponement of the inspection of the books for four days to allow him to get complete instructions; but the Magistrate declined to grant a longer postponement than 24 hours, and directed the inspection to take place at the Court House on the following day. On 24th August, Mr. Chatterjee, counsel for the accused, applied to the Magistrate

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to set aside the search warrant, which he refused to do, and directed that the inspection should take place in the Court House, in the presence of Ahmed Mahomed or his agent, and an officer of the Court. The inspection of the books thereupon commenced in the Magistrate's office, in the presence of a pleader on behalf of Ahmed Mahomed, of Mr. Hume, of Noor Mahomed, and of two officers of the Court.

During the progress of the inspection an account of Topun Ramchore with Ahmed Mahomed was discovered in the books [120] for the year 1882, showing payments of various sums of money by Ahmed Mahomed to Topun Ramchore amounting to Rs. 4,158; and certain entries in one of the khatta books were initialled by Mr. Hume, who brought the fact of the alleged discovery to the noitce of Ahmed Mahomed's pleader, and requested him to go and see the book, which the pleader declined to do, saying, "what is the use of my going."

On the 25th August Mr. Bonnerjee applied to us for a rule calling upon the prosecutors to show cause why the order granting the search warrant and the order granting inspection of the books should not be set aside. We took time to consider whether we should grant a rule, and intimated that, in the meantime, the inspection should not be proceeded with.

On 29th August we granted a rule "to show cause why the Magistrate's order of 23rd August granting inspection of all books, papers, and documents found by the police at the premises of the accused Ahmed Mahomed and seized and brought away by them to his Court should not be set aside, and such other order made on the premises as to this Court may seem meet."

The rule was argued before us on the 7th, 8th and 9th September; Mr. Hill and Mr. Palit appearing in support of it; the Advocate-General, Mr. Garth showing cause.

Mr. Hill's first argument was that the issue of a search warrant by a Magistrate is a judicial act; that before he can have "reason to believe" within the meaning of s. 96 of the Criminal Procedure Code, he must be satisfied by judicial inquiry; and he urged that this warrant had been granted without a proper judicial inquiry and upon insufficient materials.

In support of the first branch of his argument, he cited a passage from 2 Hale's P. C., 15, and *Queen* v. *Hossein Ali Chowdhry* (1).

I agree with Mr. Hill that the issue of a search warrant is a judicial act, and that it ought only to be issued after judicial inquiry, and upon proper materials. But assuming the point taken by the learned counsel to be open to him upon argument of the rule as granted, upon which I entertain the gravest doubt, I can see nothing to lead me to the conclusion that this search [121] warrant has been issued without a judicial inquiry or upon improper materials.

Mr. Hill's second objection was that the warrant was bad on the face of it. Here again I must say that I have considerable doubt whether this point is open to argument upon this rule. But assuming that it is, I am of opinion that the warrant is good.

Mr. Hill argued that, by virtue of s. 554 of the Criminal Procedure Code, the forms in Sch. V are to be taken as integral parts of the Act; that, therefore, the words "specify clearly" in Form VIII of Sch. V are an integral part of the Act, and that the recital in the warrant

(1) 8 W. R. Cr. 74.

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" that the production of *khatta books for the years* 1882 *to* 1887 is essential to the inquiry now being made or about to be made," was not a clear specification. No doubt, it would have been better if the warrant had recited " that the production of the khatta books of the said Ahmed Mahomed for the years 1882 to 1887 is essential."

But I think that the warrant must be looked at as a whole.

It recites that a charge has been made against Ahmed Mahomed, that the production of khatta books for the years 1882 to 1887 is essential to the inquiry, and then it authorizes the officer to whom it is directed " to search for the said property in the house of Ahmed Mahomed," it would have been better if it had said " the said Ahmed Mahomed " " No. 13, Pollock Street." I think the warrant sufficiently clearly shows that it was the accused's khatta books for the years 1882 to 1887 that had been made to appear to be essential to the inquiry, and that it was those khatta books which the officer to whom the warrant was directed was to search for. In support of his argument, Mr. Hill referred to *Entick* v. *Carrington* (1). The facts of this case are so familiar to every lawyer and every student of the constitutional history of England, that it would be affectation and waste of time to give even the briefest outline of them. The case decided, amongst other things, that *general* warrants were bad. The warrant in this case is not a *general* warrant, but as I have already pointed out, a warrant to search for and seize certain specified documents.

[**122**] Mr. Hill's next argument was that there was no power under the Criminal Procedure Code to issue a search warrant for documents at all. Again calling in aid the provisions of s. 554 of the Criminal Procedure Code, and reiterating the argument that by virtue thereof Form VIII in Sch. V was an integral part of the Act, he contended that a document was not " a thing."

Now assuming that the forms in Sch. V of the Criminal Procedure Code are by virtue of s. 554 of that Code to be taken as integral parts of the Act (a very large assumption I think), they clearly cannot over-ride and render nugatory the enabling sections.

Section 94 of the Criminal Procedure Code, so far as is material to this case, says: " Whenever any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceedings under this Code by or before such Court, such Court may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons." Section 96 of the Criminal Procedure Code says, so far as is material to this argument: " When any Court has reason to believe that a person to whom a summons under s. 94 has been or might be addressed will not or would not produce the document or other thing as required by such summons, it may issue a search warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained." The words of s. 94 are of the widest possible character. Any person in whose possession or power a document or other thing, which the Court considers necessary or desirable for the purposes of any investigation, inquiry or trial, is, may be summoned to produce it. The words of s. 96 are equally wide. Any person to whom a summons under s. 94 has been or might be addressed, and who, the Court has reason to believe, will not or would

(1) 19 Howell's State Trials 1030.

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not produce the document or other thing, is liable to have his premises searched; searched for what? Surely for the document or other thing which the Court has reason to believe he will not or would not produce. [**123**] The whole object of s. 96 would be frustrated if we were to hold that, because Form VIII, Sch. V, says, " specify the thing clearly " and not " specify the document or other thing clearly," there was no authority to issue a search warrant for a document. I do not think it would serve any useful purpose to consider as Mr. Hill invited us to do, whether a search warrant for documents in the premises of an accused person could be lawfully issued in England. The judgment in the Court of Common Pleas as delivered by Lord Camden in *Entick* v. *Carrington* (1), is no doubt a great, almost an overwhelming, authority against the legality of such a proceeding; and it may be that the issue of a search warrant in the case of *Reg.* v. *Colucci* (2) was illegal; see the note of Mr. Graves, the learned author of Russell on Crimes, at p. 433 of Vol. III, 5th Edition.

The judgment of Lord Camden was based upon the fact " that there was no written law giving any Magistrate powers to issue a search warrant for papers." The absence of such statutory authority, which continues, as far as I know, up to the present time, is no doubt the reason for Mr. Graves' query. Amongst the many astonishing legislative enactments of this country, there is one authorizing under certain circumstances the issue of a search warrant for documents not only in the premises of an accused person, but also in the premises of any other person in the world, using the word " world " in a somewhat restricted sense.

I don't think I do Mr. Hill's able and exhaustive argument any serious injustice when I say that the points to which I have alluded were in the nature of preliminary skirmishes, attacks upon his enemies' outpost, preparatory to the real combat which was waged upon the right claimed by the prosecution to inspect the books.

Mr. Hill urged that any right on the part of the prosecution to inspect these books must depend upon the statutory law of the land. Section 5 of the Criminal Procedure Code, he pointed out, enacts that " all offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter [**124**] contained;" and if he said, the Criminal Procedure Code is silent, as the Advocate-General admitted it is as to any, right of inspection of documents seized under a search warrant, they cannot be inspected, at any rate not by the prosecution.

It was urged that the only object of ss. 94 and 96 of the Criminal Procedure Code was to procure the production of documents. It was pointed out that the heading of the chapter in which these sections find a place is " Of process to compel the production of documents and for the discovery of persons wrongfully confined;" that in Act X of 1875, which contains in ss. 86 and 87 provisions similar to those in ss. 94 and 96 of the Criminal Procedure Code, the chapter in which those sections are to be found is headed " Of securing attendance of witnesses and production of documents;" that in Act IV of 1877, which in ss. 144 and 145 also contains provisions similar to those of ss. 94 and 96 of the present Code, the chapter in which those sections occur is headed " Of evidence," and the subdivision of the chapter containing ss. 144 to 147 is headed " Of securing documentary evidence."

It was admitted by the Advocate-General, as contended for by Mr. Hill, the word " inspect " in cl. 3 of s. 96 of the Criminal Procedure

(1) 19 Howell's State Trials 1030. (2) 3 F. and F. 103.

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Code applies only to locality or place, not to "document or other thing." A reference to s. 97 of the Criminal Procedure Code shows that this view is correct.

Mr. Hill then entered into an elaborate history of the law of discovery. He pointed out that at common law there was no right to discovery in civil cases; he traced the action of the Courts of Equity in aiding discovery in civil actions, and stated the main principles upon which those Courts acted in granting discovery to be three in number, *viz.*, 1st, that the documents sought to be discovered should be specifically mentioned; 2nd, that discovery should only be granted as against the parties to a suit; 3rd, that it should only be granted in aid of civil rights; and he cited authorities to show that these were the principles upon which Courts of Equity had acted. These principles, he contended, found legislative sanction in the statute law of this country. The first principle was embodied in s. 163 of the Civil Procedure Code; the second in the provisions of Chap. X of the Civil [125] Procedure Code; and the third in s. 132 of the Evidence Act. Having traced the history of discovery in relation to civil actions, Mr. Hill pointed out that there were no provisions in the Criminal Procedure Code similar to those contained in Chap. X of the Civil Procedure Code, and this he said was because the common law with regard to discovery had never been modified by statute with reference to criminal cases; nor had the second of the three principles upon which Courts of Equity acted in aid of the common law ever been applied to criminal cases. There was, urged Mr. Hill, no right of discovery at all in criminal cases. In support of this proposition the following authorities were cited, *viz.*, Bacon's *Abridgment*, Vol. 2, p. 286, title "Evidence"; 3 Russell on Crimes p. 433 (5th Ed.); *Reg.* v. *Mead* (1); *Rex* v. *Purnell* (2); *Rex* v. *Cornelius* (3); *Roe d. Haldane* v. *Harvey* (4); *Rex* v. *Justices of Buckingham* (5); and *Rex* v. *Earl of Cadogan* (6). I have examined all these authorities, and no doubt they establish very clearly the proposition that the English Courts, from an early date down to the year 1828, have constantly refused to compel discovery in criminal cases.

With great respect to the learned counsel, I must take leave to say that this argument, able and captivating as it was, is beside the mark. The Legislature in this country has authorized the production, and, under certain circumstances, the compulsory production, of an accused person's documents in Court. The question is, what are the rights of the prosecution with regard to them now they are in Court? Mr. Hill's answer to the question, which I put to him during the course of the argument, is this: They may, upon the chance that a certain entry in one of the books will support their case, call for the entry and examine it, and if they do this they must put it in, whether it tells for them or against them. If this is so the prosecution would be in a worse position than a plaintiff in a civil suit, for though a party calling for a document which he has given the other party notice to produce is bound, if the document is produced and inspected, to put it in if required to do so, yet as a matter [126] of practice notice to a party to produce documents is not given unless the party giving it has obtained a knowledge of their contents, either from answers to interrogatories or by inspection before trial, or from some private source.

(1) 2 Ld. Raym 927. (2) 1 Wilsson 239. (3) 2 Str. 1210.
(4) 4 Burrows 2484. (5) 8 B. & C. 375. (6) 5 B. & Ald. 902.

When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search warrant issued under the provisions of s. 96 of the Criminal Procedure Code, I can see no distinction between such documents and those of any description found upon his person at the time of his arrest or on his premises at the time of, or subsequent to, his arrest. I asked Mr. Hill in the course of the argument if he could point to any distinction and he admitted that he could not. Nor can I see any distinction between such documents and any other things found upon a prisoner when arrested, or upon his premises at the time of or after his arrest. That documents or other things found upon a prisoner at the time of his arrest, or upon his premises at the time of, or subsequent to, his arrest, may be used in evidence against him if material to the issue, is too plain for argument. The books are full of reports of cases where this has been done; it is a matter of daily occurrence at every Criminal Assize, at every Quarter Sessions.

Now can it be argued with any show of reason that the police or the solicitor for the prosecution are not to have an opportunity of inspecting and examining documents or other things found upon a prisoner when arrested, or upon his premises at the time of, or subsequent to, his arrest, before tendering them as evidence? A man is charged with burglary. The evidence shows that he was found in a counting-house where there was a safe, that the windows of the counting-house had been forced upon, and the safe unlocked. Upon the prisoner, when arrested, or at his premises at the time of, or subsequent to, his arrest, are found house breaking instruments and a bunch of keys; the prosecution allege that the window was forced open with one of the house-breaking instruments, and the safe opened with one of the keys; must they produce the frame of the window before the Court and the house-breaking instruments, call for the latter one by [**127**]one, and try each separately to see if it fits the lock of the safe? If this is the law it is consistently and persistently broken every day, and if it is the law one would expect to find some trace of an expression of opinion by some Judge that it is so; and we should expect to find that amongst the thousands of learned counsel who have defended prisoners an objection was taken, that the police had no right to ascertain before they came to Court, whether any of the house-breaking instruments fitted the window frame, or whether any one of the keys fitted the lock, or, in other words, that the police had no right to inspect the house-breaking instruments or the keys. I might multiply illustrations, but I will take a reported case. In *Reg.* v. *Bernard* (1), which was a trial under a special commission before Lord Campbell, C. J., Pollock, C. B., Erle and Crowder, JJ., a sergeant of police stated that after the prisoner was in custody he had searched a room at his residence and there found a letter from one Allsop which he had handed to the solicitor for the Treasury; the Attorney-General, Sir Fitz Roy Kelly, proposed to have the letter read, and this before any evidence had been given to connect Allsop with the prisoner. Now can it be conceived that the letter had not been read by the solicitor to the Treasury when he was preparing his briefs and by the Attorney-General before he proposed to have it read? How else could they have known whether or not it was relevant to the enquiry? The prisoner was defended by Mr. Edwin James Q. C., Mr. Simon, Mr. Hawkins (now Mr. Justice Hawkins), Mr. Sleigh, Mr. Brewer and Mr. Scobell; they objected to the admission of the letter, not upon the

(1) 1 F. and F. 240.

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ground that the Court or the Treasury had no right to its custody, or to inspect it, but upon the ground that the charge against the prisoner being one of murder, the principle upon which, upon a charge of treason, documents found after the arrest have been held admissible did not apply. Admitting that the letter was shown to have been in the prisoner's possession, there was no evidence, beyond the receipt of the letter, which was a passive act, to connect him with the writer. The Court was unanimously of opinion that the letter was admissible "not on the ground that the writer of the letter was [128] a co-conspirator with the prisoner, but on the ground that it was found in the prisoner's possession, and that its contents were relevant to the present inquiry."

If I am right in holding that documents and other things seized upon the premises of an accused person by virtue of a search warrant issued under s. 96 of the Criminal Procedure Code stand upon precisely the same footing as documents and other things found in his possession upon a lawful arrest for an offence under the Indian Penal Code, which, as I have already pointed out, it is not denied by Mr. Hill, and which I think is the case, it seems to me to follow as a matter of course that there must be a right of inspection.

The question of the legality of the seizure of chattels, including documents in the possession of persons charged with an offence, was considered very lately in the case of *Dillon* v. *O'Brien* (1). The facts of that case were as follows: The plaintiff was engaged in carrying out the notorious "Plan of the campaign" (the *modus operandi* of which I need not describe), which was admitted to amount to a conspiracy at common law. Whilst so engaged he was arrested upon a warrant, and certain Bank notes, gold and silver coins, paper books, paper documents and writings then in his possession were seized. The plaintiff brought an action of trover in respect of the chattels seized; the defendant justified getting out the warrant for the arrest of the plaintiff, and justified the seizure of the chattels "for the purpose of producing the same as evidence on the prosecution of the plaintiff," averring that the same was and are material and necessary evidence in the said prosecution; the plaintiff demurred, and the demurrer was argued before Palles, C. B., Dowse, B., and Andrews, J. In delivering the judgment of the Court, Palles, C. B., says: "I, therefore, treat it as clear and beyond doubt that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being whether this right extends to cases of misdemeanour.

[129] "Although no case has been cited (nor have I myself found any) in which the right has (in reference to misdemeanours) been judicially decided to exist, or any text-book which draws the distinction here attempted to be taken, the circumstances of one case at least, *viz.*, that so much relied on for the plaintiff [*Entick* v. *Carrington* (2),], were such that, if there was any trace of such a distinction, it could hardly fail to have been referred to either at the Bar or by the Bench. The absence, however, of express or direct authority entitles the defendants to have the matter determined on principle.

(1) 20 Irish L. R. 300. (2) 19 Howell's State Trials, 1029.

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"For this purpose I must first ascertain the reason of the rule as applicable to felony. The characteristic by which felony is distinguished from misdemeanour is that at common law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) *for the purpose of making an inventory.* Such a right has nothing in common with that of taking for the purpose of evidence. Forefeiture in felony, therefore, cannot be the origin of the right. To what then is it to be referred? Its purpose and object, *viz.*, to produce in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. On the existence of this interest in the state many of the most important principles of our jurisprudence depend. It is this which renders illegal an agreement to compromise a prosecution, whether for felony or, [with one possible exception *Keir* v. *Leeman* (1)], for misdemeanour. It is this, too, which prevents even a malicious prosecution against an innocent person constituting a cause of action if there be reasonable and probable cause for its institution. The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the [**130**] officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance if he cannot otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the obstruction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture.

"If material evidences of crime are in the possession of a third party, production can be enforced by the Crown by *subpœna duces tecum.* But no such writ can be effective in the case of the person charged.

"It appears to me to be clear that this must be the origin of the right in felony, and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists, and cannot (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

"Let me, however, assume for a moment that the rule does not extend to misdemeanours, and see whether the results which necessarily would follow from this distinction would be those reasonable ones which usually are found to spring from the application of rules having their origin in the common law. All attempts to commit felonies are, at common law, misdemeanours only, and therefore inflicting a mortal wound was, at common law, until the actual death of the victim, no more than a misdemeanour; and if we are to confine the rule in question

(1) 9 Q. B. 371.

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to felonies, we must face this absurdity, that in cases of murder, by firing at, wounding, or poison, the right of the constable to take the instrument of the crime and the evidence of guilt would depend, not upon the commission of the act which results [131] in death, but upon the victim having actually ceased to breathe. All reason is against such an implication; and I can be no party to it unless coerced by authority.

"This brings me to the only case relied on by the plaintiff—*Entick* v. *Carrington* (1). The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was a reasonable and probable cause for believing him to be guilty, nor that a crime had, in fact, been committed by any one, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or any one else. The nature of the question there is shown by the statement of Lord Camden (1), that, 'if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' Lord Camden takes pains to show that the word 'papers' in the warrant could not, in point of law, be restrained to libellous papers only; and he adds: 'All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away, for it is observable that nothing is left either to the discretion or to the humanity of the officer.' It was, of course, decided that that warrant was illegal; but the case as a decision is not in point here. The right here claimed is not to take all the plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in *Entick* v. *Carrington* (1) upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt and a lawful apprehension of the guilty person. If (by the law as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground; the care which was taken to show that the warrant embraced all papers [132] would have been thrown away, and the entire of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension as distinguished from general warrants to seize all papers."

In this country there is no distinction between felony and misdemeanour. Now, if the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanour rests "upon the interest which the State has on a person guilty or reasonably believed to be guilty of a crime being brought to justice, and on a prosecution, once commenced being determined in the due course of law," how can such interest be protected unless there is a right to inspect as well as to seize and detain? The latter would be almost useless without the former. Mr. Hill admitted that, though there was no express legislative enactment authorizing him to do so, the

(1) 19 Howell's State Trials, at pp. 1063 (1064).

Magistrate might inspect these books, but he said he could not delegate his authority. 1887 Oct. 13.

Now the Magistrate is not conducting the prosecution: it is no part of his duty to suggest or dictate what evidence shall be put in. CRIMINAL REVISION.

I am fully conscious of the dangers to which Mr. Hill and Mr. Palit alluded as possibly resulting from this view of the law. I admit that, if the right of inspection claimed here exists, it exists equally with regard to the books of third parties. There is nothing except the discretion of the Magistrate, to prevent the seizure of the books of any merchant or banker in this city. There is nothing except the discretion of an officer in charge of a police-station to prevent the seizure of the books and plant of an indigo concern in the mofussil. 15 C. 109=12 Ind. Jur. 259.

But as Maule, J., said in the well-known bigamy case, "that is no business of mnie." All I have to do is to interpret the law of this country to the best of my ability.

If the dangers to which attention was called are real, and I think they are not only real but forcible, the Legislature must be invoked to remove them.

I am of opinion that the Magistrate had a right to allow [**133**] inspection of these books, and that consequently this rule should be discharged; but the inspection must be limited to the books named in the search warrant.

GHOSE, J.—This rule arises out of an order made by the Presiding Magistrate of the Northern Division of Calcutta on the 23rd August last, granting inspection of all the books and papers found in the premises of one Ahmed Mahomed, and seized and brought up by the police under a search warrant issued by the said Magistrate on the 20th idem. The circumstances of the case are shortly as follow:—

On the 20th August last Mr. Hume, on behalf of the firm of Messrs. Jackariah & Co., laid an information before the Magistrate against two individuals, Ahmed Mahomed and Topun Ramchore, charging them with the offence of cheating in a large sum of money; and in support of the application that Mr. Hume made, one Noor Mahomed, a member of the aforesaid firm, was examined, and a statement made before Mr. Hume by Topun Ramchore on the previous day, *i.e.*, on the 19th idem, was produced before the Magistrate. The evidence of Noor Mahomed was shortly to the effect that both the accused had cheated the Company in the sum of about a lac of rupees between the years 1882 to 1887; and the statement of Topun Ramchore was that he entered into a conspiracy with Ahmed Mahomed in defrauding the Company in the manner in which they did. The Magistrate, upon the materials that were laid before him, ordered a summons to issue against Ahmed Mahomed, and a warrant of arrest against the other accused, Topun Ramchore. Later on the same day, it would appear that an application for a search warrant was applied for on behalf of the prosecutor for the purpose of searching the premises of Ahmed Mahomed, No. 13, Pollock Street, for the books of his business from 1882 to 1887. The order that was passed upon this application was, that a search warrant do issue; and, in accordance with this order, a warrant was drawn up in the form prescribed by No. 8, sch. V of the Criminal Procedure Code. The warrant was as follows:—(Reads warrant; see 15 C. pp. 116, 117).

The police on the authority of this warrant went to the premises, No. 13, Pollock Street, and seized not only certain [**134**] khatta books found on the premises, but also various other papers as detailed in

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the return of the police: and in due course forwarded the same to the Court of the Magistrate. It also appears that, subsequent to the issue of the order of the 20th of August for a search warrant, several applications were made on behalf of Ahmed Mahomed for the purpose of withdrawing the said order, but they were refused; and on the 23rd of August the order, which is the subject-matter of this rule, was made by the Magistrate, *viz.*, granting to the prosecutor inspection of the books and papers found in the house of the accused and brought up by the police.

The application that was made to us on behalf of Ahmed Mahomed questions the legality of the order granting a search warrant, as also that of the order granting inspection of the books, and papers, but the rule that was granted was, rightly or wrongly, confined to the order of inspection. This rule has now been heard before us, and discussed at considerable length, and with great ability, by the learned Counsel on either side.

Mr. Hill on behalf of Ahmed Mahomed, in the first place, contended that there were no materials whatever before the Magistrate, properly so called upon which he could grant under s. 96 of the Criminal Procedure Code the order for a search warrant. If the matter was open before us, speaking for myself, I should be inclined to hold that the said order of the Magistrate was bad in law, for it would appear that no summons under s. 94 of the Criminal Procedure Code was in the first instance issued upon Ahmed Mahomed for the production of any particular documents; and there was nothing to indicate upon the evidence of Noor Mahomed that there was any reason to believe that the said documents would not be produced upon summons being served. And as regards the statements made before Mr. Hume by Topun Ramchore, I need hardly say that they were no evidence whatever against Ahmed Mahomed; and besides, there was also nothing even upon those statements to justify the grant of a search warrant. Search warrants are judicial acts, and must be granted upon proper materials. But, as I have already said, the matter is not [135] open before us, and the order itself having been executed, and the books and papers having been brought up before the Magistrate, the question does not now really arise.

The next point that was raised by Mr. Hill was that the warrant that was issued was bad, because it was not specific, but too wide and general in its character. As to this matter it seems to me that, although it would have been desirable, nay proper, for the Magistrate to specify the books of what particular business, and whose books were to be brought up, still there can be no doubt what the warrant really meant; and it does not appear that any such objection, as is now raised, was raised before the Magistrate. I think that the accused has not been prejudiced by reason of the specification of the documents required to be seized being somewhat indistinct; and on this ground, and also on the ground that upon the rule as granted the matter is not properly open before us, I agree with my learned colleague in disallowing the objection.

The next matter that was urged by Mr. Hill was that in granting an order for a search warrant, and also in granting inspection of all the documents brought up, the Magistrate has in effect compelled the defendant to make a discovery as against himself in aid of the criminal prosecution. He contended, quoting many authorities, that in England no man could be compelled to produce evidence so as to criminate himself, and that discovery was only granted in equity in aid of civil rights, and never in aid of a criminal prosecution; and he argued that the law in this country ought to be administered in the same way as in England.

There can, I think, be no doubt, upon the authorities which have been laid before us, that in England the law is as it has been contended for; but it seems that the law in this country is not the same. With a view to see how the law which we have to administer stands, it may be necessary shortly to refer to the history of the legislation on the subject, and in doing so, it is not necessary to refer back further than the year 1861. In that year an Act, No. XXV of 1861, was passed. Section 114 of that Act ran as follows:—

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"When a Magistrate shall consider that the production of any [**136**] thing is essential to the conduct of an inquiry into in offence known or suspected to have been committed, he may grant his warrant to search for such thing, and it shall be lawful for the officer charged with the execution of such warrant to search for such thing in any house or place within the jurisdiction of such Magistrate. In such case the Magistrate may specify in his warrant the house or place or part thereof to which only the search shall extend."

It will be observed that the Legislature used the expressions "anything" and "such thing;" the word "document" was not specifically mentioned.

This Act was amended in some respects by Act VIII of 1869, but so far as the particular matter now before us for consideration is concerned, the law remained the same as in 1861. The next Act upon the subject is Act X of 1872 by which the law regulating the procedure of the Courts of Criminal Judicature other than the High Courts in the Presidency town and the Courts of Police Magistrates was consolidated and amended, and the portions of this Act which ought here to be referred to are ss. 365 to 367 and Chapter XXVII.

Section 365 ran as follows: "Whenever an officer in charge of a police-station, or any Court, considers that the production of any document is necessary or desirable for the purposes of any investigation or judicial proceeding, such officer or Court may issue a summons to the party in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons."

Section 336: "If there appears reason to believe that the person to whom the summons is addressed will not produce it as directed in the summons, such officer or Court may issue a search warrant for the document in the first instance."

Section 367: "Any Court may, if it thinks fit, impound any document produced before it, or may, at the conclusion of the proceedings, order such document to be returned to the person who produced it." It is not necessary to refer in detail to the several sections in Chapter XXVII. It is sufficient to say that the law upon [**137**] the matter of that chapter, as it existed in 1869, was somewhat amplified.

On referring to ss. 365 to 367 it will, however, be observed that in 1872, for the first time, special provisions were made for the production of documents by a party either by summons or by search warrant; and this was perhaps thought necessary by reason of a decision of the High Court of Calcutta in *Queen* v. *Hossein Ali Chowdhry* (1) as to the right construction to be put upon s. 114 of Act XXV of 1861, and as to the powers conferred thereby upon the Court and police officers in respect of searching for documents or any other thing. The party might be, as it is obvious, either the accused himself or a third party, and the Legislature in 1872

(1) 8 W. R. Cr. 74.

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thought it right to lay it down in clear terms that any party might be compelled to produce documents for the purpose of any investigation or judicial proceeding.

It may be useful here to refer to some extent to the proceedings of the Legislative Council upon the Criminal Procedure Bill of 1872.

It would appear from the speech of Mr. Fitz James Stephen that was made on the occasion (*vide* pp. 393-394, Vol. XI of the Proceedings of the Legislative Council of India) that he did not quite agree with several of the provisions of the Bill; and as to the modifications upon the then existing system which had been made by the Select Committee, he referred, for the reasons thereof, to his colleagues and specially to the then Lieutenant-Governor of Bengal. The Lieutenant-Governor in his speech in pages 409 and 410 then, amongst other matters, said as follows:—

"The criminal law was, as the honorable member had said, a law of overwhelming importance in this country; he meant not only the law for the administration of criminal justice but the executive administration as carried on through the Magistrates. The prevailing ideas on the subject of criminal law had been somewhat affected by the English law; and the departures from the rules of the English law which the Committee recommended were founded on this ground, [138] that many of the prominent parts of the English law were based on political considerations, the object of those familiar rules of criminal law being not to bring the criminal to justice, but to protect the people from a tyrannical Government, and the functions of juries of the people having been for many centuries principally directed to the protection of the interests of the people. Not only were those provisions now unnecessary in England, but they were especially out of place in a country where it was not pretended that the subject enjoyed that liberty which was the birthright of an Englishman, and it was not intended to introduce rules into the criminal law which were designed with the object of securing the liberties of the people. That being so, His Honour thought they might fairly get rid of some of the rules, the object of which was to secure for the people that jealous protection which the English law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any Code of fair play, but that their object should be to get at the truth, and anything which would tend to elicit the truth was regarded by the Committee to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for some of those things which his honourable friend Mr. Stephen had called superstitions. For instance, His Honour did not see why they should not get a man to criminate himself if they could; why they should not do all which they could to get the truth from him; why they should not cross-question him, and adopt every other means, short of absolute torture to get at the truth. They had already done a good deal in the direction of clearing away English prejudices, and the Committee proposed to make further concessions to common sense in the present Bill, &c., &c., &c."

It is obvious, upon a consideration of the observations which I have just quoted, that the Legislature was quite sensible to the many important differences that existed between the English law and the law which existed in this country, and which was then being enacted.

[139] One of the matters of difference which must have, as I may assume, occurred to them was as to the compelling of an accused person

furnishing or producing evidence as against himself; and according to the speech of the then Lieutenant-Governor, they thought that the same protection, which an accused in England was entitled to receive, need not be extended to an accused in this country; and that "they were not bound to protect the criminal according to any Code of fair play, but their object should be to get at the truth; and that they "did not see why they should not get a man to criminate himself if they could." And I further observe, with reference to the particular matter now before us, that the Select Committee in their supplementary report, dated the 12th March, 1872, evidently referring to ss. 365 to 367 of the Bill, said that they had made "the necessary provision for securing documentary evidence and for impounding such documents as the Court thinks fit." The words "*securing* documentary evidence," read by the light of the remarks of the then Lieutenant-Governor, are to my mind significant as showing the intention of the Legislature.

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Whether the policy which influenced the action of the Legislature in 1872 was right or not, it is not for me to say. But it is clear that they intended that an accused person might be compelled to furnish evidence, the production of which might have the effect of criminating him.

The other Acts that may be referred to upon the same subject are Act X of 1875 (the High Courts Criminal Procedure Act), ss. 79-86; and Act IV of 1877 (the Presidency Magistrates Act), ss. 144-147; wherein the law was practically the same as in the Act of 1872.

We then come to the present Criminal Procedure Code, Act X of 1882, whereby the previous laws in the Mofussil and in the Presidency towns were consolidated and amended; and so far as the particular matter before us is concerened, the law will be found in ss. 94 to 99.

Section 94 runs as follows: "Whenever any Court, or in any place beyond the limits of the towns of Calcutta and [**140**] Bombay, any officer in charge of a police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial, or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order.

"Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he cause such document or thing to be produced instead of attending personally to produce the same.

"Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, ss. 123 and 124, or to apply to a letter post-card, telegram, or other document in the custody of the Postal or Telegraph authority."

Section 96 says: "Where any Court has reason to believe that a person to whom a summons or order under s. 94 or a requisition under s. 95, paragraph 1, has been or might be addressed will not or would not produce the document or other thing as required by such summons or requisition."—

"Or where such document or other thing is not known to the Court to be in the possession of any person—

"Or where the Court considers that the purposes of any inquiry, trial, or other proceeding under this Code will be served by a general search or inspection—

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"It may issue a search warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained.

"Nothing herein contained shall authorise any Magistrate, other than a District Magistrate or Chief Presidency Magistrate, to grant a warrant to search for a document in the custody of the Postal or Telegraph authorities."

It will be observed that the law, so far as the immediate subject before us is concerned, is practically the same as it was [**141**] in 1872; and there can, I think, be no doubt that the Legislature intended, as I have already observed, that an accused person might be compelled to produce evidence against himself; and reading the above sections with Schedule V, No. VIII of the Criminal Procedure Code, the only safeguards, as far as I can see, which the Legislature provides are: 1st, that the documents called for, or in regard to which a search warrant is issued, must be distinctly specified; 2nd, that the documents are necessary for the purpose of the enquiry; and, 3rd, that while granting a search warrant, the Magistrate must exercise his judicial discretion, and that he should not make such an order unless the materials before him justify him in so doing.

The documents when seized are, as indicated in No. VIII of the Schedule, to be brought before the Court; and then arise the question, when they are so brought before the Court, whether the Magistrate may grant to the prosecutor the liberty to inspect them. According to a strict reading of the sections themselves, referred to above, there is no power given even to the *Court* to inspect them; but it would be simply idle to say that the Court would not have that power. Then, again, the production of such documents is, as the learned Advocate-General has justly argued, for the purpose of their being used as evidence in the cause; and one fails to see how it is possible that this should be done unless the prosecutor has an opportunity of inspecting them. It was contended by Mr. Hill that the Magistrate, and the Magistrate alone, has the power to inspect, and that he is bound to determine by examination made by himself, or through an interpreter, as to the bearing or relevancy of any particular document. But it is obvious that the Magistrate does not prosecute the case, and he has no interest, one way or the other, in the result of the prosecution; and he cannot be expected to know and decide for himself whether any particular document is to go in as evidence.

Whether the documents are necessary for the enquiry is a matter which must be determined by the Magistrate at the time when he makes an order under s. 94, or issues a search warrant under s. 96; and therefore it seems to me that, [**142**] when they are brought before the Court under an order duly made, the Magistrate would have the power to allow the prosecutor the inspection thereof. They stand, when they are brought to Court, precisely in the same position, as my learned brother has so forcibly pointed out, as documents or things found either upon the person of a prisoner at the time of his arrest, or at his houses upon a search made by the police, and afterwards forwarded to the Court. On referring to Chapter XIV of the Criminal Procedure Code, which deals with the power and duties of the police, it would appear that under s. 165 the police are authorised to search for any document or thing necessary for the investigation of a case; and then s. 170 provides, that if, upon an investigation under that chapter, there is sufficient evidence against an accused, he shall forward him to the Magistrate with any weapon or other articles which may be necessary to produce before him, and shall require the complainant, if any,

and all persons acquainted with the circumstances of the case, to appear before the Magistrate, prosecute, and give evidence in the matter of the charge. When, therefore, upon search, a police officer finds any documents which he thinks necessary for the investigation of the case, he has to forward the same to the Court; and this he does evidently under s. 170; and he requires the complainant to appear before the Magistrate and prosecute the case. Now it is obvious that, in the very nature of things, the prosecutor would have an opportunity of looking at the documents thus seized; and it is difficult to conceive that, if in the case of a search and seizure by the police, the prosecutor necessarily inspects the documents or articles seized, the Legislature intended that he should not have the same opportunity or privilege when under the order of the Court any particular document or other thing is seized under a search warrant and brought up to the Court.

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Mr. *Hill*, as also Mr. Palit, contended before us that the privilege claimed for the prosecution in this case is not enjoyed by a party to a suit in a civil case when his adversary or a witness in the cause produces a document in Court; that whereas in the case of a witness, he may object to the production of a document called for from him, and in the case of a party to [**143**] suit, if his adversary inspects the document, the latter is bound to put it in as evidence; but that in the case of a criminal trial or enquiry the prosecutor would, if the contention of the learned Advocate-General was right, be entitled to inspect a document without even being compelled to put it in as evidence. They also called attention to the fact that both the Criminal Procedure Bill and the Civil Procedure Bill passed through the Legislative Council about the same time, and that it was hard to believe that the Legislature could have meant to give to a prosecutor such extraordinary privileges which they denied to a party to a civil suit. It is indeed true that the power of inspection is not in distinct terms given in the Criminal Procedure Code to a prosecutor. In fact the Code is silent upon the matter, whereas the Civil Procedure Code clearly makes provision for such inspection under certain circumstances. If, however, the argument of the learned counsel for the petitioner were carried to its legitimate extent, it must come to this, and indeed they did contend for that position, that a prosecutor in a criminal case can, under no circumstances, be permitted to inspect a document or thing produced by the police, unless it be at the trial *after* such document or thing is put in evidence. But even as to this, *viz.*, as to its being put in evidence at the trial, the Code is silent; in fact it stops short with saying that the documents or things when seized by the police are to be brought up to Court. Then, again, who is to put the documents or things in evidence. That the Legislature intended that the Magistrate should conduct the case for the prosecution, and have the responsibility of determining by inspection as to whether any document is to go in as evidence is a proposition which seems to me almost impossible to accept. If this is a correct view, and if we bear in mind the true purpose for which any document or thing is seized and brought up to Court, one cannot help thinking that the Legislature, while providing for the seizure and production in Court of documents, intended by implication that the prosecutor should, under the orders of the Court, have the power, to inspect and determine whether they should go in as evidence.

[**144**] It was further contended by Mr. Hill that all that the prosecutor in this case might have called for were the particular entries in the books of the accused, and when they were brought into Court they could be put

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in as evidence at the trial, and that *then* the prosecutor would have the liberty of inspecting them. But it seems to me that it would be simply impossible for a prosecutor in a case like this to give the precise dates of the entries in the books of the accused without inspection beforehand.

There is one other matter which I think it right to mention here. It is this, that the order of the Court was to search for and bring up the khatta books of the defendants' business from 1882 to 1887. The police evidently exceeded their authority and seized not only certain khatta books, but also various other papers. I think that those other papers are not properly before the Court; and it follows that no inspection can be had in respect to them. While, therefore, I agree with my learned colleague in holding that the order granting inspection in the circumstances of this case cannot be set aside, I think that the inspection should be confined to the documents covered by the warrant of the 21st August last.

J. V. W. *Rule discharged.*

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15 C. 145 (F.B.).

[**145**] FULL BENCH.

Before Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Ghose.

Sudduruddin Ahmed and others (*Plaintiffs*) *v.* Bani Madhub Roy Chowdhry and others (*Defendants*).*

[14th December, 1887.]

Enhancement of rent; Suit for—Dismissal of enhancement suit—Rent suit at old rate for year for which rent had been sought at enhanced rate—Civil Procedure Code, s. 43.

The dismissal of a suit for rent at an enhanced rate is no bar to a subsequent suit for rent at the rate originally fixed.

Kunnock Chunder Mookerjee v. *Guru Dass Biswas* (1), overruled.

[R., 3 C.P.L.R. 3 (5).]

Reference to a Full Bench made by Mr. Justice Norris and Mr. Justice O'Kinealy.

On the 26th April, 1885, the plaintiffs sued the defendants for rent due to them for the year 1289 (1882) on 92 bighas of land at an annual jumma of Rs. 52-14. The defendants, amongst other matters, pleaded that in the year 1883 the plaintiffs had instituted against them a suit for the recovery of rent for the same lands for the year 1289 (1882) at an enhanced rate, and that such suit had been dismissed, and that the plaintiffs were not therefore entitled to sue them again for rent at the old rate for that same year.

The plaint in the enhancement suit contained only one prayer, *viz.*, for assessment of the rent at the enhanced rate; and the suit was dismissed on the ground that notice of enhancement had not been proved to have been served. The lower Courts held on the authority of *Kunnock Chunder Mookerjee* v. *Guru Dass Biswas* (1) that the plaintiffs could not

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* Full Bench in Special Appeal No. 1773 of 1886, against the decision of Baboo Mohendro Nath Mitter, Subordinate Judge of Burdwan, dated 27th July, 1886, confirming the decree of Baboo Krishna Nath Roy, Munsif of Culna, dated 27th November, 1885.

(1) 9 C. 919=12 C. L. R. 599.

again sue for rent for the year 1289, the appellate Court adding that "the plaintiffs, not having chosen to put forward their claims for rent for 1289 at the original rate in the former suit, are barred from suing for that rent in the present suit."

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[**146**] The plaintiffs appealed to the High Court on the ground that s. 43 of the Civil Procedure Code did not preclude the second suit, and the Court (NORRIS and O'KINEALY, JJ.) referred to a Full Bench the question whether the plaintiffs could recover rent at the old rate in the suit then before the Court?

The order of reference was as follows:—

"This is a case in which the plaintiffs sued for the rent for the year 1289. We must take it upon the pleadings, the grounds of appeal and the findings in the lower Courts, that previous to that suit the plaintiffs brought a suit for enhancement of rent on the ground of notice, and that they failed in that suit, because service of notice was not proved. The question then is whether they can now recover the old rent in this action?

"In the case of *Soorasoondery Dabee* v. *Golam Ally* (1) this matter was discussed before heir Lordships in the Privy Council, and they said: 'It was contended on the part of the appellants that, even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the kabuliyat. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. In a suit for enhancement of rent, it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, nor could an issue have been properly raised, in this suit as to whether the rent for 1272, at the rate specified in the kabuliyat, had been paid or satisfied, nor is there anything in the case to show whether it has been paid or not.'

"It would, therefore, appear to us that their Lordships in the Privy Council looked upon a suit for enhancement of rent after notice, and a suit for rent as originally fixed, as based upon two distinct causes of action.

"The decision in the case of *Ghunshyam Singh* v. *Tara Proshad Coondoo* (2) favours, if anything, the plaintiff's contention. On the other hand, the case of *Kunnock Chunder Mookerjee* v. *Guru Dass Biswas* (3) distinctly decides that a subsequent suit [**147**] will not lie. Looking at the decision of their Lordships in the Privy Council we have some doubt as to the correctness of this decision. We, therefore, refer the case to a Full Bench."

Moulvie *Mahomed Yusuf* and Moulvie *Serajul Islam*, for the appelants.

Baboo *Taruck Nath Sen*, for the respondents.

Moulvie *Mahomed Yusuf*.—A suit for enhancement of rent and a suit for rent are founded and proceed on different principles—see *Soorasoondery Dabee* v. *Golam Ally* (1); and *Khedaroonissa Bibee* v. *Boodhee Bibee* (4). It is for the defendant, who contends that the suit is barred, to make out that the suit is not maintainable under s. 43 of he Code. In determining the question whether the second suit is founded on the same cause of action as the first suit, the cause of action must be sought

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(1) 15 B. L. R. 125 (note).
(2) 8 C. 465=10 C. L. R. 447
(3) 9 C. 919=12 C. L. R. 599.
(4) 13 W. R. 317.

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for in the plaint alone. In a suit for arrears of rent the cause of action arises on a breach of contract; whereas in an enhancement suit it arises from the notice and the defendant disregarding the notice. The real question is not whether the claim could have been included in the former case, but whether the cause of action is the same. Section 43 of the Civil Procedure Code should be read with ss. 45 and 50; although the plaintiff might have joined different causes of action, yet his not doing so does not show that he has split his cause of action. It is possible that a claim at an enhanced rate might alter the jurisdiction of the Court, namely, if the enhanced rate asked for was over Rs. 1,000, and the rent at the old rate Rs. 500; the suit in such case would then have to be brought in different Courts.

The observation made in *Soorasoondery Dabee* v. *Golam Ally* (1) are repeated in *Hurronath Roy* v. *Govind Chunder Dutt* (2). The Privy Council in *Rajah of Pittapur* v. *Venkata Mahipati Surya* (3), in discussing s. 7 of Act VIII of 1859, say that that section does not say that every suit shall include every cause of action, but that it shall include the whole of the claim arising out of the cause of action.

[The respondents were here called upon.]

[**148**] Baboo *Taruck Nath Sen*, for the respondents,—The Privy Council in *Soorasoondery Dabee* v. *Golam Ally* (1) do not say that the suits were for different causes of action; but that they were suits of a different principle. The case of *Kunnock Chunder Mookerjee* v. *Guru Dass Biswas* (4) shows that suits for enhanced rent and suits for rent are claims arising in respect of the same subject-matter, and that a person cannot, after having unsuccessfully sued for rent at an enhanced rate, sue afterwards for the original rent for a previous year. I also refer to the cases of *Bhubo Soonduree Chowdhrain* v. *Kasheenath Acharjee* (5), and *Ghunshyam Singh* v. *Tara Prosad Coondoo* (6), which tend to show that the two claims are founded on the same cause of action. With regard to the words of s. 43 of the Code, see the remarks of the Privy Council in *Buzloor Ruheem* v. *Shumsoonissa Begam* (7).

JUDGMENT.

The judgment of the Full Bench (consisting of WILSON, TOTTENHAM, PIGOT, O'KINEALY and GHOSE, JJ.) was delivered by

WILSON, J.—The point which comes before us in this reference is a very short one. It is stated that the suit is a suit for rent at the rate claimed, on the ground of its having been previously paid at that rate. It appears that, previously to this suit, the plaintiffs had brought a suit for enhancement of rent on the ground of notice, and failed in that suit, because service of notice was not proved. The question is, whether they can now recover the old rent in this suit. We have referred to an abstract of the plaint in the former suit, and we find that the precise nature of this suit was this. It was a suit claiming rent at an enhanced rate on the ground of an alleged notice of enhancement, justified, as it was said, by the circumstances of the case.

We have to say, whether the present suit is barred by reason of the provisions of s. 43 of the Code of Civil Procedure. That [**149**] section

(1) 15 B. L. R. 125 (note).
(2) 2 I. A. 193 (200)=15 B. L. R. 120 (137).
(3) 12 I. A. 116=8 M. 520.
(4) 9 C. 919=12 C. L. R. 599.
(5) 22 W. R. 351.
(6) 8 C. 465=10 C. L. R. 447.
(7) 11 M. I. A. 551 (604).

says: "Every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action." And it is added: "If the plaintiff omit to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." The only question therefore is, whether the claim in the present suit is founded upon the same cause of action as the claim in the former suit.

The relation of these two claims to one another was considered by the Privy Council in the case of *Soorasoondery Dabee* v. *Golam Ally* (1). The passage in which this matter is dealt with occurs at page 130: "It was contended on the part of the appellants that, even if they were not entitled to enhance the rent, they were entitled to recover the rent at the rate specified in the kabuliyat. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely on different principles. In a suit for enhancement, it would be no bar to plead that all the arrears according to the original rate had been paid," and so on.

It is true that in many cases since the date of that decision, it has been held that a suit may be so framed, that the Court may, as an alaternative, give the plaintiff a decree for rent at the old rate, when he has failed to establish his right to rent at the enhanced rate. But that it is not because the two claims are founded upon he same cause of action, but because, under the provisions of the Procedure Code, different causes of action may be combined in the same suit. These are different causes of action, based upon two distinct obligations having distinct origins. This is how the matter was viewed in the case of *Khedaroonissa Bibee* v. *Boodhee Bibee* (2). That case was decided under the terms of the Procedure Code of 1859, but those terms were, for the present purpose, substantially identical with the language of the present Code, and Loch and Hobhouse, JJ., held that the dismissal of a suit for rent at an enhanced rate was no bar to a subsequent suit for rent at the old rate. On the other hand, in the more recent case of *Kunnock Chunder Mookeerjee* v. [**150**] *Guru Dass Biswas* (3), Cunningham and Maclean, JJ., took a contrary view. We are unable to concur in the latter decision, and it appears to us that those learned Judges addressed their attention not precisely to the point arising on the section. The section speaks of claims arising out of the cause of action, whereas what the learned Judges say is—"it is true that the Privy Council have pointed out that a suit for enhancement and a suit for rent are different proceedings. None the less they are, in our opinion, remedies, and claims arising in respect of the same subject-matter." So it may, no doubt, be correctly said they are, but they are not in our judgment claims arising out of the same cause of action.

It has not been shown that any issue or question arises with regard to the rent for 1289, except the question of law on which we have expressed our opinion. The decrees of the lower Courts will, therefore, be set aside, so far as they relate to the rent of 1289, and the plaintiff will have a decree for the rent of that year with costs.

T. A. P. *Appeal allowed.*

(1) 15 B. L. R. 125 (note). (2) 13 W. R. 317. (3) 9 C. 919=12 C. L. R. 599.

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CIVIL REFERENCE.

15 C. 150.

15 C. 150.

CIVIL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

MURARI MOHUN ROY (*Plaintiff*) *v.* KHETTER NATH MULLICK (*Defendant.*)* [21st December, 1887.]

Stamp Act, Schedule I, cl. 5—Document—Agreement to pay.

A document was executed in these terms: "This document, a hand-note, is executed by me for the purpose of purchasing a *ghor.* I take from you Rs 7. I will pay interest on the sum at half-anna per rupee per mensem. Having received the Rs. 7 in cash, this hand-note is executed:". *Held,* that the document was not a promissory note, nor a bond; but was an agreement to pay, and as such was chargeable with duty under cl. 5, sch. I of the Stamp Act.

Ferrier v. *Ram Kulpa Ghose* (1) referred to.

[**R.**, 10 C.P.L.R. (Cr.) 1 (4); **D.**, 4 Bom. L.R. 912 (914).]

[**151**] MURARI MOHUN ROY brought a suit upon a note of hand against Khetter Nath Mullick for the recovery of Rs. 11-11. The note was executed by the defendant on the 16th Assar 1292 B. S. (29th June 1885), and bore a receipt stamp of one anna. The document ran as follows: "This document, hand note, is executed by me for the purpose of purchasing a *ghor.* I take from you Rs. 7. I will pay interest on the sum at half-anna per rupee per mensem. Having received the Rs. 7 in cash, this document is executed." There was no attesting witness to the document, and the defendant's name was written on a corner of the paper upon a receipt stamp for one anna. It was contended on behalf of the defendant that the document was insufficiently stamped and therefore inadmissible in evidence. The Munsif held that the document was neither a bond as defined in the Stamp Act, nor a promissory note as defined in the Negotiable Instruments Act; but a mere receipt, and as such properly stamped, and gave a decree to the plaintiff contingent on the opinion of the High Court, to which he made the following reference: "For the purpose of the stamp law, what is this document, a bond, a promissory note or a receipt under the definition given in the Stamp Act."

The opinion of the High Court (WILSON and O'KINEALY, JJ.) was as follows:—

OPINION.

This is a reference made by the Munsif of Culna under s. 617 of the Code of Civil Procedure. He desires to know what is the proper construction to be placed on a document tendered in evidence in a case tried by him. That document runs as follows: "This document, hand-note, is executed by me for the purpose of purchasing a *ghor.* I take from you Rs. 7. I will pay interest on the sum at half-anna per rupee per mensem. Having received the Rs. 7 in cash, this hand-note is executed. Dated 16th Assar 1292 B.S."

The Munsif is of opinion that the document does not fall within the definition of a bond as given in the Stamp Act. In this opinion we concur. He also considers that it is not a promissory note, and we are of the same opinion. The document under reference is very similar to that set out in

* Civil Reference No. 11 A of 1887, made by Baboo Krishna Nath Roy, Munsif of Culna, dated the 21st of May 1887.

(1) 23 W. R. 403.

the case of *Ferrier* v. *Ram Kulpa Ghose* (1). There the note ran as [152] follows: "Received from Mem Saheb the sum of Co's Rs. 40, and I gave interest for one month, two rupees." It was held that this document was not a promissory note nor a bond, but merely an agreement to pay. We are, therefore, of opinion that the present document is an agreement to pay, and as such is chargeable with duty under clause 5 of the Schedule to the Stamp Act.

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K. M. C.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, Sir J. Hannen and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Coorg.*]

IN THE MATTER OF SOUTHEKAL KRISHNA RAO (*Petitioner*). [21st July, 1887.]

Legal Practitioner's Act (*XVIII of* 1879),—*ss.* 14 *and* 40—*Irregularity in procedure in dismissing a mukhtar.*

A charge of unprofessional conduct brought against a practitioner, holding a certificate under Act XVIII of 1879, having been found to be established by a Subordinate Court, which also considered that he, in consequence should be dismissed, and the same having been reported, in conformity with s. 14 of that Act, to the principal Court in the province, such dismissal was ordered. *Held*, that the practitioner could not be dismissed or suspended under that section, without his having been allowed, under s. 40, an opportunity of defending himself before that Court.

It is within the duties of Court, informed of the misconduct of one of the practitioners before it, to take steps to have the matter adjudicated upon

[**R.**, 27 C. 1023 (1041)=4 C.W.N. 389: 20 A. 61 (63)=3 A.L.J. 811=A.W.N. (1906) 268 (269); 24 M. 83; 34 M. 29=11 Cr. L.J. 310 (318)=6 Ind. Cas. 313 (321)=20 M. L.J. 500; **D.**, 31 P.W.R. 1909=11 Cr. L.J. 148=4 Ind. Cas. 1022.]

APPEAL from two orders (28th February 1883 and 28th July 1883) made by the Judicial Commissioner of Coorg.

The two orders against which this appeal was preferred were made by the Judicial Commissioner upon the report of the Assistant Commissioner. The first cancelled the certificate of the appellant, as a mukhtar, practising under Act XVIII of 1879, and directed that his name be struck off the roll of second grade pleaders. The second order confirmed the first.

The charge against Southekal Krishna Rao was stated by the Commissioner of Coorg (20th November 1882), as follows, *viz.*, that he being engaged as a pleader by Ramasetty Nanjappah, [153] on the prosecution of an appeal to the Judicial Commissioner, fraudulently and improperly represented to him in a telegram that his appeal had been filed and fixed for hearing on a certain date, which he well knew or had reason to believe, was not the case; also that, until criminal proceedings were taken against him in the Court of the Magistrate of the district, he failed to account to the said Nanjappah for the money entrusted to him with the object of

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(1) 23 W. R. 403.

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retaining an advocate for the said appeal; also, that he had falsely stated to the Magistrate that he had given Rs. 40 to a third person on that account.

These charges were, by order of the Commissioner, on the 14th December 1882, enquired into by the Assistant Commissioner, who received as evidence the record of a case instituted by Nanjappah, relating to the detention of the money abovementioned, in the Court of the District Magistrate, under s. 417 of the Indian Penal Code. These proceedings had resulted in the discharge of Southekal Krishna Rao, under s. 215 of the Code of Criminal Procedure.

The Assistant Commissioner found the charges proved, and his findings were, on the 15th February 1883, submitted to the Judicial Commissioner, who thereupon made the order of the 28th February 1883, the first of those now complained of. The Judicial Commissioner, however, afterwards, on 5th June 1883, directed the Commissioner to examine certain witnesses on behalf of Southekal Krishna Rao. This was done, and the depositions were forwarded by the Commissioner on the 6th July 1833, to the Judicial Commissioner, with the comment that whatever view might be taken concerning the alleged re-payment there was no denying the fact that Southekal Krishna Rao had kept his client for many months out of his money, and returned it only under stress of criminal proceedings, having by means of a false telegram made him believe that his appeal had been filed. The Judicial Commissioner on the 28th July following made the second of the orders now under appeal, confirming his previous order.

Special leave to appeal to Her Majesty in Council having been obtained on 26th November 1886, Mr. *C. W. Arathoon*, for the appellant, argued that, with reference to s. 40 of Act XVIII of [**154**] 1879, the Judicial Commissioner had not the power to suspend or dismiss a practitioner under s. 14, without allowing him an opportunity of defending himself before him—an opportunity not shown by the proceedings to have been given. The proceedings before the Commissioner, taken under the order of 5th June 1883, did not remove the effect of this irregularity in the Judicial Commissioner's procedure. He added that the misconduct charged was not, even if proved, sufficiently aggravated to require, or justify, a sentence so severe as that which the appellant was undergoing.

After Mr. *Arathoon* had been heard their Lordships' judgment was delivered by—

JUDGMENT.

SIR J. HANNEN.—This is an appeal by one Krishna Rao against an order of the Acting Judicial Commissioner of Coorg, Mr. Plumer, by which he struck the name of the petitioner off the roll of second grade pleaders in the Courts of Coorg.

The facts out of which the appeal arises are as follows. One Nanjappah had instituted a suit in which he had been unsuccessful. He had appealed once, and he desired to appeal again. The present appellant, who was at that time a vakil, was going to Bangalore, and he was requested by Nanjappah to give instructions to a barrister of the name of Meenakshaya, at Bangalore, to take such steps as might be necessary for this appeal; and on the 27th or 29th of January 1880, Nanjappah remitted to the appellant a sum of Rs. 80 for stamps and court-fees. It appears that the appellant did, in accordance with the directions he had received from Nanjappah, hand over the papers relating to the case, and

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the Rs. 80, to Mr. Meenakshaya. Mr. Meenakshaya was at that time about to leave Bangalore for two or three days, and he took the papers with him. He appears to have left on the 1st of February. On the 2nd of February the appellant, either in consequence, as he says, of a telegram from Nanjappah, or of his own motion, went to the office of Meenakshaya and there saw one of his clerks. There is a question as to what information he received from that clerk with regard to the appeal. The appellant says that he was told in answer to his inquiry that the appeal might have been filed, by which their Lordships understand him to mean that as Mr. Meenakshaya [155] was away, the clerks did not know what had been in fact done, but that it might have been filed by him before he left. The clerk, however, gives a different account of the transaction, and says that all that he said was that the appeal might be filed when Mr. Meenakshaya returned. Whichever of those two statements is correct it does not justify, literally, the telegram which the appellant sent to Nanjappah, because he telegraphed to him: "Appeal filed Saturday; hearing not fixed." From his own point of view of the facts, it would appear that he assumed that the appeal had been filed, whereas, as he admits, all the information he received was that it might have been filed. That certainly is an inaccurate telegram. But the first question which underlies all these proceedings is whether or not it was a fraudulent statement by him that the appeal had been filed on Saturday. Now, as he had handed over the papers and the Rs. 80 to Mr. Meenakshaya, who had taken the papers out of town for the purpose of considering what should be done, it does not appear that there could have been any motive for the appellant's telegraphing falsely and fraudulently that the appeal had been filed, and it would appear more natural to come to the conclusion that there had been some misunderstanding on his part, or that he incautiously and improperly telegraphed as a fact that that had been done which the clerk had stated was probable. It has been suggested by the Commissioner, who has finally reported on the case, that he may have anticipated the events which did subsequently occur, namely, that Mr. Meenakshaya would return the money, and so he would have an opportunity of appropriating it, or some of it. That is taking a very hostile view of his conduct, and their Lordships are not prepared to say that the facts lead with any degree of certainty to so adverse a conclusion. But as a matter of fact the appellant did receive back from Mr. Meenakshaya the papers and Rs. 60, Mr. Meenakshaya retaining Rs. 20 as his fee for advising upon the case. The appellant did not, as he ought to have done, hand over that Rs. 60, or at any rate as much of it as he considered should be paid after deducting some reasonable sum for his own expenses. He did not in fact hand over any. In the following December, Mr. Hayes, a barrister, [156] was instructed by Nanjapph to write to the petitioner asking him to render an account of the money which he had received back from Meenakshaya. The petitioner wrote to Mr. Hayes saying that he was entitled to retain Rs. 20. He also said: "After my return to this place Nanjappah never asked for the money. If he had done so, I was ready to pay him Rs. 40, after deducting Rs. 20 which Mr. Meenakshaya had retained, and Rs. 20 for my travelling expenses. Such being the case, I was astonished to see your letter." He did not, however, remit the money to Nanjappah, but he alleges that on the following 28th of February 1881, he paid a sum of Rs. 30 to Mr. Hayes, which together with another sum of Rs. 10, which he had previously given him, made up a sum of Rs. 40, on

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account of this claim of Nanjappah: and by way of proving that, he produced a letter from Mr. Hayes which simply demands payment of Rs. 30, and upon which letter the appellant states that he made a memorandum of those two payments of Rs. 30 and Rs. 10, making up the Rs. 40 which he had expressed his willingness to pay in his letter to Mr. Hayes.

There is a dispute upon this, as upon almost every other fact of the case. Mr. Hayes denies that he received that money on account of Nanjappah; but it is quite certain that there were money transactions between Mr. Hayes and the appellant, and it is not impossible to believe that this sum of Rs. 40 was paid by the petitioner to Mr. Hayes on account of Nanjappah.

In that state of things Nanjappah instituted proceedings against the petitioner of a criminal nature. When those proceedings came on for hearing a compromise was arrived at by its being agreed that Nanjappah should receive the whole Rs. 80 back again. There is a question how that Rs. 80 was made up. The appellant says that half of it was paid by Mr. Hayes, the other half being furnished by him. Mr. Hayes, however, denies that he furnished anything, and represents that the whole of it was paid by the appellant under fear of the proceedings that had been taken against him. A compromise was effected by the receipt of the Rs. 80 by Nanjappah. But although the claim of Nanjappah was thus put an end to, proceedings were afterwards instituted—the proceedings which are now the subject of appeal [157] before this Board—against the appellant in his character of pleader and officer of the Court. Those proceedings took place before Colonel Hill, who is the Commissioner of Coorg. It does not appear very clearly what led to the institution of those proceedings, but it is unnecessary to inquire into their origin, as if it became known to an officer presiding in a Subordinate Court that one of the practitioners before that Court has been guilty of unprofessional conduct, it would be within the scope of his duties to take steps for the purpose of having that matter adjudicated upon. That would properly take place under the 14th section of the Legal Practitioners Act, No. XVIII of 1879, which provides that "if any such pleader practising in any Subordinate Court is charged in such Court or office with any such misconduct"—that is (referring back to the preceding section)—"in the discharge of his professional duty," then that certain steps shall be taken. The presiding officer is to send him a copy of the charge, and also a notice that on a day to be thereby appointed such charge will be taken into consideration. Ultimately it becomes the duty of such officer, if he finds the charge established, and considers that the pleader should be suspended or dismissed in consequence, to record his finding and the grounds thereof, and to report the same to the High Court, and the "High Court may acquit, suspend, or dismiss the pleader or mukhtar."

A report was made to Mr. Plumer, the Acting Judicial Commissioner, who in this respect represents the High Court. The Acting Judicial Commissioner has given the two orders which are the subject of appeal in this case. The first was on the 28th of February 1883, when he makes the order with this preface: "In the matter of the recommedation made by the Commissioner of Coorg for the removal of the name of Southekal Krishna Rao from the roll of second grade pleaders for his having defrauded one Ramasetty Nanjappah of Mercara." He goes on to say that the record of the case before him showed clearly that Krishna Rao received Rs. 80, and that he fraudulently omitted to repay it, and also that he made a false statement that he had paid his client a portion of the money

through Mr. Hayes. Then coupling that with alleged previous misconduct, [**158**] he comes to the conclusion that he ought to be struck off the roll. **1887 JULY 21.**

Up to that time it is to be observed that the petitioner had not been heard before Mr. Plumer. Petitioner remonstrated upon the order that had been made, and the result was another order of the 5th of June 1885, that is, that evidence shall be adduced by the appellant, and evidence was in fact taken before Colonel Hill. Their Lordships are of opinion that the petitioner had the opportunity of adducing such evidence as he might think fit, and that his complaint on that head is not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report of order: "I have gone very carefully again though all the papers connected with this case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order or to alter the conclusion I arrived at." He therefore concludes "I confirm my former order striking petitioner off the rolls."

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This order was made without the petitioner's having had the opportunity of being heard before the Acting Judicial Commissioner after the evidence had been taken, and in that respect their Lordships are of opinion that there has been a plain irregularity, because in whatever way the proceedings may be instituted, they are subject to the provision of the 40th section of the Act referred to, by which it is enacted that "notwithstanding anything hereinbefore continued, no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authorities suspending or dismissing him." Now the only authority which could suspend or dismiss him was the High Court represented by the Acting Judicial Commissioner, Mr. Plumer, before whom he never has had an opportunity of defending himself. Their Lordships are, therefore, of opinion that this order directing that he be struck off the rolls is in that respect irregular, and that it must be set aside, and the petitioner be restored to the roll.

It is unnecessary to give a definite opinion upon the merits of the case, but their Lordships consider that, if the charge had [**159**] been established in a regular way, the offence, as alleged against the petitioner, was not of a character which called for his entire removal from the profession, but that a suspension for less time than that which he has in fact undergone would have been sufficient to meet the merits of the case.

Their Lordships will therefore humbly advise Her Majesty to set aside the order appealed from and to order that the petitioner be restored to the roll.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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Appel-
late
Civil.

15 C. 159.

15 C. 159.

APPELLATE CIVIL.

Before Mr. Justice Mitter, Offg. Chief Justice, and Mr. Justice Beverley.

Mamat Ram Bayan and others (*Plaintiffs*) *v.* Bapu Ram Atai Bura Bhakat and others (*Defendants*).*
[17th August, 1887.]

Right of Suit—Civil Procedure Code (Act XIV of 1882), s. 11—Hereditary right to an office—Declaratory decree—Jurisdiction—Emolument.

A suit for the establishment of a right to the hereditary title of musicians to a *satra* will lie under s. 11 of the Code of Civil Procedure, notwithstanding that the right sought to be established is one which brings in no profit to those claiming it.

[**F.**, 13 B. 429 (433); **Disc.**, 3 N.L.R. 131 (134); **R.**, 11 M. 450 (451); 12 C.L.J. 74 (78)=14 C.W.N. 1057 (1062)=6 Ind. Cas. 864 (866).]

This was a suit brought for a declaration of the plaintiffs' hereditary title to the office of musicians in a *satra* in Zillah Kamrup.

The plaintiffs alleged that they held the office of musicians to the *satra* in succession to their ancestors, and that in March, 1884, at a time when they were giving the usual performance on the occasion of the *Dolejatra*, the defendants, claiming themselves a right to such office, by force put a stop to the performance.

The defendants, amongst other defences raised, objected that the suit was not one cognizable by a Civil Court; and that if the plaintiffs had a right to sue, they could not sue jointly.

[**160**] The Munsif held that, as the plaintiffs had been dispossessed in a body on the same grounds, they had but one cause of action, and could jointly sue, and that they had a right to sue under s. 11 of the Code.

The defendants appealed to the District Judge, who, without going into the first point decided by the Munsif, held that the word "office" in s. 11 of the Code did not include the performance of a religious ceremony to which no emoluments were attached, and that the suit would not therefore lie.

The plaintiffs appealed to the High Court.

Babu *Baikunt Nath Dass*, for the appellants contended that the suit would lie.

Babu *Surendra Nath Roy* for the respondents.—On the question of the Courts not interfering in the determination of trivial questions of dignity and caste where no emoluments were attached to the office, referred to *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (1); *Rama* v. *Shivram* (2); *Murari* v. *Suba* (3); *Balkrishna Chimnaji* v. *Balaji Ramchandra* (4); *Shankara bin Marabasapa* v. *Hanma Bin Bhima* (5); and also to *Namboory Setapaty* v. *Kanoo Colanoo Pulia* (6); *Sunkur Bharti Swami* v. *Sidha Lingayah Charanti* (7); *Rajkisto Majee* v. *Nobaee Seal* (8); *Srinivasa*

* Appeal from Appellate Decree No. 1288 of 1886, against the decree of H. Luttman-Johnson, Esq., Judge of Assam Valley Districts, dated the 1st of March, 1886, reversing the decree of Baboo Shib Proshad Chuckerbutty, Munsif of Gauhati, dated the 19th of March, 1885.

(1) 10 B. 233. (2) 6 B. 116. (3) 6 B. 725. (4) 9 B. 25.
(5) 2 B. 470. (6) 3 M. I. A. 359. (7) 3 M. I. A. 198. (8) 1 W. R. 351.

v. *Lakshmamma* (1); *Vasudeb Vithal Samant* v. *Ramchandra Gopal Samant* (2).

1887 Aug. 17.

Appellate Civil.

15 C. 159.

The judgment of the Court (Mitter, O. C. J. and Beverley, J.) was as follows:—

JUDGMENT.

This suit was brought for the purpose of obtaining a declaratory decree confirming the plaintiffs' hereditary title to the office of musicians in a *satra* at a village called Sundaridia, within the jurisdiction of the Sub-division of Barpita in Kamrup. The defendants resisted the claim upon various grounds, and objected also that the suit could not be maintained in any Court.

The Munsif overruled the objection, holding that the Civil Court has jurisdiction to try all suits of a civil nature, and that [**161**] the present suit is of a civil nature. The Court of first instance decided in favour of the plaintiffs on the merits also, and decreed the claim.

On appeal by the defendants the District Judge, being of opinion that such an action as this would not lie under s. 11, decreed the appeal, and dismissed the suit. He says: It is not pretended that any emoluments attached to the position of musician. Defendants are entitled to their share (if any) of the proceeds of the temple property as *bhakats*, not as musicians. Does the word 'office' in the explanation to s. 11 of the Civil Procedure Code include the performance of a religious ceremony, or part of a religious ceremony, to which no emoluments are attached, which carries with it no profit or loss, which is purely honorary? I think not. I think that in order to establish a claim to an office, it must be shown that the office is one of profit.'' In that view of s. 11 the lower appellate Court held that an action like this would not lie, and accordingly dismissed the suit, without going into the other questions that arose upon the issues raised by the Court of first instance. We are unable to concur in the view taken by the lower appellate Court as to the meaning of the word "office" in s. 11 of the Civil Procedure Code. The District Judge is of opinion that a charge or a trust to which no emoluments are attached is not an "office" within the meaning of s. 11. A charge or a trust of a *shebait* in a temple may not be one of profit; it may not bring to the person who is employed in the trust, or in the charge, any emoluments at all. On the other hand, it may subject him to expenditure out of his own pocket; still in a case like that, if a person undertakes a trust or a charge as a *shebait*, he, in our opinion, should be considered as employed in an "office," within the meaning of s. 11 of the Civil Procedure Code. Many cases were cited in the course of the argument in support of the view taken by the lower appellate Court, but none of them fully supports the view taken by the District Judge. They are to the effect that a suit for the vindication of an alleged dignity attached to an office, if the alleged dignity does not carry with it any pecuniary gain or profit, will not lie in a Civil Court. But this is not a suit for the vindication of any alleged dignity attached to any [**162**] office, but this is a suit for the establishment of the plaintiffs' right to a hereditary office. In our opinion it is not necessary, in a suit of this description, to establish that the charge or trust is one which ensures some profit to the person claiming it. If it be a charge or trust for the performance of particular duties in a temple or the like, it would, in our opinion, be an "office"

(1) 7 M. 206. (2) 6 B. 129.

1887 Aug. 17. — Appellate Civil. — 15 C. 159.

within the meaning of s. 11 of the Civil Procedure Code, whether any emoluments are attached to it or not.

We are, therefore, of opinion that the present suit will lie under that section. We, therefore, set aside the decree of the lower appellate Court, and remand the case to that Court to decide on the merits. Costs to abide the results.

T. A. P. *Appeal allowed.*

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15 C. 162.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

NUND KUMAR SHAHA (*Defendant*) *v.* SHURNOMOYI (OR SHURNOMOYI DASI) (*Plaintiff*).* [18th November, 1887.]

Stamp Act (I of 1879), *Sch.* I *Art.* 1—*Stamp Duty—Evidence—Acknowledgment—Balance Sheet—Nikash.*

A *nikash,* or balance sheet, made out and signed by a gomastah of a business showing a balance due by him to the owner of the business, is not an acknowledgment of a debt within the meaning of art. 1, sch. I of the Stamp Act, and is admissible in evidence without being stamped.

Brojo Gobind Shaha v. *Goluck Chunder Shaha* (1) followed.

[**Disc.,** 39 C. 789=16 C.W.N. 945=15 Ind. Cas. 279.]

IN this suit the plaint alleged that the plaintiff employed the defendant as gomastah to carry on her shop, he being remunerated by a 10-anna share of the profits thereof, and the plaintiff being entitled to the remaining six annas of such profits. It further alleged that the defendant had misappropriated monies from the capital funds with which the shop was carried on, and that on an account being demanded from him, he prepared and signed a balance sheet or *nikash* showing a sum of money due from him.

[**163**] The suit was brought to recover the balance of this sum after crediting the defendant with certain amounts admitted to be due to him.

The defendant in his written statement denied the material allegations in the plaint, and specifically denied that he ever submitted an account as set out.

The evidence in the case was directed to the question whether or not the defendant prepared and signed the account. The plaintiff's witnesses alleged he did so, whilst the defendant denied it. The document was not stamped.

The Munsif of Perozepore who originally tried the case disbelieved the plaintiff's story and his witnesses, and dismissed the suit, but on appeal to the Judge of Backergunge this decision was reversed and the amount sued for decreed. The defendant now preferred this second appeal to the High Court.

Mr. *Roberts*, and Baboo *Kashi Kant Sen*, for the appellant.

Baboo *Durga Mohun Dass*, for the respondent.

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* Appeal from Appellate Decree No. 1034 of 1887, against the decree of J. F. Bradbury, Esq., Judge of Backergunge, dated the 25th of February 1887, reversing the decree of Baboo Bidhu Bhusan Chuckerbutty, Munsif of Perozepore, dated the 19th of April 1886.

(1) 9 C. 127.

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Mr. *Roberts*, for the appellant.—Except the account alleged to have been rendered and signed by the defendant there is no evidence to support the plaintiff's claim. Either that document is an acknowledgment of a debt, and that is how it is put forward by the plaintiff, or it affords no foundation of proof on which a decree against the defendant could properly be made.

I submit that it must be treated as an acknowledgment of a debt within art. 1, sch. I of the Stamp Act (I of 1879), and as such it requires a one-anna stamp. Instruments requiring a one-anna stamp cannot under s. 31 be stamped after the drawing or execution thereof. This objection is fatal to the suit, which should be dismissed. The point was raised in the original Court.

Baboo *Durga Mohun Dass*, for the respondent was not called upon.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—The only point raised in this appeal by the learned counsel for the appellant is that the document referred to in the judgments of the two lower Courts is an acknowledgment of a [**164**] debt within the meaning of art. 1, sch. I of the Stamp Act, and being such a document it should have been stamped with a one-anna stamp; and that, requiring a one-anna stamp, under s. 31 of the Stamp Act, it was a document for which no penalty could be paid, and which could not be received in evidence.

We have looked at the document ourselves, and we think that it is not an acknowledgment of a debt within the meaning of art. 1, sch. I of the Stamp Act, and we are fortified in this opinion by a decision of Mr. Justice Prinsep and Mr. Justice O'Kinealy on a very similar point in the case of *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (1).

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 164.

CIVIL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

AMRITOMOYE DASIA (*Plaintiff*) *v.* BHOGIRUTH CHUNDRA *alias* JOGESSUR SHADHOO (*Defendant*).* [6th December, 1887.]

Small Cause Court, Mofussil, jurisdiction of—Maintenance Suit for arrears of Fixed maintenance—Small Cause Courts (Provincial) Act (Act IX of 1887), *Sch. II, cl.* 38.

A suit for arrears of fixed maintenance is a suit relating to maintenance within the meaning of that term as used in cl. 38 of sch. II of the Provincial Small Cause Courts Act (Act IX of 1887), and is therefore not cognizable by a Court of Small Causes,

[**F.**, 10 A.L.J. 185 (186)=16 Ind. Cas. 13 (14); **R.**, 16 B. 267 (268).]

THIS was a reference from the Small Cause Court of Jessore under the provisions of s. 617 of the Civil Procedure Code, and the facts of the case which gave rise to it were as follow:—

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* Civil Reference No. 15-A of 1887, made by Babu Jugobundhoo Gangooly, Judge of the Court of Small Causes, Jessore, dated the 27th of August 1887.

(1) 9 C. 127.

1887
Dec. 6.

Civil Reference.

15 C. 164.

The plaintiff instituted the suit after the Provincial Small Cause Courts Act (Act IX of 1887) came into force to recover arrears of maintenance from the defendant. She alleged that her late husband, one Uma Charan Haldar, left his property by will to the defendant upon the condition that he paid to her maintenance at [165] the rate of Rs. 3 per month; that she had already been forced to institute suits for the recovery of that amount, and on the 28th April had obained a decree from the Small Cause Court for the arrears of maintenance then due at that rate. In the present suit she claimed arrears for the period between Chait 1292 (March 1886) to Ashar 1294 (June 1887). The suit was undefended, and the Judge found that the plaintiff had obtained a decree for arrears of maintenance at the rate alleged on the 28th April 1886, and that the amount of the decree was realized by execution. He also found that the arrears claimed in the suit were due. He, however, considered that, under the Provincial Small Cause Courts Act of 1887, the Small Cause Court had no jurisdiction to try such a suit as the present, and he accordingly directed the plaint to be returned to be presented to the proper Court subject to the opinion of the High Court upon the question as to whether he had jurisdiction to try it.

In his judgment he expressed a doubt as to whether the words "a suit relating to maintenance" as used in cl. 38 of Sch. II of the Act in question covered suits to recover arrears of maintenance at fixed rates as well as suits to establish a right to maintenance. To illustrate his doubt he referred to s. 7, cls, 1 and 2 of the Court Fees Act (Act VII of 1870), which deals with two different classes of suits for maintenance for the purposes of that Act, the one being suits for arrears of maintenance and the other suits for maintenance; and he considered that it might well be urged that the words in cl. 38—"a suit relating to maintenance"—were equivalent to "a suit for maintenance" and did not therefore include a suit such as the present for arrears of maintenance at fixed rates, but merely were meant to apply to suits to establish a right to maintenance. He also referred to cls. 128 and 129 of Sch. II of the Limitation Act (Act XV of 1887), where the distinction between suits for arrears of maintenance and for a declaration of a right to maintenance is also observed; and to the decisions in the cases of *Nobin Kalee Debea* v. *Bindoobashinee Debea* (1); *Bhugwan Chunder Bose* v. *Bindoo Bashinee Dossee* (2); *Sidlingapa* v. *Sidava* [166] *kom Sidlingapa* (3); and came to the conclusion that the words "suit relating to maintenance" as used in cl. 38 of sch. II of Act IX of 1887 must be taken to include a suit for arrears of maintenance as well as one to establish a right to maintenance.

He, however, referred the question as to whether he had jurisdiction to try the case to the High Court.

No one appeared on the reference. The opinion of the High Court (Norris and Beverley, JJ.) was as follows:—

OPINION.

We are of opinion that a "suit for arrears of fixed maintenance" is a "suit relating to maintenance" specified in cl. 38 of the second schedule of the Provincial Small Cause Courts Act, IX of 1887, and is, therefore a suit excepted from the cognizance of a Court of Small Causes.

H. T. H.

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(1) 5 W. R. S. C. C. Ref. 5. (2) 6 W. R. 286. (3) 2 B. 624.

15 C. 166.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

1887 DEC. 7.

APPELLATE CIVIL.

15 C. 166.

IN THE MATTER OF SIRDHAR ROY.

SIRDHAR ROY *v.* RAMESWAR SINGH.* [7th December, 1887.]

Bengal Tenancy Act (VIII of 1885), *ss.* 61, 62—*Deposit of Rent—Review of order receiving deposit of rent.*

When under ss. 61 and 62 of the Bengal Tenancy Act a deposit of rent is made by tenant, and the Court grants him a receipt, the Zemindar has no right to come in and be heard in the matter, there being no machinery whatsoever provided by the Act for the Court to enter into a judicial enquiry in connection with the matter of the deposit. As far as the tenant is concerned, after such deposit is made and a receipt granted, the Court is *functus officio,* and is not authorized to return the money to the tenant upon an application made by the zemindar.

The words "the full amount of the money then due" in s. 61, and the words, "the amount of rent payable by the tenant" in s. 62, mean nothing more than the words "what he shall consider the full amount of rent due from him at the date of the tender to the zemindar" as used in Bengal Act VIII of 1869, and have no relation whatever to the amount of rent *justly* due or *justly* payable by the tenant.

THIS was a rule calling upon Rameswar Singh, a zemindar, to show cause why an order passed by the Munsif of Madhubani [**167**] on the 2nd February 1887, ordering a tenant of such zemindar to withdraw from the Court a sum of money already deposited and received by the Court as rent due to the zemindar under s. 62 of the Bengal Tenancy Act, should not be set aside as being passed without jurisdiction.

The facts were as follows:—

On the 19th November 1886, an application was presented to the Munsif by one Sirdhar Roy, a tenant of one Rameswar Singh, under s. 61 of the Bengal Tenancy Act for permission to deposit a certain amount of rent, stating, among other matters, that he had tendered the money to the landlord's agent, but that the agent had refused to receive it and grant a receipt. The Munsif accepted this application and received the rent, and granted to the tenant a receipt under s. 62 of the Act, causing a notice of the receipt of the deposit to be served upon the zemindar. The zemindar, who apparently had been already aware of the deposit being made by the applicant, applied to the Court, stating that the tenant had deposited rent upon false and unfounded grounds, and that the deposit ought not to have been received, and praying that the order already passed by the Court permitting the deposit might be cancelled. The Munsif thereupon held a proceeding on the 2nd February 1887, and being of opinion that the dispute between the parties was as to the form of receipt which the tenant was entitled to receive from the zemindar, but that such a dispute could not be taken cognizance of by him, cancelled his previous order, and directed the tenant to take back the money deposited.

The tenant thereupon applied to the High Court, and obtained the rule above referred to.

Mr. *Woodroffe* (with him Baboo *Umakali Mookerji*), to show cause, contended that the words "full amount of the money then due" in s. 61,

* Civil Rule No. 550, against the order of Prayag Nath, Munsif of Madhubani, dated the 2nd of February 1887.

1887 DEC. 7.

APPELLATE CIVIL.

15 C. 166.

and the words "an acquittance for the amount of the rent payable by the tenant" in s. 62, showed that it is only when there is no dispute as to the amount of rent due that the tenant is entitled to deposit the rent, and that it would be an injustice if the landlord were not entitled to come in and be heard in the matter; and further that the Munsif had power [168] to review his order allowing the deposit to be made—*Reasut Hossein* v. *Hadjee Abdoollah* (1).

Baboo *Trailokhonath Mitter* and Baboo *Dwarkanath Chuckerbutty* in support of the rule contended that there was no provision in the Act allowing the landlord to come in and be heard on the right to deposit.

The following judgment (omitting the facts as set out above) was delivered by GHOSE, J. (PETHERAM, C. J., concurring):—

JUDGMENT.

Sections 61 to 65 of the Bengal Tenancy Act lay down the procedure in regard to the deposit of rent by a tenant; and the question we have to determine in this case is whether, after the Court has received rent from a tenant and granted him a receipt, the zemindar is entitled to come in and ask to be heard upon the matter of the deposit, and to have the order of deposit cancelled.

Section 61 of the Act lays down the case in which a tenant may present to the Court an application for permission to deposit his rent, as also the particulars which the petition is to contain. Section 62 provides that, if it appears to the Court that the applicant is entitled to make the deposit, it shall receive the rent and grant a receipt. It would appear upon a consideration of these two sections that, if a verified application is made to the Court, and if it contains the grounds under which an application under s. 61 is authorized to be made, and if it also contains the particulars which must be mentioned, the Court is bound to receive the rent and give a receipt to the tenant. The Court is not authorized at this stage of the proceeding, or at any subsequent stage, to enter into a judicial enquiry as to whether sufficient grounds in law exist entitling the tenant to make the deposit. We then find that, under s. 63, the Court is to affix a notification in the Court-house on the receipt of the money; and if it is not paid away within the period of 15 days, a notice of the receipt of the said deposit is to be served upon the zemindar; and under s. 64 the zemindar may apply if he pleases to receive the amount deposited.

These are the only provisions which the Bengal Tenancy Act has laid down in regard to the deposit made by a tenant; and it [169] will be observed that there is no machinery whatsoever provided for the Court to enter into a judicial enquiry in connection with the matter of this deposit, nor is there any provision entitling the zemindar to come in, and to be heard, upon the subject. And it seems to us that, so far as the tenant is concerned, after the deposit is made and receipt granted, the Court is *functus officio*, and is not authorized to return the money to the tenant upon an application made by the zemindar.

It was strongly pressed upon us that, when in s. 61 the Legislature uses the words "the full amount of the money then due," and in s. 62 "the amount of the rent payable by the tenant," it intends that it is only in cases where there is no dispute as to the amount of rent of the holding that the tenant is entitled to deposit the rent, and the

(1) 2 C. 131=3 I. A. 221.

1887 Dec. 7. — Appellate Civil. — 15 C. 166.

Court is authorized to receive such deposit; and that the receipt granted by the Court operating as an acquittance as against the landlord for the amount of the rent payable and deposited by the tenant, it would be an apparent injustice to the zemindar, if he was not entitled to come in, and to be heard, upon the matter. But it seems to us that this contention cannot be maintained. The words " the full amount of the money then due " as they occur in s. 61 do not, as we read them, mean anything more than the words " what he shall consider the full amount of rent due from him at the date of the tender to zemindar " as they occur in s. 46 of Bengal Act VIII of 1869, which has now been repealed by the Bengal Tenancy Act. The provisions entitling a tenant to deposit his rent in Court were introduced for the first time in the year 1862 (Bengal Act VI of 1862), with a view to protect tenants from harassment by zemindars, and to save them from costs, interest, and damages being awarded against them in a suit by the zemindar for rent; and it appears to us that the words in s. 61 and s. 62 of the Bengal Tenancy Act referred to above have no relation whatsoever to the amount of rent *justly* due or *justly* payable, but only to such rent as the tenant at the time of the deposit considers to be the rent due and payable. It is entirely at the option of the zemindar either to receive the rent deposited or not just as he pleases. He may, if he objects to the amount of rent [**170**] payable by the tenant for his holding, bring a suit under s. 158 of the Act to have that matter determined, or he may bring a suit for the recovery of the whole of the arrear of rent due to him up to the date of deposit within six months from the date of the service of notice upon him, disregarding altogether the deposit made by the tenant; and if in that suit it be proved that the tenant had, without reasonable or probable cause, neglected or refused to pay the amount of rent due to the zemindar, the Court might award to him damages and costs in *addition* to the rent. But if, on the other hand, it appears that the suit of the zemindar was without reasonable or probable cause, the Court might award the tenant damages as against the landlord (see s. 68 and sch. III, Part I, art. 2 of the Bengal Tenancy Act).

Upon these considerations it seems to us clear that when a deposit is made by a tenant and the Court grants him a receipt the zemindar cannot in any way be prejudiced, and that the tenant makes such a deposit at his own risk.

A question was raised before us as to whether the Munsif was authorized to entertain an application for review of his previous order, and Mr. *Woodroff* relied strongly upon the case of *Reasut Hossein* v. *Hadjee Abdoollah* (1). But in the view that we take of this matter, the question is not one of review, but whether the Munsif, after the deposit was made and receipt granted, had jurisdiction to entertain the application by the zemindar. Regarding it, however, as a question of review, it seems to us that it is only where a party is affected and bound by the order reviewed against, and when he has a right to be heard in the matter, that he can apply for review, but not otherwise; and in this view the case of *Reasut Hossein* v. *Hadjee Abdullah* has no application whatsoever.

For these reasons we think that this rule must be made absolute, and the order of the Munsif of the 2nd February 1887, set aside.

T. A. P. *Rule absolute.*

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(1) 2 C. 131=3 I. A. 221.

1887
Nov. 21.

CIVIL REFERENCE.

15 C. 171.

15 C. 171.

[171] CIVIL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

KOYLASH CHUNDRA SHAHA AND ANOTHER (*Decree-holders*) *v.* C. CHRISTOPHORIDI (*Judgment-debtor*) AND ANOTHER (SURETY).*
[21st November, 1887.]

Surety, Liability of—Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 344.

S on the 16th January 1886, obtained a decree for a certain sum of money against *C*. In execution of that decree *C* was arrested on the 28th January, and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure, and he was thereupon released upon furnishing security under the provisions of s. 336 of the Code. *K* became surety for *C* and executed a bond undertaking to produce *C* at any time when the Court should direct him so to do, and in default of so producing him to pay the amount of the decree, and standing security for *C*'s applying to be declared insolvent. On the 19th February *C* filed his petition to be declared an insolvent before the District Judge under s. 344 of the Code, and on the 14th May 1886, his petition was dismissed owing to his non-appearance.

S thereupon applied for execution of the decree against *K*.

Held, that *K* was released from his obligation under the bond executed by him when *C* filed his petition under s. 344 to be declared an insolvent.

[**F.**, 19 B. 210 (212); 24 M. 560 (562); 26 M. 366 (367); **Appr.**, 13 A. 100 (102)=11 A.W.N. 5; 16 A. 37 (38); **R.**, 15 A. 183 (184)=13 A.W.N. 68; 100 P.R. 1894; U.B.R. (1892-1896) Vol. II, 269; 12 C.L.J. 419 (421)=7 Ind. Cas. 917 (918).]

THIS was a reference by the Judge of the Small Cause Court at Dacca under the provisions of s. 617 of the Civil Procedure Code, and the facts which gave rise to it were as follows:—

On the 16th January 1886, the plaintiff obtained a decree in the Small Cause Court against the defendant Christophoridi for Rs. 550-5-9, and in execution of that decree the defendant was arrested and brought before the Court on the 28th January. The defendant thereupon expressed his intention of applying to be declared an insolvent under the provisions of Chapter XX of the Civil Procedure Code, and upon his furnishing security that he would appear when called upon, and that he would so apply to be declared an insolvent, he was released from custody under the provisions of s. 336 of the Code.

[172] Mr. E. C. Kemp stood surety for the defendant, and a bond was taken from him in the vernacular, of which the following is a translation:—

"I, E. C. Kemp, at present residing at Faridabad Mill Barracks, Thanna Sudder, do hereby execute this bail bond. Mr. Christophoridi, judgment-debtor in the said case, has been brought under arrest, so I, duly standing as security on his behalf, do execute this bail bond that I shall produce him at any time whenever the Court will direct me to do so; that if I fail to produce him, then I shall pay the whole of the amount of this decree. On default I will have no objection to the amount being realized from my immoveable and moveable property or my person; so I do stand security for his applying to be declared insolvent."

* Civil Reference No. 16A of 1887, made by Baboo Mohendra Nath Mitter, Judge of Small Cause Court, Dacca, dated the 12th of September 1887.

On the 19th February 1886, the defendant filed his petition to be declared an insolvent before the District Judge under s. 344 of the Code, and on the 13th March 1886, a copy of the petition was forwarded by the District Judge at the request of the defendant to the Small Cause Court.

On the 14th May 1886, the petition of the defendant to be declared an insolvent was dismissed by the District Judge owing to his non-appearance.

On the 2nd December 1886, the plaintiffs (decree-holders) applied for execution of their decree, and asked the Court to call upon the surety to produce the judgment-debtor, and on his failing to do so to order that the decree should be executed against him, and notice was thereupon issued to the surety to produce the judgment-debtor on the 7th March 1887. On that day the surety appeared, and contended that, inasmuch as the judgment-debtor had filed his petition of insolvency within the time prescribed by s. 336, he was no longer liable under the bond. The Court, however, refused to accept that contention, and thereupon the surety applied for and obtained six months' time within which to produce the judgment-debtor. On the 7th September 1887, the surety again appeared, and expressed his inability to produce the judgment-debtor, who had left Dacca, and again contended he was not liable.

[**173**] The Judge of the Small Cause Court, however, was of opinion that the surety was not released from his obliogation undeor the bond simply on the judgment-debtor filing his petition to be declared an insolvent within one month, but that his liability continued so long as he was not discharged by the Court, or so long as the decree was capable of execution against the judgment-debtor, and that the security might be realized in the manner provided by s. 253 of the Code. As, however, he considered the question was not altogether free from doubt, he, at the request of the surety, referred the question to the High Court, and directed execution to be stayed pending its decision.

Mr. *Bonnaud* and Mr. *Linton* appeared at the hearing of the reference for the surety, Mr. Kemp.

No one appeared on behalf of the judgment-creditors.

Mr. *Bonnaud* contended that the surety, Mr. Kemp, was entitled to be discharged from his bond, inasmuch as the judgment-debtor had complied with the provisions of s. 336 of the Civil Procedure Code. [NORRIS, J.—Is there not a recent decision under this section?] The case of *Lalji Sahoy* v. *Odoya Sunderi Mitra* (1). But in that case the judgment-debtor instead of applying under s. 344 to be declared an insolvent applied to have the decree which had been obtained against him *ex parte* set aside. This application having been refused, and the application for execution of the decree having subsequently been struck off, the Court held that the surety's liability ceased when the proceedings taken in execution of the decree, wherein the security was furnished, came to an end.

In the present case, however, the judgment-debtor did apply under s. 344 of the Civil Procedure Code to be declared an insolvent within one month, the period prescribed by s. 336; the surety, therefore, is entitled to his discharge. It is only in the event of the judgment-debtor failing so to apply that the Court may under s. 336 of the Code either direct the security to be realized or commit the surety to jail in execution of the decree.

(1) 14 C. 757.

1887 Nov. 21. — Civil Reference. — 15 C. 171.

[174] The opinion of the High Court (Norris and Beverley, JJ.,) was as follows:—

OPINION.

We are of opinion that the surety, Mr. Kemp, was released from his obligation under the bond executed by him when the judgment-debtor filed his application under s. 344 to be declared an insolvent.

H. T. H.

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15 C. 174.

CIVIL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

Uma Churn Mandal (*Plaintiff*) *v.* Bijari Bewah (*Defendant*).*
[6th December, 1887.]

Small Cause Court, Mofussil—Jurisdiction of—Arrears of rent of homestead or bustoo land, Suit for—Provincial Small Cause Courts Act (Act IX of 1887), *sch. II, cls.* 7 *and* 8.

A Mofussil Small Cause Court has no jurisdiction to entertain a suit for arrears of rent of homestead or bustoo land under the provisions of the Provincial Small Cause Courts Act (Act IX of 1887).

[R., 3 L.B.R. 47 (49).]

This was a suit instituted in the Court of Small Causes, Jessore, for the recovery of arrears of rent for the years 1291 to 1293 due in respect of a plot of homestead or bustoo land held by the defendant under the plaintiff. The suit was instituted after the Provincial Small Cause Courts Act (Act IX of 1887) came into force, and the Judge of the Small Cause Court held that, having regard to the provisions of that Act, he had no jurisdiction to try the suit, and directed that the plaint be returned for presentation in the proper Court; but as the plaintiff requested him to refer the question to the High Court as to whether he had not jurisdiction, he made the present reference.

In his order of reference the Judge gave the following reasons for arriving at the conclusion that he had no jurisdiction:

" Now s. 6 of the old Act XI of 1865 enacted that ' suits for rent ' where the claim does not exceed Rs. 500 were cognizable by the Small Cause Court. The words ' for rent ' in that section did not include suits for rent which were cognizable by a Revenue Court under Act X of 1859 or suits for rent which were transferred from the Revenue Courts to the Civil Courts by Bengal Act VIII [175] of 1869 which repealed Act X of 1859, as will be apparent from the proviso to cl. 4 of the said section.

" By Bengal Act VIII of 1869 suits for rent with respect to agricultural or horticultural lands, *putni* lands, *ijara* lands, &c., were cognizable by the Civil Courts.

" Hence by s. 6 of Act XI of 1865 it was held that a Small Cause Court had jurisdiction to try only such suits ' for rent ' which was claimed either for houses or for lands other than the lands specified above which came within the scope of Bengal Act VIII of 1869. It was therefore held that a suit for rent of land where the principal subject of the

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* Civil Reference No. 12A of 1887, made by Baboo Juggobundhoo Gangooly, Judge of the Court of Small Causes, Jessore, dated the 30th of July 1887.

entire occupation is bustoo, the residue, if any, being merely subordinate, would lie in the Small Cause Court, but that it would not lie where the principal subject of the entire occupation is agricultural land and the buildings are mere accessories. See *Chundessuree* v. *Gheenah Pandey* (1); *Gokhul Chund Chatterjee* v. *Masahroo Kandoo* (2); *Pearee Bewah* v. *Nokoor Kurmokar* (3); and *Moti Chund* v. *Luchmun Bhoorja* (4). It was also held that even a suit for use of land would lie in the Small Cause Court. *Woomapersad Shaw* v. *Shumsher Sirdar Mehter* (5); *Brice* v. *Toogood* (6); *Bachoo Chowbey* v. *Ghoorlait* (7). It is therefore clear from the above rulings that under Act XI of 1865 a Small Cause Court had jurisdiction to entertain a suit for arrears of rent of bustoo or homestead land.

" The question now is whether the new Act IX of 1887 gives jurisdiction to a Small Cause Court to try such a suit.

" Section 15 of the said new Act declares that ' a Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes,' and that, ' subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed Rs. 500 shall be cognizable by a Small Cause Court.' Now cl. 8 of the second schedule to that Act [**176**] has excepted suits for recovery of rent other than house-rent from the cognizance of the Small Cause Court. It therefore seems to me that a suit for house-rent and not for land-rent is now cognizable by the Small Cause Court under the new Act. The word ' house-rent,' as far as I understand, means rent payable for houses and not payable for land occupied by houses. If the Legislature had meant house-rent to include rent for houses as well for lands occupied by houses, it would have distinctly enacted to that effect.

" It may be urged that the jurisdiction of a Small Cause Court to try suits for rent of homestead lands has been conferred by the case law, and that hence by s. 2 of the new Act IX of 1887 a Small Cause Court has still jurisdiction to entertain such suits. But such case law has been considered at the time of the passing of the new Act. Section 2 of the Act has therefore nothing to do with it.

" I think, therefore, that the suits for rent of holdings held for dwelling purposes are no longer triable by the Small Cause Courts, but, by the regular Civil Courts under the provisions of the Bengal Tenancy Act VIII of 1885 enacted in substitution for Ben. Act VIII of 1869.

" It may be said that the expression ' house-rent ' in Act IX of 1887, cl. 8, sch. II, may mean rent for homesteads. Now, though s. 182 of the Tenancy Act does not settle the jurisdiction of a Court to try suits for rent of a ryot's homestead, I think that when that section is read with s. 144 of the Tenancy Act, suits for rent of ryots' homesteads may now be said to be cognizable by the regular civil Courts.

" Again, if cl. 4, s. 167 of the Tenancy Act be read along with cl. (*c*), s. 160 of that Act, it will appear that the purchaser of the homestead holding can enhance the rent of that holding under the provisions of the Tenancy Act. Further, cl. 7 of sch. II of Act IX of 1887 also gives jurisdiction to the ordinary Civil Courts to hear such suits. Now it would be an anomaly that a suit for enhancement of rent of homestead

(1) 24 W. R. 152. (2) 21 W. R. 5. (3) 19 W. R. 308. (4) 7 Mad. Jur. 70.
(5) 4 W. R. S. C. C. Ref. 10. (6) 5 W. R. S. C. C. Ref. 18.
(7) 4 N. W. P. H. C. 56.

1887 DEC. 6. — CIVIL REFERENCE. — 15 C. 174.

lands will lie in the ordinary civil Courts, whereas a suit for rent of homestead lands will not lie there. It is to avoid this anomaly, I think, that the Legislature has enacted in cl. 8 of sch. II of [177] Act IX of 1887 that suits for house-rent only, and not for land rent, will lie in the Small Cause Court.

I therefore think that this Court has no jurisdiction to entertain the suit."

No one appeared on the reference.

The opinion of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

OPINION.

We are of opinion that a suit for the rent of homestead or bustoo land is not cognizable by a Court of Small Causes under the provisions of the Provincial Small Cause Courts Act IX of 1887. Looking at ss. 7 and 8 of the second schedule to the Act, we think it was the intention of the Legislature to limit the jurisdiction of Small Cause Courts with reference to claims for rent to cases in which the rent is claimed in respect of houses the property of the person seeking to recover the rent.

H. T. H.

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15 C. 177.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

KISHORI MOHUN SETT (*Decree-holder*) *v.* GUL MOHAMED SHAHA (*Judgment-debtor*).* [2nd December, 1887.]

Execution of decree—Practice—Execution Proceedings—Power of District Judge to transfer execution proceedings to another Court—Civil Procedure Code, ss. 25, 647.

A District Judge has no power to transfer execution proceedings to a Subordinate Court.

In the matter of Balaji Ranchoddas (1), and *Gaya Parshad* v. *Bhup Singh* (2) dissented from.

[**Diss.**, 22 B. 778 (782); **R.**, 1 O.C. 117 (118); 32 C. 875 (882)=9 C.W.N. 705; 10 C.W.N. 12 (13); 13 Ind. Cas. 542 (543); **D.**, 97 P.R. 1907=33 P.L.R. 1908.]

THIS was an appeal from an order of the District Judge of Dinagepore reversing the order of the Munsif of that district, and holding that the latter officer had no jurisdiction to entertain certain execution proceedings.

[**178**] The suit was originally instituted in the Munsif's Court, but was transferred to the Court of the Subordinate Judge by whom the decree was passed. The judgment-creditor then applied for execution to the Subordinate Judge, and subsequently an order was made by the District Judge transferring the execution proceedings to the file of the Munsif. In the Court of the latter the judgment-debtor took the objection that that Court had no jurisdiction to entertain these proceedings, but the Munsif held that, as the order for the transfer had been made

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* Appeal from Order No. 295 of 1887 against the order of C. A. Kelly, Esq., Judge of Dinagepore, dated the 11th of may 1887, reversing the order of Baboo Sitikunto Mullick, Munsif of that district, deated the 11th of December 1886.

(1) 5 B. 680. (2) 1 A. 180.

by the District Judge, the objection could not be sustained, and he accordingly overruled it. The judgment-debtor thereupon appealed to the District Judge, who held that s. 647 of the Civil Procedure Code did not authorize the transfer of execution proceedings by a District Judge, as he considered that s. 25 of the Code mentioned suits only, and s. 223 provided the method for execution of decrees by other Courts.

1887 DEC. 2.

APPELLATE CIVIL.

15 C. 177.

The District Judge was referred to the case of *Balaji Ranchoddas* (1), but as he stated there were other decisions to a contrary effect, he declined to follow that ruling. He accordingly decreed the appeal and reversed the Munsif's order.

The judgment-creditor now preferred this second appeal to the High Court.

Baboo *Gopal Chunder Ghosal*, for the appellant.

Baboo *Josoda Nundun Poramanick*, for the respondent.

The following cases were cited at the hearing of the appeal:—

In the matter of Balaji Ranchoddas (1); *Gaya Parshad* v. *Bhup Singh* (2); *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (3); *Abdool Hye* v. *Macrae* (4); *Kedar Nath Mahata* v. *Bungshee Dhur Roy* (5); *Hamidoodeen* v. *Bhadae Sahoo* (6).

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

In this case the plaintiff sought to recover a sum of money and brought his suit in the Munsif's Court. By an order of the District Judge the suit was transferred to the Court of the Subordinate Judge. It was tried by that officer, and a decree [**179**] was made in favour of the plaintiff. The decree-holder subsequently applied for execution of his decree in the Subordinate Judge's Court. By an order of the District Judge the execution proceedings were transferred to the file of the Munsif. The judgment-debtor objected to this order, but the Munsif decided against him, holding that the plea of jurisdiction could not stand. Upon appeal the District Judge held that the objection of the judgment-debtor on the question of jurisdiction was a good one. The District Judge's attention was called to the case of *Balaji Ranchoddas* (1), which has been cited before us, and with reference to that case he observes that there are contradictory rulings.

We have to observe that this point has been raised several times in this Court, and it has been constantly held that there is no power to transfer execution proceedings, that the power is only to transfer a suit, and not to make a transfer of a suit after the suit has once been commenced.

Our attention has been called by the learned pleader for the appellant to a decision of the Allahabad High Court, which is certainly in his favour. If this were a point of law, having regard to the conflicting decisions, we should feel it our duty to refer it to a Full Bench; but it is a pure matter of practice, and no inconvenience, as far as we can see, will arise from our continuing to follow the course adopted by the decisions of this Court.

We therefore dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

(1) 5 B. 680. (2) 1 A. 180. (3) 8 C. 51. (4) 28 W. R. 1.
(5) 17 W. R. 45. (6) 18 W. R. 345.

1887
DEC. 7.

APPEL-
LATE
CIVIL.

15 C. 179.

15 C. 179.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

BROJO GOPAL SARKAR (*Plaintiff*) *v.* BUSIRUNNISSA BIBI AND ANOTHER (*Defendants*).* [7th December, 1887.]

Right of suit—Suit to set aside sale—Regular suit—Fraud—Sale under Act X of 1859*—Civil Procedure Code (Act XIV of* 1882,) *s.* 244*—Act XXIII of* 1861, *s.* 11.

B obtained an *ex parte* decree for arrears of rent against *S* under Act X of 1859, and in execution of that decree brought the tenure to sale. At the [180] sale the tenure was purchased by *N*. *S* then brought a suit against *B* and *N* to set aside the sale on the ground that the rent decree and all execution proceedings taken thereunder were fraudulent, and alleging that *B* was the actual purchaser in the name of *N*.

An objection was taken that the suit would not lie, and that the questions in the suit were such as could have been determined, and were determined, by the Court executing the decree.

Held, that neither s. 244 of the Civil Procedure Code, nor the corresponding s. 11 of Act XXIII of 1861, has any application to proceedings in execution of a decree under Act X of 1859, and that the suit, being one to set aside the sale on the ground of fraud, was maintainable.

Saroda Churn Chuckerbutty v. *Mahomed Isuf Meah* (1) distinguished.

[R., 17 C. 769 (772) (F.B.)]

THE plaintiff in this case sued to set aside a sale of a tenure, the sale having taken place in execution of a decree passed under Act X of 1859 for arrears of rent of the tenure. The decree was *ex parte*, and the plaintiff alleged that he was unaware of the suit, no summons having been served on him, and that in addition there had been irregularities in the execution proceedings which vitiated them. He did not ask to have the decree of the Revenue Court set aside, but he imputed fraud, to the principal defendant, who was the plaintiff in the rent suit. Subsequently to the institution of the suit the purchaser at the sale was added as a party defendant, the plaintiff alleging that he was a mere benamidar for the principal defendant. The defendants, amongst other objections, denied that there had been any fraud, and contended that the Munsif's Court had no jurisdiction to set aside the sale, inasmuch as it had taken place in execution of a decree of the Revenue Court.

The Munsif held that he had jurisdiction to set aside the sale if there was fraud, and finding that there had been such fraud set aside the sale without in any way touching the decree, merely finding that there were irregularities in the execution proceedings.

On appeal the District Judge reversed the decree of the Munsif, and in his judgment gave the following reasons for so doing:—

"On appeal it is argued first of all that the Munsif had no power to set aside the sale, and the case of *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (1) is quoted. This, it seems to me, settles the matter. The Munsif has not touched the Revenue [181] Court's decree, and the purchaser in execution holds under a certificate of sale, which sale took place while the decree was subsisting. The question of the

* Appeal from Appellate Decree No. 636 of 1887, against the decree of J. R Hallett, Esq., Judge of Rungpore, dated the 18th of December 1886, reversing the decree of Baboo Gopal Chunder Banerjee, Munsif of Julpigooree, dated the 28th of November 1885.

(1) 11 C. 376.

irregularities in the sale is one for the Court executing the decree, which I observe did decide on the point of execution irregularity, and the execution proceedings of the Civil Procedure Code are applicable in Act X cases [*Nilmoni Singh Deo* v. *Taranath Mukerjee* (1)]. I think, therefore, that the Munsif had no jurisdiction to entertain this suit, and I reverse his decision and decree this appeal. I do not enter into the merits of the case, but decide it on the point of law."

1887 DEC. 7. APPELLATE CIVIL. 15 C. 179.

The plaintiff accordingly now preferred this second appeal to the High Court.

Baboo *Nilmadhub Bose*, for the appellant.

Munshi *Mahomed Yusoof* and Munshi *Shamsool Huda*, for the respondents.

The judgment of the High Court (NORRIS and GHOSE, JJ.) was as follows:—

JUDGMENT.

The facts of this case are shortly these: The plaintiff held a certain tenure under Busirunnissa Bibi, the principal defendant in this suit. Busirunnissa recovered an *ex parte* decree for arrears of rent against the plaintiff under Act X of 1859, and, in execution of that decree, brought the tenure to sale, and at the sale, which took place on the 20th December 1884, the tenure was purchased by one Nil Mahomed, the second defendant.

The plaintiff has brought the present suit to set aside the above sale upon the ground that the rent decree, as also the proceedings taken by Busirunnissa in execution thereof, were all fraudulent, and that she herself purchased the property ostensibly in the name of Nil Mahomed.

The Court of first instance was of opinion that the plaintiff had no notice of the suit in which the decree was obtained, and that the sale in execution thereof was fraudulent; and it accordingly gave the plaintiff a decree.

On appeal, the learned Judge of the District Corut has reversed the judgment of the Court of first instance, and dismissed [**182**] the suit, upon the ground that, in accordance with the law laid down by a Divisional Bench of this Court in *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (2), the suit does not lie, and that "the question of irregularities in the sale is one for the Court executing the decree." He also holds that "the execution provisions of the Civil Procedure Code are applicable in Act X cases," and quotes the decision of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1) in support of his view.

The learned vakeel who appeared before us for the appellant questioned the correctness of the ruling in *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (2), and citing some other rulings, as bearing upon the question, contended that, the sale being impugned upon the ground of fraud and not bare irregularities, the suit was well maintainable.

In the view we take of the matter before us, it is not necessary to express any opinion as to the correctness or otherwise of the ruling in question, for it seems to us that it has no application to the circumstances of this case. The sale which was sought to be questioned in that case was one under Bengal Act VIII of 1869, where, in s. 34, it was provided that suits under that Act, and all proceedings therein, were to be regulated by the Civil Procedure Code. Now, one of the sections of the

(1) 9 C. 295=12 C.L.R. 361.

(2) 11 C. 376.

1887 DEC. 7.

APPELLATE CIVIL.

15 C. 179.

Civil Procedure Code which may be taken to apply to proceedings in execution of a decree under Act VIII of 1869 is s. 244; and the learned Judges who decided the above case held, as we understand their judgment, that the purchaser at the sale being the decree-holder, and the question raised being one relating to the execution of the decree, and between parties to the suit in which the decree was obtained, no separate suit would lie, by reason of the provisions of s. 244, to set aside the sale, notwithstanding that the sale was impugned upon the ground of fraud. Now the sale with which we are concerned took place under Act X of 1859, wherein, it will be observed, there was no such provision as in s. 34 of Act VIII of 1869. It follows, therefore, that s. 244 of the Civil Procedure Code, or the corresponding s. 11 in Act XXIII of 1861, can have no application [**183**] to the proceedings in execution of a decree under Act X of 1859. [See *Hur Dyal Mundul* v. *Tirthanund Thakoor* (1)].

The learned Judge however has relied upon a ruling of the Privy Council referred to above; but upon an examination of that case it will appear that all that the Judicial Committee held was that decrees under Act X of 1859 passed by Revenue Authorities could be transferred for execution to a Civil Court exercising jurisdiction in another district; and that a Rent Court established by Act X of 1859 was a Civil Court falling within s. 284 of Act VIII of 1859. We do not think that this ruling establishes the broad proposition which the Judge thinks it lays down, that "the execution provisions of the Civil Procedure Code are applicable in Act X cases."

There being, therefore, no provision in Act X of 1859 which makes s. 244 of the Civil Procedure Code applicable to the execution proceedings taken under that Act, the only question for our determination is, whether a suit lies in the Civil Court for the purpose of setting aside the sale upon the ground of fraud. Upon this question we feel no hesitation in holding that it does lie. [See *Nilmoney Bonick* v. *Poddo Lochun Chuckerbutty* (2); *Umbica Churn Chuckerbutty* v. *Dwarka Nath Ghose* (3); *Nundo Lall Doss* v. *Delawur Ali* (4); *Hur Dyal Mundul* v. *Tirthanund Thakoor* (1); *Ishan Chunder Bandopadhya* v. *Indro Narain Ghossami* (5); *Ujolla Dasi* v. *Dhiraj Mahatab Chand* (6).

Nor do we think that the fact relied upon by the Judge in one portion of his judgment, that the Revenue Court decided against the plaintiff "on the point of execution irregularity," is a bar to a separate suit, when such suit is based not upon bare irregularity in the sale proceedings, but upon fraud in connection with the suit itself, and the sale which was brought about by the decree-holder in furtherence of that suit.

Upon all these considerations, we are of opinion that the judgment of the Court below must be reversed, and the case remanded to that Court for trial on the merits.

Costs to abide the result.

H. T. H. *Appeal allowed and case remanded.*

(1) 13 W.R. 34. (2) 5 W.R. Act X, 20. (3) 8 W.R. 506.
(4) 11 W.R. 244. (5) 9 C. 788=12 C.L.R. 391. (6) 7 C.L.R. 215.

15 C. 184.

1887 Nov. 17.

APPELLATE CIVIL.

15 C. 184.

[184] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

DEWANUTULLA (*Plaintiff*) v. KAZEM MOLLA AND OTHERS (*Defendants*).* [17th November, 1887.]

Pre-emption—Perpetual Lease—Sale.

Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants a lease of it, even though it be a *mourasi* lease, the doctrine of pre-emption will not apply.

Moorooly Ram v. *Huree Ram* (1) and *Ram Golam Singh* v. *Nursingh Sahoy* (2) followed.

[Cited, 136 P.R. 1907; R., 43 P.R. 1892; 16 A. 344 (349) (F.B.).]

THIS was a suit brought by the plaintiff to establish his right of pre-emption with respect to two plots of land alleged to have been sold by the defendant No. 1 to the defendant No. 2 on the strength of his being defendant No. 1's *sharik* and neighbour. The defendants, amongst other defences immaterial for the purpose of this report, pleaded that the plaintiff could not maintain the suit by reason of the defendant No. 1 having merely granted a *mourasi* lease of the land in suit to the defendant No. 2.

The Munsif found that the plaintiff was clearly a *sharik* as regards one of the plots claimed, and a neighbour with regard to the other, but found no authority for holding that the giving of a *mourasi* lease entitled a *sharik* or neighbour to claim the right of pre-emption, and he dismissed the suit on the ground that there had been delay in making the *talub-i-shad*.

On appeal the Subordinate Judge held there was no such delay, but found that the property in respect of which the right was claimed was merely a tenant's holding; that neither the pre-emptor nor the defendant had any proprietary interest in it; and that, therefore, the plaintiff was not entitled to the right claimed. He further held that as the lands in suit had not been sold out and out, but merely sublet in perpetuity, it could not be said that there had been an entire cessation of the right of the defendant No. 1 in the property, and that on this ground also the plaintiff was not entitled to exercise his right of pre-emption.

[185] He accordingly concurred in dismissing the plaintiff's suit.

The plaintiff now preferred this second appeal to the High Court.

Munshi *Mahomed Yusoof* and Munshi *Shamsul Huda*, for the appellant.

Baboo *Kishori Lal Sircar*, for the respondents.

Munshi *Mahomed Yusoof*.—The nature of the transaction must be determined according to Mahomedan law. A lease under that law must be limited as to time; it cannot be transferred, and it terminates at the death of either party. In this case the *milkiat* or ownership in the lands has been transferred and not merely the usufruct, hence the transaction under the Mahomedan law is a *bai* (sale) and not an *ijara* (lease). The

* Appeal from Appellate Decree, No. 355 of 1887, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 22nd of November 1886, affirming the decree of Baboo Srigopal Chatterjee, Munsif of Jhenidah, dated the 30th of August 1886.

(1) 8 W.R. 106. (2) 25 W.R. 43.

1887 Nov. 17. — APPELLATE CIVIL. — 15 C. 184.

word *milkiat* (ownership) must be understood as it is used in the Mahomedan law. If a lease in perpetuity is not a sale, it is equivalent to a sale, and the right of pre-emption applies to such cases. The decision in *Gobind Dayal* v. *Inayatullah* (1) supports this contention. The cases of *Moorooly Ram* v. *Huree Ram* (2), and *Ram Golam Singh* v. *Nursing Sahoy* (3), do not apply, as in those cases the parties were Hindus.

Baboo *Kishori Lal Sircar*, for the respondents, was not called upon.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This was a suit to enforce a right of pre-emption under the Mahomedan law. The plaintiff and the defendant No. 1 appear to be joint properitors of a certain mokurarri or permanent tenure; and the defendant No. 1 has created a sub-lease in perpetuity of his share; and it is in respect of that sub-lease that the plaintiff now sues to enforce his right of pre-emption.

The suit has been thrown out by the lower appellate Court on two grounds: In the first place the Subordinate Judge holds that inasmuch as the plaintiff and the defendant No. 1 were only the tenants and not the actual proprietors of the land, the doctrine of pre-emption will not apply; and, secondly, that, as the defendant [**186**] No. 1 did not sell his entire interest in the property out and out, but simply created a lease in perpetuity, the doctrine of pre-emption is not applicable.

We have heared Munshi Mahomed Yusoof at great length in regard to what he considers the proper principles of Mohamedan law on this subject; but we are of opinion, as regards the second objection which has been referred to, that the matter is practically concluded by two decisions of this Court—one in the case of *Moorooly Ram* v. *Huree Ram* (2), and the other in the case of *Ram Golam Singh* v. *Nursing Sahoy* (3).

The learned pleader contends that these decisions are not in accordance with the strict principles of Mahomedan law, and he has further pointed out that they were both passed in cases in which the parties were Hindus. We are of opinion, however, that, as decisions of this Court, they are binding upon us in this matter; and we observe that the objection as regards the parties being Hindus was specially noticed by Mr. Justice Kemp, who remarks in his judgment that for that reason "he is certainly not disposed to extend the right beyond the strict limits of the Mahomedan law, or beyond the decisions of this Court on that matter." It is clear, therefore, that that fact did not influence the decision of the Court in those cases. Those decisions establish this proposition, that where a co-proprietor does not part with his entire interest by an absolute sale, but merely creates a lease of it, the doctrine of pre-emption will not apply. That being so, we think that the present case is concluded by authority; and it is not necessary for us to go into the other point, namely, whether the parties, that is, the plaintiff and the defendant No. 1, not being actual proprietors, but merely lesses in perpetuity, had such a *milkiat* in the property as would entitle either of them to claim the right of pre-emption. On this point we express no opinion.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

(1) 7 A. 775. (2) 8 W.R. 106. (3) 25 W.R. 43.

15 C. 187.

1887 Aug. 20.

APPELLATE CIVIL.

15 C. 187.

[187] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

HARAGOBIND DAS KOIBURTO AND ANOTHER (*Defendants Nos.* 1 *and* 3) *v.* ISSURI DASI AND OTHERS (*Plaintiffs*).*
[20th August, 1887.]

Civil Procedure Code, ss. 244 and 258—Judgment-debtor as part-purchaser of a decree, Suit by.

H. D. and *R. D.* owned a 6-anna share in certain decrees. The other decree-holders subsequently sold their 10-annas share to *H. S.* and *S. M.*, two of the judgment-debtors. *H. D.* and *R. D.* then proceeded to execute the decrees, and in satisfaction thereof were allowed to receive, upon giving security under s. 231 of the Code, the full 16-anna share of the decretal amount from *H. S.* and *S. M.*, notwithstanding the objection of the latter on the ground of their purchase. Thereupon, *H. S.* and *S. M.* brought a suit for declaration of their right of purchase and the recovery of a 10-anna share of money in the hands of *H. D.* and *R. D.*:

Held, that the plaintiffs were entitled to the relief sought for.

Held, also, that the provisions of s. 258 of the Civil Procedure Code did not affect the suit, which was brought not upon the allegation that the decrees were satisfied by the plaintiffs' purchase, but, on the contrary, was founded upon the proposition that the decrees were not so satisfied.

Abdul Rahiman v. *Khoja Khaki Aruth* (1) referred to.

Held, further, that the claim was not within the words "relating to the execution of the decree" in s. 244 of the Civil Procedure Code, inasmuch as it did not raise any question in respect to the furtherance of, or hindrance to, or the manner of carrying out the execution of the decrees.

[R., 2 M.L.J. 14 (15): 14 C.L.J. 489=12 Ind. Cas. 745 (749).]

HARAGOBIND DAS KOIBURTO and Ramdhone Das Koiburto together with three other persons, obtained certain decrees for arrears of rent against Holodhur Shaha, Monomohini, Bonomali Shaha and Brindabun Shaha. Haragobind and Ramdhone were owners of a 6-anna share of the decrees. Holodhur and Monmohini purchased the 10-anna share of the decrees from the other decree-holders in the name of one Rashoraj, whose application under s. 232 of the Civil Procedure Code to be entered on the record as assignee by purchase of the 10-anna share was refused on the ground that he was a benamidar of the judgment-debtors. [188] Haragobind and Ramdhone then took out execution of the entire amount of the decrees, and in satisfaction thereof were allowed to receive, upon giving security under s. 231 of the Code, the full decretal amount from Holodhur and Monomohini, notwithstanding the objection of the latter on the ground of their purchase. Holodhur and Monomohini as principal plaintiffs, along with others (whom it is unnecessary to mention for the purposes of this report), brought a suit for declaration of their right of purchase and the recovery of a 10-anna share of the money in the hands of Haragobind and Ramdhone, who were then the principal, and other decree-holders (the vendors of the 10-anna share) being merely *pro forma*, defendants. The Munsif upon a consideration of all the points of the case gave the plaintiffs

* Appeal from Appellate Decree, No. 1270 of 1886, against the decree of Baboo Nil Madhub Bundopadhya, Subordinate Judge of Tippearah, dated the 27th of April 1886, affirming the decree of Baboo Nil Madhub Dey, Munsif of Brahmonbaria, dated the 30th of September 1882.

(1) 11 B. 6.

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a decree. On appeal the Subordinate Judge held that s. 244 of the Civil Procedure Code was fatal to the suit, and reversed the order of the Munsif.

The plaintiffs appealed to the High Court; s. 244 was held not to apply to the case, and the suit was remanded for trial on the merits. The Subordinate Judge, who tried the case on the remand, restored the Munsif's order and decreed the suit. The defendants appealed to the High Court; but the order of the lower Court was upheld. An application for review of judgment was then made, it was granted, and a re-hearing took place. The grounds for review were: (*a*) That the suit was barred under s. 244; and (*b*) that the plaintiffs by their so-called purchase could not, under cl. (*b*) of s. 232 of the Code, acquire a higher position than that of judgment-debtors, who had satisfied the decrees passed against them and some others jointly, and therefore were not entitled to realize any portion of the decretal amount in execution of the decrees like any other ordinary assignee.

Mr. *Woodroffe* (with him Baboo *Gopinath Mookerjee* and Munshi *Serajul Islam*), for the appellants.

Mr. *Evans* (with him Baboo *Gobind Chunder Das*), for the respondents.

JUDGMENT.

The judgment of the Court (Prinsep and Pigot, JJ.) was delivered by

[**189**] Pigot, J.—This is an appeal from a decision of the Officiating Second Subordinate Judge of Tipperah, delivered on the 27th April last year, confirming a decree of the Munsif by which the sum claimed by the plaintiffs against the defendants as due to them in respect of monies realized in proceedings in execution in four several suits, *viz.*, 22 of 1870, 37 of 1876 and 21 of 1877 in the Court of the Subordinate Judge of Tipperah, and 1761 of 1877 in the Court of the Munsif of Brahmonbaria, had been allowed. The case is part of a dispute in which, during eight or nine years, the parties have been wandering in a wilderness of litigation arising out of questions upon the construction and effect of the sections of the Civil Procedure Code relating to the execution of decrees, and a vast mass of questions have, in the course of the multifarious proceedings that have taken place, been debated and decided. We think it unnecessary to refer to any of the questions that have arisen in the suit or in these proceedings save the question which was argued before us upon the hearing of the review. The case came before this Court (Prinsep and Agnew, JJ.) in appeal from the decision of the Subordinate Judge, which has just been mentioned, and which decision was arrived at after a remand in June 1885, ordered by this Court. The judgment of this Court upon the appeal after remand, which was delivered on the 22nd December 1886, dismissed the appeal from the judgment of the Subordinate Judge, and on an application for review of judgment a rule, made absolute on the 2nd July, was granted, and it was upon the hearing of that application for review that the only point really left in the case was argued before this Bench by Mr. *Woodroffe* on one side and Mr. *Evans* on the other.

The defendants who appealed became owners of a 6-anna share in the decrees in the four suits I have mentioned. The plaintiffs were judgment-debtors together with other persons in those four suits which were rent suits. Upon an application for execution made on behalf of the judgment-creditors a petition was made by the person Rashoraj, whose

name appears as first plaintiff in the present suit, praying that his name should be recorded as assignee of the 10-anna share in the decrees under execution. That application (there were in form [190] several, as the four execution matters were concerned: but they may be treated as one, as in effect they were) was opposed and was rejected upon the ground that Rashoraj was the benamidar of judgment-debtors under the decrees, that is to say, plaintiffs Nos. 4 and 5 in the present suit. Subsequently to this *benami* purchase, it appears that the defendants, the present appellants, purchased or attempted to purchase at an execution sale the 10-anna share in the decrees which had been, as we have said, already purchased in Rashoraj's name, *benmai* for plaintiffs Nos. 4 and 5 in this suit. It is unnecessary to do more than to refer to that attempted purchase, for it has been held, and no question now arises with respect to it, that that purchase is of no avail, and passed no right to the purchasers, the *benami* purchase in Rashoraj's name having long preceded the issue of the attachment which led to the sale at which the defendants, the present appellants, purchased, if they did purchase, that share in the decrees. The defendants, appellants, applied for leave to execute the decrees, and they were required to give, and did give, security under s. 231 for the protection of the rights of other persons interested in the decrees. Of that fact there is no question. The decrees were executed against all the judgment-debtors, the plaintiffs in this suit, Nos. 4 and 5, unsuccessfully seeking to restrain the execution of those decrees as against them set up their position as purchasers of a 10-anna share which they had been held really to be, although in Rashoraj's name. That contention of theirs was rejected upon the ground that no certificate of satisfaction according to the terms of s. 258 had been made. The entire amount of the decrees claimed in execution was satisfied by the present plaintiffs Nos. 4 and 5, and was received by the defendants, appellants, and this suit is brought by the plaintiffs Nos. 4 and 5 to recover from the defendants, appellants, the amount of the execution money which represents the 10-anna share in the decrees of which the plaintiffs undoubtedly became purchasers in the name of Rashoraj.

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The position of the claim in the present suit as between these parties is therefore simply this, that the plaintiffs have paid twice over in respect of the 10-anna share of the decrees against them. [191] They have satisfied the decrees, and they have done so after having previously, as it has been found, paid the sum of Rs. 550 for the purchase of the 10-anna share. That is the plaintiffs' position. The position of the defendants, appellants, is that, having never been legally entitled to more than a 6-anna share of the decretal amount, they have recovered the entire amount, for it is unnecessary to dwell, as we have said, upon their first contention that they had become owners of a 10-anna share under the sale to which we have referred.

Against the right of the plaintiffs to bring this suit, it is argued that the suit will not lie by reason of the provisions of s. 258, that the purchase of the 10-annas share being in truth, *pro tanto*, a satisfaction of the decree and not being certified as such under that section, could not be recognized for any purpose by the Court. The case of *Abdul Rahiman* v. *Khoja Khaki Aruth* (1) was dwelt upon at length by the learned counsel for the appellants. That case decides that a suit will not lie to enforce

(1) 11 B. 6.

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an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree. The present is not such a suit. This suit is not brought upon the footing or upon the allegation that the decrees were satisfied by the purchase in Rashoraj's name. On the contrary, it is founded upon the proposition that the decrees were not so satisfied. The plaintiffs say that in virtue of that purchase they became owners of 10 annas of the decrees on their way to execution. In the judgment delivered by Farran, J., in the Bombay case referred to, a number of cases, decided before Act XII of 1879 was passed, are discussed, the most important of which is, perhaps, the Full Bench decision of this Court in *Gunamani Dasi* v. *Prankishori Dasi* (1). The result of those cases is thus stated at p. 28: "By a consensus of opinion of all the High Courts it was therefore held that where a judgment-creditor, without certifying, had received money or property in satisfaction of a decree from his judgment-debtor, and then executed his decree, he was liable to restore the money or property so recovered in the first instance." He then a little farther on, at page 30, says: "Such was the state [**192**] of the law when Act XII of 1879 was passed. Applying to this enactment the principles of construction which I have referred to, I think it would be straining its language, and would be imputing to the Legislature a desire to work injustice, if it were held that it deprived the Courts of their power to give relief to a judgment-debtor who, after having paid money out of Court to his decree-holder, is compelled by the latter to pay over again under execution process. If the Legislature had intended to override that consensus of decision to which I have referred, it would, I think, have used clearer and more apt terms. The payment itself would, in that case, have been declared to be void, incapable of proof, or possibly illegal. The decision in *Poromanand Khasnabish* v. *Khepoo Paramanick* (2) is in accordance with this view. That case follows the case of *Sitaram* v. *Mahipal* (3) and *Ishen Chunder Bandopadhya* v. *Indro Narain Gossami*, (4) but is opposed to the ruling of this Court in *Patankar* v. *Devji* (5). The ruling in the latter case cannot, I think, be supported. What the Courts are forbidden to recognize is the payment of the decree, not the fact that a certain number of rupees passed from the hands of the judgment-debtor to those of the decree-holder."

It appears to us, therefore, that the decision of the Court of Bombay cited by the appellants does not, as to the effect of s. 258, make in their favour. The case is not an authority for the proposition which might perhaps seem to be countenanced by the headnote as it stands, that a transaction intended to operate as a satisfaction of decree, but which fails to have that operation because not certified, is void for every purpose, as if it were tainted with illegality. It goes no farther than the proposition stated by the Chief Justice at p. 12 that "no Court can recognize an uncertified adjustment *as operating in satisfaction of a decree* for any judicial purpose whatever." This proposition is incompletely stated in the headnote of the case in which the words "as operating in [**193**] satisfaction of a decree" are omitted. The claim on the part of the plaintiffs may then be regarded in a two-fold light. They claim as persons who are owners by purchase of 10-16ths of a thing which the defendants, who have no right to it beyond a 6-16th share, have obtained

(1) 5 B.L.R. 223. (2) 10 C. 354. (3) 3 A. 533.
(4) 9 C. 788=12 C.L.R. 201. (5) 6 B. 146.

possession of. They say that defendants obtained leave, giving security under s. 231 to recover the decretal amounts, as s. 231 describes it, for the benefit of all persons jointly interested in the decree, the Court making such order as it deemed necessary for protecting the interests of the persons not joining in the application; and they say that not merely is there an equitable foundation for their claiming the money, but that there is an express obligation incumbent upont the defendants to pay the money recovered in execution to the different persons who shall appear to be owners of the decree with the defendants. That second consideration does not seem to have been before the lower Courts; it was discussed before us. But it is in truth as much an illustration of the nature of defendants' obligation as a fact creating it; for, whether he gave security or not, he would equally, when allowed to issue execution, being only a part owner of the decretal amount, hold the surplus, if it came into his hands, for such persons as were really entitled to it; no doubt so far as the security creates an obligation, plaintiff could not recover in respect of it in this suit, as it is not referred to in the plaint. We think there is no doubt of the defendant's liability; and that s. 258 does not constitute any defennce to the suit.

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Then it is said that, although this is not a claim made in respect of an alleged satisfaction of a decree uncertified, it is "a question arising between the parties to the suit relating to the execution of the decree." These words "relating to the execution of the decree" are no doubt very vague and sweeping words, but the question arising here is certainly not in respect to the furtherance of, or hindrance to, or the manner of carrying out, the execution of the decree, for the foundation of the plaintiffs' claim is the execution of the decree. It is a right, an alleged right, arising partly in consequence of the decree having been executed by the defendants, appellants, and that is all. It is at least doubtful whether, even by giving the widest possible [194] meaning to the words "relating to the execution of the decree," we could include the present case within them, for the question between the parties arises in consequence of defendants having taken out of Court all the decretal monies in place of 6-16ths of them, which they did after the decrees had been satisfied by payment. We must give the terms of the section a liberal construction in order to include a claim such as this within them supposing it possible, and why should we do so? In order to enable the defendants, appellants, to keep what certainly they had no right to? Or in order to punish the plaintiffs Nos. 4 and 5 for having omitted to cause the benami purchase to be entered as satisfaction of the decree? We see no reason why we should strain the section in order to accomplish either of these results. We think that under these circumstances, the former decree of this Court dismissing the appeal should be restored, and this appeal shall stand dismissed with costs, including the costs of the review.

K. M. C. *Appeal dismissed.*

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CRIMINAL REFERENCE.

15 C. 194=12 Ind. Jur. 347.

15 C. 194=12 Ind. Jur. 347.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF THE PETITION OF ABDUL HOSSEIN.

QUEEN-EMPRESS *v.* ABDUL HOSSEIN.* [29th August, 1887.]

Police Act (V of 1881), s. 29—Power to make rules under Act V of 1861—District Superintendent of Police, Power of—A rule or regulation and a lawful order distinguished.

There is no express power given by Act V of 1861 to any officer save the Inspector-General of Police to make rules: therefore the violation of a general rule alleged to have been made by a District Superintendent of Police to the effect that constables are to be within the lines at a particular time or at roll-call is not punishable under s. 29 of the Act.

Semble.—The violation of a special order made by a District Superintendent of Police requiring the presence of an officer or of certain officers within the Police lines and issued expressly to him or each of them would [195] come within s. 29 of the Act as being not "a rule or regulation" but a "lawful order" made by a competent authority and relating to the duties of the officer or officers.

ABDUL HOSSEIN, a police constable, was sentenced by the District Magistrate of Dinagepore to six weeks' rigorous imprisonment for disobedience of orders under s. 29 of Act V of 1861. The order alleged to have been disobeyed was to the effect that "constables are to be within the lines at 9 P.M." The Sessions Judge was of opinion that there was no satisfactory evidence to show that to be absent from the lines after 9 o'clock was against rules, and further that, in order to render the prisoner punishable under s. 29 of the Act, it would be necessary to prove that the offence fell under s. 12 of the Act. The Sessions Judge, therefore referred the case to the High Court under s. 438 of the Criminal Procedure Code with the view that the conviction and sentence should be set aside.

Baboo *Ram Charan Mitter* appeared in support of the conviction.

No one appeared for the prisoner.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

JUDGMENT.

This is a case reported under s. 438 of the Criminal Procedure Code by the Sessions Judge of Dinagepore, who has also under that section suspended the sentence and let the petitioner out on bail.

Petitioner, a police constable, was tried summarily by the District Magistrate of Dinagepore, convicted of the offence of disobedience of orders, and sentenced under s. 29 of the Police Act V of 1861, to six weeks' rigorous imprisonment. The Sessions Judge is of opinion that the conviction by the Magistrate is bad in law.

The petitioner was sent up to the Magistrate for punishment by the District Superintendent with a memo. which is attached to the record and runs as follows: "246 W. C. Abdul Hossein is again reported for absence from roll-call on the night of the 4th May, and says he went to eat at his house and fell asleep. In D. O. 385 he was fined ten days' pay for this very offence, and has been warned not to leave his lines." "His

* Criminal Reference No. 199 of 1887 made by C. A. Kelly, Esq., Sessions Judge of Dinagepore, dated the 21st of July 1887, against the order passed by C. R. Marindin, Esq., District Magistrate of Dinagepore, dated the 13th of May 1887.

disobedience [196] of orders is wilful and a defiance of my authority. I forward his case to the Magistrate for exemplary punishment under s. 29, Act V." The prisoner was charged with disobedience to orders.

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The Magistrate's decision is: It is satisfactorily proved that the accused was absent from the lines after 9 o'clock on the night in question, which is against rules." The evidence as to rules is that of the line Sub-Inspector, who says that "the orders are that constables are to be within the lines at 9 P.M." The evidence against the accused was, first, a former punishment for absence from 9 o'clock roll-call; second, that of Debiram, that accused was absent from the 12 o'clock roll-call; third, Bital proved the absentee roll-call. "I call out the names. The havildar said such and such are not present, and I wrote his name down. Eighteen constables were absent. The havildar stood the file of men there. I was in a hut with a light;" fourth, Ramlall said: "Abdul Hossein was absent from roll-call on May 4th at midnight. I was helping the havildar to take the roll-call. Bital was calling over the names. He was sitting by a door with a lantern. Bital was with me when we looked for the men who did not answer. Bital marked down the absentees after they were called out and did not answer." That is the evidence for the prosecution. Some evidence was given for the accused which the Magistrate apparently did not believe. The Sessions Judge thinks, first, that there is no satisfactory evidence that the accused was as a fact out of the lines at 12 o'clock; second, that there is no evidence that to be abent from the lines after 9 o'clock is against rules, except the statement of the line Sub-Inspector set out above; third, that there is nothing to show by whom the rule, if it exists, was made; and fourth, he thinks that no rule the violation of which is punishable under s. 29 of the Police Act can be made, save by the Inspector-General under s. 12 of the Act.

We think the first three grounds for reversing the conviction are sufficient. If the rule be that the officers must be and remain within the lines after 9 P.M., there is no evidence that the accused violated it, for there is no proof that he was searched for and was, as a fact, absent from the lines. If there be a rule that the officers must attend roll-call at midnight, or at any other hour at which the roll is called, no evidence of the existence of [197] such a rule was given. It is to be observed that it was for absence from roll-call apparently that the accused was sent up; and it was to his not having attended roll-call that the evidence was directed. We think the Sessions Judge well advised in pointing out, as he does, the distinction between a judicial and a departmental punishment. Rigorous imprisonment is no light punishment, and the law or rule, for the violation of which it is imposed, as well as the fact of such violation, ought to be clearly proved in order to warrant the infliction of it. The law requires proof before depriving the subject of his liberty, and is not satisfied by probabilities alone. Probably, or perhaps, there was a rule known to the accused requiring him to be in the lines at 9 P.M., or perhaps at the time when the roll was called, on the occasion in question. Probably or possibly be disobeyed it. It may even be the case that, if there was such a rule, it was one made by a competent authority. But there is no proof of it, or that it was notified to accused, or that, if it was, he violated it. The only fact established in the case is that he did not answer to his name at 12 o'clock roll-call; and there is not a title of evidence to show that he was bound to do so. There is no evidence properly so called of any rule whatever.

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The fourth point mentioned by the Sessions Judge is of importance. He holds that, had it been proved that a rule requiring presence in the lines, or at roll-call, had been made by the District Superintendent, a violation of that rule would not have been punishable under s. 29 of the Act. There is no express power given by the Act to any officer, save the Inspector-General of Police, to make rules; he can do so under s. 12, for, amongst other purposes, "preventing abuse or neglect of duty." Such rules must be made subject to the approval of the local Government. It was argued before us that the District Superintendent has power under s. 4 which gives him the administration of the Police throughout the district, which, it is to be observed, is under the general control of the Magistrate. It is not necessary to determine the question in this case; but the matter is of such consequence that we think it right to state the inclination of our opinion, which is that a general rule of the nature suggested, but not proved in the present case, made [198] by a District Superintendent, would not come under the Act, but that probably a special order requiring the presence of an officer or of certain officers within the Police lines, issued expressly to him or each of them, would come under s. 29 as being not a "rule and regulation," but a "lawful order" made by competent authority and relating to the duties of the officer, one of which is to be at hand when required for service. A rule made under the Act, officers are bound to know and to obey. An order to bind an officer must be given to him, and to make him punishable for not carrying it out, the fact of its having been given to him must be proved. Any instance of failure to enforce discipline in the Police is much to be regretted, only the more necessary is it that regulations or individual orders be so framed and so promulgated or issued that the violation of them can be legally punished under the Act. We set aside the conviction and sentence.

K. M. C. *Conviction set aside.*

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15 C. 198.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

ZAHRUN AND OTHERS (*Defendants*) *v.* GOWRI SUNKAR AND ANOTHER (*Plaintiffs*).* [20th August, 1887.]

Jurisdiction of Civil Court—Suit for partition—Revenue-paying estate—Proceedings under Bengal Act VIII of 1876, *s.* 31, *Effect of.*

The jurisdiction of the Civil Court in matters of partition of a revenue-paying estate is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue.

Held, accordingly, that pendency of partition proceedings before the Collector, under s. 31 of Bengal Act VIII of 1876, was no bar to a suit for a declaration that under a partial partition effected between the co-sharers a portion of land had been separately allotted to the plaintiff.

[**F.,** 2 C.L.J. 351; **Appr.,** 16 C. 203 (206); **R.,** 24 C. 725 (745) (**F.B.**); 16 C.W.N. 639 =13 Ind. Cas. 123 (125).]

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* Appeal from Order No. 50 of 1887, from an order of Baboo Trailokya Nath Mitter, Subordinate Judge of Patna, dated the 8th of December 1886, reversing an order of Moulvi Abdul Bari, Munsif of Patna, dated the 9th of August 1886.

GOWRI SUNKAR, together with another was the owner of a 1 anna 17 dams 10 cowrie share out of an undivided 16 annas share of mouzah Shernowjahan. A private partition, it would seem, [**199**] had been effected between all the co-sharers, whereby 30 bighas of land had been taken out of the whole mouzah and partitioned among all the shareholders in proportion to their respective shares, the remainder being left joint as before. Of the 30 bighas, 3 bigahs 10 cottahs fell to the share of Gowri Sunkar and his coparcener, who sold a 12-dam out of their own share of the mouzah to Musst. Zahrun and others. Gowri Sunkar and his coparcener were then about to build a house on a portion of the 3 bighas odd; but were opposed by Zahrun and the other purchasers, and therefore brought a suit against them for the partition of the said land by declaration of their right to separate possession of the 3 bighas under the private partition. Zahrun objected to the suit on the ground among others that, inasmuch as the mouzah was a revenue-paying one and the *butwara* proceedings in respect to the whole 16 annas share were already pending before the Collector, the suit was not maintainable. It appeared from a judgment of the Special Deputy Collector that he had disallowed the allegation of private partition made by Gowri Sunkar, and was taking proceedings to allot the 16 annas rateably among the co-sharers. The Munsif, relying upon this judgment and upon a consideration of *Chunder Nath Nundi* v. *Hur Narain Deb* (1); *Damoodar Misser* v. *Senabutty Misrain* (2); *Ajoodhya Pershad* v. *Collector of Durbhungah* (3); *Badri Roy* v. *Bhugwat Narain Dobey* (4); and *The Secretary of State for India in Council* v. *Nundun Lall* (5), upheld the objection raised on behalf of the defendants and dismissed the suit. On appeal the Subordinate Judge remanded the suit, pointing out at the same time that necessary parties may be added. He was of opinion that the suit was not one for partition of a revenue-paying estate in which the question of protection of Government revenue was involved, and the Civil Court was therefore competent "to declare whether or not the particular 3 bighas odd had been in the possession of the parties [**200**] in accordance with a private arrangement made by the proprietors, as representing portion only of their respective interest in the parent estate."

Against that order of the Subordinate Judge the defendants appealed to the High Court.

Munshi *Mahomed Yusuff*, for the appellants.

Baboo *Surendra Nath Roy*, for the respondents.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

JUDGMENT.

The plaintiffs, as co-sharers in an estate, asked for a declaration that, under a private partition made between themselves and the other proprietors, 3 bighas 10 cottahs were allotted to them, and they also asked for a partition of the estate by giving them an area representing their share, 1 anna 5 dams 10 cowries. A short time before the institution of this suit an application for *butwara* was made to the Collector by the defendants, and about the date of the institution of this suit an order was passed by the Collector under s. 31, Bengal Act VIII of 1876, declaring the estate to be under partition. The matter for decision before the lower

(1) 7 C. 153. (2) 8 C. 537=10 C.L.R. 401. (3) 9 C. 419=11 C.L.R. 550.
(4) 8 C. 649=11 C.L.R. 186. (5) 10 C. 435.

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Courts as well as before us in second appeal is simply whether the Civil Courts have jurisdiction to entertain a suit of this description at the same time that a partition of the estate is pending before the Collector. The jurisdiction of the Civil Courts is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue. We observe that in Act XIX of 1873, regarding partition of estates in the North-Western Provinces, the Legislature has declared it to be necessary to limit the ordinary jurisdiction of the Civil Courts, inasmuch as it has specially enacted s. 135 so as to exclude their jurisdiction, except as expressly provided, from interference with the proceedings of the Collector in such matters of partition. There is no similar provision, that we are aware of, in respect of the Civil Courts in Bengal. Section 265 of the Code of Civil Procedure of 1882, which is generally a re-enactment of s. 225 of the Code of 1859, evidently contemplates the existence of the jurisdiction of the Civil Courts to try suits for partition of estates or for [**201**] the separate possession of the share of an undivided estate paying revenue to Government, but at the same time it leaves it to the Collector only to give due effect to any order passed by a decree of a Civil Court. Upon these considerations, as well as from the terms of Bengal Act VIII of 1876, it seems to us that, although the Collector may, in some respects, be able to decide on matters in dispute between co-sharers regarding their respective rights, still the jurisdiction of the Civil Courts as the final Court for the settlement of such disputes is not ousted. The primary object of the law is to carry out as far as possible the partition of a joint estate on which the proprietors have agreed, but this is only subordinate to the protection of the interests of the Government revenue. The principal object in view is to carry out an equitable partition by which the interests of the Government may be secured by the apportionment of the revenue on each portion of the original estate. The effect of s. 29 of the Butwara Act, as we understand it, is that the rights of the parties as between themselves in respect to any portion of the Civil Court will not affect the joint liability of the sharers in respect to the payment of the entire revenue assessed on the estate until the Collector has taken proceedings in accordance with that Act. The only question is whether the plaintiffs are entitled to ask the Court for an order declaring their right to separate possession of 3 bighas 10 cottahs on the ground of a private partition by agreement amongst their co-sharers, and whether they are entitled to a share amounting to 1 anna 5 dams 10 cowries in any partition which may take place. We think that there are no valid grounds for the objection taken, and we accordingly affrm the judgment of the lower appellate Court and dismiss this appeal with costs.

K.M.C. *Appeal dismissed.*

15 C. 202=12 Ind Jur. 307.

1888 JAN. 17. — APPEAL FROM ORIGINAL CIVIL. — 15 C. 202=12 Ind Jur. 307.

[202] APPEAL FROM ORIGINAL CIVIL.

Before Sir. W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, and Mr. Justice Tottenham.

IN THE MATTER OF THE APPLICATION OF SOOBUL CHUNDER LAW.
SOOBUL CHUNDER LAW *v.* RUSSICK LALL MITTER.*
[17th January, 1888.]

Civil Procedure Code (Act XIV of 1882), *ss.* 213, 276, 295—*Administration Decree—Attachment after date of institution of administration suit under decree obtained prior to such suit—Injunction.*

On the 22nd July 1886, one *R. L.* obtained a money decree against one *P. C.* On the 5th November 1886 *P. C.* died; and on the 18th December 1886, *R. L.* applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th and 12th January 1887. On the 21st December 1886, one *S.* filed a suit to administer the estate of the deceased and on the 20th January 1887, obtained the usual administration decree. On the 5th May 1887, *S.* applied for an order staying all proceedings taken by *R. L.* against the estate of *P. C.* and directing him to come in should he think fit so to do, and prove his claim in the administration suit. *Held,* that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted.

[**Cited,** 27 C. 351 (354)=4 C.W.N. 610; **F.,** 29 C. 428 **(F.B.)**; **R.,** 16 B. 91 (108); 29 B. 405=7 Bom.L.R. 488 (492); 26 M. 673 (680); 20 M. 224 (226).]

ONE Prosunno Coomar Surbadhicarry having died intestate on the 5th November 1886, a suit for administration of his estate was instituted against his widow by one Soobul Chunder Law on the 21st December 1886; and in such suit on the 20th January 1887 the usual administration decree was made.

Previous to this decree, one Russick Lall, on the 4th June 1886, had instituted a suit, being suit No. 228 of 1886, against Prosunno Coomar Surbadhicarry, and had obtained against him a money decree on the 22nd July 1886. On the 18th December 1886, three days previous to the date of the institution of the administration suit by Soobul Chunder Law, Russick Lall applied for the attachment of certain properties belonging to the estate of Prosunno Coomar Surbadhicarry; and on the 8th and 12th January 1887, certain properties belonging to such estate were duly attached.

[203] Subsequently to these events, one Matinginy Dabee instituted a suit, being suit No. 124 of 1887, against Sorunginey Dassee, the widow, heiress and representative of Prosunno Coomar Surbadhicarry, which suit, had not, however, at the time of the application next mentioned, proceeded to a decree.

On these facts, Soobul Chunder applied in the administration suit, on notice, for an order staying all proceedings already taken by Rssick Lall and Matinginy Dabee against the estate of Prosunno Coomar Surbadhicarry, and directing them to come in, should they think fit so to do, and prove their claim in the administration suit.

Mr. *Hyde*, for the applicant, contended that he was entitled to the order asked for, inasmuch as in India an attaching creditor was entitled to no priority over other creditors until a sale at his instance had actually

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* Appeal No. 21 of 1887, from an order of Mr. Justice Trevelyan, dated 9th June 1887.

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taken place, and therefore the Court was bound to stay him; for in staying other creditors, some of whom had obtained, and others of whom were in a position to obtain, decrees, and refusing to stay him, it would be working an injustice and would have the effect of allowing an attaching creditor to carry away the whole proceeds, whereas under s. 295 of the Code of Civil Procedure every creditor who had obtained a decree was enabled to share rateably with the attaching creditor. This provision appeared for the first time in the Code of 1877, and thus made a clear distinction between the principle to be observed in this country in distributing the assets of a judgment-debtor and that obtaining in England. The Court in this country, therefore, in administering an intestate's estate should do so in accordance with that principle, and not refuse to interfere and stay an attaching creditor merely because it might be the practice of the Court of Chancery in England to refuse such an application, as the law to be administered here in such matters is distinct from that in England. The only authority on the point is that of *Fanendrabhushan Chatterjee* v. *Kedar Nath Dey* (1) and in the notes of judgment of Mr. Justice Pigot however in that case it would appear that his Lordship's attention was not drawn to the alternation in [204] the law under s. 295 of the Code, and he seems to have been entirely guided by English authorities which have now no application in this country.

Mr. *Bonnerjee contra.*

TREVELYAN, J.—I have taken some time to consider this application, as I thought it might be necessary to decide a question of some importance with regard to the position of an attaching creditor. It has been assumed in some cases in the Court that a creditor who attaches after judgment obtaines a priority over the Official Assignee, but I am not aware that it has ever been expressly decided in this Court that a creditor who has merely attached and has not obtained an order for sale acquires any such priority.

The Allahabad High Court has held that the Official Assignee's title has priority over an attachment after judgment; and Mr. Justice Wilson has held that an attachment after judgment does not give a creditor any interest in the property attached, and therfore does not entitle him to redeem.

I need not, I think, here enter into this question. Assuming that an attachment after judgment does not create a charge on any interest in the property, and that it might be possible, under certain circumstances in an administration suit, to restrain a creditor who has attached after judgment, I do not think that I can interfere in this case. I must follow the principle laid down by Mr. Justice Pigot in the case of *Fanendrabhushan Chatterjee* v. *Kedar Nath Dey* (1) and decline to interfere with the action of a diligent creditor who has followed up his decree by attachment.

Mr. *Hyde* has pointed out to me that the effect of the administration decree is to prevent creditors taking advantage of the provisions of s. 295 of the Civil Procedure Code. This is not the only matter in which s. 295 is defective. It is not for me to fill up the gaps in a Statute. If the creditor having the conduct of this suit had been diligent, he would have applied for an injunction before the attachment had been made.

The application as against the plaintiff in suit No. 228 of 1886 must be dismissed with costs. The plaintiff in suit No. 124 [205] of 1887 must be restrained, and will have liberty to claim in the administration

(1) Suit No. 720 of 1881 (unreported).

suit, and may add the costs up to this date to her claim. Costs of the applicant in this application will be costs in the administration suit.

1888 JAN. 17.

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15 C. 202=12 Ind. Jur. 307.

Against so much of the order as refused the injunction against Russick Lall Mitter, Soobul Chunder Law appealed.

Mr. *Pugh*, Mr. *Hyde* and Mr. *Acworth*, for the appellant.

Mr. *Bonnerjee* and Mr. *O'Kinealy*, for the respondent.

Mr. *Pugh*.—Up to 1849 the Courts in England used to restrain judgment-creditors, but in *Vincent* v. *Godson* (1) the injunction was refused. The ground of the decision in *Marriage* v. *Skiggs* (2) (decision of the year 1859), was that the assets had been actually realized. Where a creditor sues for administration it usually means the estate is insolvent. The reasons for granting such injunction after an administration decree is passed are given in *Largan* v. *Bowen* (3).

[WILSON, J.—Has the Court of Chancery interfered after execution issued?] No. The matter is different out here, because in England the process of execution effected a charge on the property from the *teste* of the writ, whereas here no charge is created; the question must be decided here under the Civil Procedure Code. In *Shib Kristo Shaha Chawdhry* v. *Miller* (4) the question is one of legal priority and not of injunction. In the case decided by Mr. Justice Pigot, *Fanendrabhusan Chatterjee* v. *Kedar Nath Dey* (5) the decree in the administration suit was after the order of sale, and therefore that case does not apply. As to the effect of an attachment see Civil Procedure Code, s. 276, Russick Lall has only rights against the goods of the intestate; therefore the difficulty felt by the Court of Chancery does not arise. Section 270 of the old Code of 1859, and s. 295 of the present Code, differ. Under s. 270 there was a statutory priority, but not so under s. 295, but on the contrary any one applying for execution is entitled to share.

[206] Mr. *Bonnerjee*, for the respondent.—Section 276 of the Code avoids as against an attaching creditor any alienation of the attached property made during the continuance of the attachment; the attachment creates an interest in the creditor entitling him to be paid out of the property attached in priority to all other creditors,—see *Anand Chandra Pal* v. *Panchilal Sarma* (6).

[WILSON, J.—That was a case under Act VIII of 1859. In England as soon as the writ of *fi-fa* is out there is an actual interest created.] None of the cases in England are decided on that ground.

[WILSON, J.—But the whole course of legislation tends that way.] The position of a judgment-creditor who has taken out a *fi-fa* is no way better than the position of a judgment-creditor who has taken out execution under the Civil Procedure Code. The case of *Giles* v. *Grover* (7) was in effect followed in *Ex-parte William, in re Davies* (8), which is decided on the ground that by the act of seizure the creditor has obtained a security out of which his debt is to be paid, and I submit this is the same under the Code. In the case of *Anandalal Das* v. *Radhamohun Shaw* (9) it has been held by Markby, J., that an attachment is good against all the world under s. 240 of Act VIII of 1859 (s. 276 of Act XIV of 1882), but the other Judges held it only benefited the attaching-creditor and those claiming under him.

(1) 3 De G. & S. 717.
(2) 4 De G. & J. 4.
(3) 1 Sch. & Lef. 299.
(4) 10 C. 150.
(5) Unreported.
(6) 5 B.L.R. 691 (703).
(7) 9 Bing. 135 (139).
(8) L.R. 7 Ch. Ap. 314.
(9) 2 B.L.R. F.B. 49.

1888 Jan. 17. — Appeal from Original Civil. — 15 C. 202=12 Ind. Jur. 307.

[Petheram, C.J.—Seizure by the Sheriff creates an interest subject to encumbrances: down to the time of the Mercantile Amendment Act seizure only affected people who came in subsequently.]

[Wilson, J.—From the issue of the writ the goods were bound, the seizure by the Sheriff carries it a step further, as the Sheriff acquires a special title in the goods.] A creditor here who has attached is in the same position as a creditor under a *fi-fa*, that is to say, he has a security out of which he should be paid. The latest case on the subject is *Fowler* v. *Roberts* (1); see the [207] remarks made in Daniel's Chancery Practice, p. 1944, as to this point. Under s. 213 of the Code administration under the Court stands on the same principle as the distribution of an insolvent's estate. It is, however, here sought that I should, because there is an administration decree, abandon my attachment, and should wait till the property is sold under the administration decree, but I submit there is no reason why I should begin *de novo*. The case of *Ranken* v. *Harwood* (2) shows that the judgment-creditor acquires a right to the goods attached by virtue of writ of *fieri facias* from the *teste* of the writ, and that an injunction should not be granted.

[Petherem, C. J.—That case goes by reason that Kirk the execution creditor had dominion over the goods.] A creditor after attachment in this country has a right at any moment to ask the Court to sell the property. Reading ss. 213 and 295 together, when a person has obtained attachment, and it has been given effect to, it would be doing violence to the sections to say he must be a stranger to the property attached because of the administration decree. Mr. Justice Pigot's judgment —*Fanendrabhusan Chatterjee* v. *Kedar Nath Dey* (3) is in point. In that case there were two points raised: (1) whether a judgment in a Mofussil Court, and in which attachment had been obtained, could be restrained by this Court; and (2) whether when a creditor had attached he could be restrained by this Court? The first point was decided by saying that this Court could restrain, and the second point by saying that the creditor was not to be restrained merely because there was an administration decree.

In *Vincent* v. *Godson* (4) the creditor had not attached. Mr. Belchambers in his Civil Courts Practice, p. 118, takes the law to be that it is not the rule to restrain a diligent creditor, who has recovered judgment before an administration decree from proceeding to execution, except under special circumstances.

JUDGMENT.

The judgment of the Court was delivered by

Petheram, C. J. (Wilson and Tottenham, JJ. concurring).—This appeal arises out of an application to stay proceedings in the execution of a decree of this Court, made by the plaintiff [208] in the present suit, which is a suit to administer the estate of Prosunno Coomar Surbadhicarry, deceased, who was the person against whom the decree, which is now sought to be executed, was obtained, and whose property has been attached under it. The facts are as follows: On the 4th June 1886, the present respondent, Russick Lall Mitter, sued Prosunno Coomar Surbadhicarry, on the Original Side of this Court, to recover a sum of money, and on the 22nd July 1886 obtained a final decree against him. On the 5th November

(1) 2 Giff. 227.
(2) 5 Hare. 215.
(3) Suit No. 720 of 1881 (unreported).
(4) 3 De G. & S. 717.

1886 Prosunno Coomar Surbadhicarry died, and on the 18th December 1886 the respondent applied to attach property under his decree. On the 21st December 1886 the plaint of Soobul Chunder Law, the present appellant, was filed, praying that accounts might be taken and the estate of Prosunno Coomar Surbadhicary administered by the Court.

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On the 8th and 12th January 1887 certain properties belonging to the estate of the deceased were attached under a decree pursuant to the application of the respondent, dated 18th December 1886; and on the 20th January 1887 a decree in the administration suit was made in favour of the plaintiff, the present applicant, who, thereupon, on the 5th May 1887, moved the Court to restrain the respondent from selling the attached property. The motion was rejected by Mr. Justice Trevelyan, and the present appeal is against his order of rejection. The sections of the Code which are applicable to the questions are ss. 213, 276, and 295; and before considering the English cases which have been cited, it will be well to examine those sections to ascertain whether the English authorities have any bearing on the matter, or whether the law here is so different to the law in England that they have not.

Section 213 provides that, when the estate of a deceased person is being administered by the Court, the assets shall be divided among his creditors, as if he were living and his estate was being administered under the insolvent law; and s. 295 provides that, where property has been attached under a decree, and prior to its realization other decree-holders have applied for execution against the debtor, the assets shall be divided amongst them all, including, of course, the person on whose application [209] the property was originally attached. Nothing equivalent to this section is contained in the English law, and the doctrine of the Courts of Equity, which corresponds to some extent to s. 213, is the doctrine that a decree for administration of the estate of a deceased is a decree in favour of all creditors; and, that as all of them are included in the same decree, it would be inequitable that one should be in a better position than another under that decree, and therefore the Court divides the assets among them. But in cases in which any creditor has obtained judgment before the decree in the administration suit, the English Courts do not interfere under the equitable doctrine, because, as it would seem, he has a judgment already, and so cannot have another under the administration decree. As I said before, the law in this country rests upon the sections of the Code so far as they are applicable, and not merely upon any doctrine of equity; and it is manifest that, according to the spirit of the Code, it was intended that all debts not actually paid should rank upon the estate, as in insolvency; and, in my opinion, the only questions are, whether the attachments of the 8th and 12th January had the effect of handing over the property attached to the creditor, so as to amount to payment; or whether they created any charge on the properties entitling the respondent to be paid out of them in priority to the other creditors of the deceased.

It is scarcely necessary to do more than state the first question, as s. 295 draws a sharp distinction between attachment and realization, and clearly shows that the legislature did not intend to treat the debt as paid until the money has found its why into the hands of the creditor. The other question is one of more difficulty, and depends on the construction which should be placed on s. 276. That section avoids, as against the attaching creditor, and alienation of the property made by the debtor during the continuance of the attachment.

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It is contended on behalf of the respondent, that in addition to this the attachment creates an interest in the creditor, which enables him to be paid out of the property attached in priority to all other creditors; and in support of this contention we were pressed with the Full Bench case of *Anand Chandra Pal* v. *Panchilal Sarma* (1)

[210] In that case certain property was attached at the suit of a decree-holder; afterwards the debtor was declared insolvent and a vesting order was made. The property was then sold under the attachment, and it was held that the sale was good, the attaching-creditor having by the attachment acquired some interest in the property which was not divested by the vesting order.

We are, however, of opinion that the case has no application under the present state of the law. Section 240 of the old Code was not in the same terms, and was not limited in the same way as s. 276 of the present Code, nor did that Code contain any such provision as that in s. 295. We think, therefore, that neither the English cases nor the cases decided under the old Code are applicable to the present case, and that we must deal with the matter as one which is not governed by any authority.

As I have before remarked, s. 276 defines certain transactions which are rendered void by the attachment; but that definition does not include the claims of other creditors, and we think that as they are not included in the definition, they are excluded by it, and that the attachment does not create, in favour of the attaching-creditor, any interest in, or charge upon, the property as against other creditors.

We come then to the conclusion that, according to the spirit of the law, as contained in the Indian Codes, which we are bound to administer, the assets of the deceased which have not been realized on behalf of a particular creditor are to be divided among the general body of the creditors; that there is nothing in the Codes themselves to prevent us from giving effect to the spirit of the law, as, in our opinion, the attachment creates no charge upon the property; and that, consequently, in the exercise of his discretion, the learned Judge ought to have restrained the execution of the decree in this case. Accordingly we decree this appeal, and direct that an injunction do issue in the terms of the motion; all costs to come out of the estate.

T. A. P. *Appeal allowed.*

Attorney for appellant: Baboo *N. C. Boral.*
Attorney for respondent: Baboo *N. C. Bose.*

(1) 5 B.L.R. 691.

15 C. 211.

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15 C. 211.

[211] APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Mr. Justice Wilson and Mr. Justice Tottenham.

PEARISUNDARI DASSEE (*Plaintiff*) *v.* HARI CHARAN MOZUMDAR CHOWDHARY (*Defendant*).* [5th December, 1887.]

Practice—Liberty to apply—Relief after judgment—Damages—Specific performance—Review—Alternative relief.

On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages; and on the 24th November 1886, obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December, 1886, the plaintiff discovered that it was out of the defendant's power to specifically perform his contract; and he, thereupon, on the 13th April 1887, applied to the Court which had granted the decree for a rehearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages when assessed might be entered up. *Held* that he was entitled to ask for such relief.

[**Rel. upon,** 4 Bom. L.R. 212 (214).]

ONE Hari Charan Mozumdar Chowdhry was a putnidar under the Nawab of Dacca, his zemindar, of an eight-anna share (out of a one-and-three-quarter-anna share) of Kismut Doajani Deher in the district of Mymensingh at an annual jumma of Rs. 212-8; and he on the 18th February 1886, agreed to grant to one Pearisundari Dassee a durputni settlement of such property in consideration of a salami of Rs. 18,800, of which Rs. 500 was to be paid as earnest money and the balance upon the execution of the durputni pottah and kabuliat on the 5th March 1886. On the same day Rs. 500 as earnest money was paid to Hari Charan. At the date of this transaction the property was under mortgage to the firm of Nilmadhub Radhabenode Shaw, which mortgage Hari Charan proposed to pay off with the salami to be paid to him by Pearisundari Dassee. Pearisundari therefore requested Hari Charan to procure for him from the mortgagees the necessary documents to enable her to prepare the durputni pottah and kabuliat. Hari Charan however informed Pearisundari that he could not obtain the necessary papers unless a sum of Rs. 1,500 were paid to the mortgagees, and at the request of Hari Charan, Pearisundari on the 22nd Falgoon [212] paid over the sum of Rs. 1,500 to the mortgagees, such payment being taken to be made in part payment of the sum of Rs. 18,800 payable as salami, and at the same time the time for the completion of the said durputni settlement was extended for 15 days from the 22nd Falgoon. Shortly after the 18th February Pearisundari discovered that Hari Charan had already disposed of in durputni to his mortgagees two parcels of the land comprised in the said property; and it was thereupon, on the 10th March 1886, arranged between Pearisundari and Hari Charan that the latter should execute in favour of the former a conveyance of his putni interest in such two parcels of land. The necessary documents were duly prepared, but Hari Charan refused to execute the contract. Thereupon Pearisundari on the 27th April 1886 instituted a suit against Hari Charan for specific performance of the said contract and agreement, or in the alternative, should it be out of the power of Hari Charan to complete, for damages.

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* Original Civil Appeal No. 32 of 1886, from a decision of Mr. Justice Macpherson, dated 13th June 1887.

1887 DEC. 5. — APPEAL FROM ORIGINAL CIVIL. — 15 C. 211.

This suit came on for hearing, and on the 24th November 1886 an *ex parte* decree, directing Hari Charan to execute a durputni pottah, and a conveyance of his putni interest in the two parcels in accordance with the agreements of the 18th February 1886 and 10th March 1886, was granted; this decree further gave the usual liberty to apply. Shortly after this decree was passed and on the 6th December 1886, Pearisundari for the first time discovered that the property referred to in the decree had on the 16th November 1886, under the provisions of Regulation VIII of 1819, at the instance of the zemindar, been sold for arrears of the putni rent, and that at such sale the property had been purchased by one Baki Khan at the price of Rs. 625.

Under these circumstances Pearisundari on the 13th June 1887 applied to the Court on motion for rehearing of the suit on the question of damages occasioned by the default of Hari Charan, asking that in lieu of the decree for specific performance a decree for damages when assessed might be entered up.

Mr. *Bonnerjee* and Mr. *Barrow*, for the petitioner.

Mr. *Hill*, for Hari Charan.

[**213**] Mr. *Bonnerjee* stated that the application was not made under the review sections, inasmuch as his client was not aggrieved with the decree, but under the liberty to apply given by the decree, and that under art. 178 of the Limitation Act the application was in time.

Mr. *Hill* contended that the liberty to apply was reserved for the purpose only of carrying out the provisions of the decree and not for new decree upon new facts, and stated that there was no provision made by the Code for such a re-hearing, and that the application was in reality one for a review.

Mr. Justice Macpherson held that the application could not be entertained under the liberty to apply, and was of opinion that the case was not one in which a review of judgment could be granted, further holding that liberty to apply had reference to matters in furtherance of the decree made, and did not admit of a new and different decree being made; and for these reasons dismissed the application, but without costs.

Pearisundari appealed.

Mr. *Bonnerjee* and Mr. *Barrow*, for the appellant.

Mr. *Bonerjee* contended that the liberty to apply reserved by the decree of the 24th November 1886, covered the application; that the High Court had full powers under the powers inherited by it from the Supreme Court to re-hear the case; and cited, as showing the practice, Fry on Specific Performance, Chapter IV, ss. 1138 to 1145 (p. 500, 2nd ed.), and *Henty* v. *Schroder* (1).

No one appeared for the respondent.

JUDGMENT.

The order of the Court (PETHERAM, C.J., WILSON and TOTTENHAM, JJ.,) was delivered by

WILSON, J. (PETHERAM, C.J., and TOTTENHAM, J., concurring). —We think the appellant is entitled to succeed on this appeal. The facts shortly are these: The intending purchaser of certain property, who had paid a portion of his purchase-money, obtained a decree for specific performance against the vendor; but after decree it became apparent that

(1) L.R. 12 Ch. D. 666.

the vendor had made it impossible for the purchaser to carry out the decree.

[214] The question now is, has the appellant any remedy. He moved the lower Court to have the matter re-heard on the new state of things, and asked to be allowed to establish his right to recover back his purchase-money. The learned Judge in the Court below refused the application, holding that the case is not one in which a review of judgment can be allowed. To me it seems that this is not a matter of review. That is a remedy to be applied for by the person *against* whom a decree or order has been made. It appears to me that the mass of authority collected in the work of Lord Justice Fry on Specific Performance, in the cases set out and explained in Chapter IV, ss. 1138 to 1145, establish that a decree for specific performance being not in the fullest sense a final decree, but one in a suit which is still pending, if the person against whom the decree has been made refuses to carry out, or has rendered himself incapable of carrying out that decree, the person in whose favour the decree was made may bring the facts before the Court, and ask for that alternative relief to which the circumstances of the case appear to entitle him. That doctrine in my opinion applies here. I think the learned Judge was wrong in deciding as he did, and I therefore think this case must go back to him to be heard on the merits of the application. Costs to abide the result.

T. A. P. *Appeal allowed.*

Attorneys for appellant: Messrs. *Barrow & Orr.*

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15 C. 214.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

RAM CHAND DUTT AND OTHERS (*Plaintiffs*) v. WATSON & CO. AND ANOTHER (*Defendants*).* [15th February, 1887.]

Co-sharers—Ijmali property—Cultivation of indigo by one co-sharer without consent of others—Injunction as between co-sharers—Practice of the English Courts in granting injunction, Applicability of.

W, while in possession of an entire mouzah as ijaradar, had, under an arrangement with the proprietors, built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of his lease, *W,* who still held a portion of the mouzah in ijara from a 2-anna co-sharer [215] continued to cultivate indigo on the khas lands as before, and, disregarding the opposition of the 14-anna co-sharers, claimed an exclusive title to do so. The 14-anna co-sharers thereupon brought a suit against *W* for ijmali possession of the khas lands and prayed, among other things, for an injunction prohibiting the defendant from sowing indigo upon the ijmali, lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendant from throwing any obstacles in the way of plaintiffs holding ijmali possession of the lands. The Court below granted an injunction prohibiting the defendant from growing indigo on the khas lands without the consent of the plaintiffs:

Held, that the plaintiffs were entitled to an injunction; but having regard to the circumstances under which the defendant cultivated the lands, it was necessary to vary the injunction granted by the Court below by making it an injunction restraining the defendant from excluding by any means the plaintiffs from their enjoyment of the ijmali possession of the lands.

[Reversed, 18 C. 10 **(P.C.).]**

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* Appeal from Original Decrees Nos. 59 and 104 of 1886 against the decrees of R. Towers, Esq., Judge of Midnapore, dated the 4th of January 1886.

1887 FEB. 15.

APPEAL FROM ORIGINAL CIVIL.

15 C. 214.

RAM CHAND DUTT and others held a 14-anna share of pergunnah Jhatibonee, known as the zemindari of pergunnah Sildah. Watson & Co. were in possession of a portion of the mouzah under an ijara from a 2-anna co-sharer. Prior to the 14th September 1883, Watson & Co. held the whole 16-anna share in ijara, and had, under an arrangement with the proprietors, built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of that lease on the aforesaid date, Watson & Co., under a 2-anna ijara from Ranee Durga Kumari, a co-sharer of the mouzah, continued to cultivate indigo on the khas lands as before. On the 3rd Bhadro 1290 (1883) Ram Chand Dutt, on behalf of the 14-anna co-sharers, gave notice to Watson & Co. prohibiting them to cultivate indigo in pergunnah Sildah. The notice was disregarded, and when the servants of Ram Chand Dutt went and tried to sow some of the lands, they were excluded by force, Watson & Co. claiming to exclude them as a matter of right. Ram Chand Dutt and others thereupon brought a suit against Watson & Co. for ijmali possession, and prayed, among other things, for an injunction prohibiting the defendants from sowing indigo upon the ijmali lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendants from throwing any obstacles in the way of plaintiffs holding ijmali possession of the lands. The defendants among other things, contended (*a*) that the plaintiffs were not entitled to a 14-anna share; (*b*) that they [**216**] (the defendants) having been in possession of the whole estate by virtue of their previous ijara, and having now acquired a right to a 2-anna share of the whole zemindari by virtue of an ijara granted by Ranee Durga Kumari, no order for an injunction could issue against them prohibiting them to sow indigo in the khas lands; (*c*) that the lands which were sown with indigo by the defendants during the current year had for a long time been sown with indigo by the defendants in khas, and no injury had been done to the plaintiffs by the defendants sowing indigo on those lands, nor had the character of the property been changed; such *danga* lands did not produce paddy crops, and no valuable crops except indigo grew on them; (*d*) that they (the defendants) had, for a considerable length of time, been carrying on indigo plantation by constructing four factories in the zemindari with the consent of all parties and with the plaintiffs' knowledge, by incurring a large amount of expenditure for the purpose, as well as by purchasing the necessary instruments and materials, &c., at a heavy cost; and they had sown indigo in the current year by spending a large sum of money, so that, if an injunction were issued against the defendants prohibiting them to sow indigo, they were likely to suffer a heavy amount of loss. After a consideration of the following authorities—*Stalkart* v. *Gopal Panday* (1), *Lloyd* v. *Bibee Sogra* (2), *L. G. Crowdie* v. *Bhikdharee Singh* (3), *Nundan Lall* v. *Lloyd* (4), cited on behalf of the plaintiffs; and 2 Kerr on Injunction, 2nd Edition, 79; *Crowdy* v. *Inder Roy* (5); *Macdonald* v. *Shib Dyal Singh Paurey* (6); *Lala Biswambhar Lal* v. *Rajaram* (7); *Sri Chand* v. *Nim Chand Shahu* (8); *Sheopershad Singh* v. *Leela Singh* (9); *Tarinee Churn Bose* v. *Ramjee Pal* (10), cited on behalf of the defendants, the Court of first instance (the District Judge) granted an injunction to the plaintiffs prohibiting the defendants from sowing indigo upon the ijmali lands without the plaintiffs' consent. "Having

(1) 12 B.L.R. 197. (2) 25 W. R. 313. (3) 16 W.R. 41. (4) 22 W. R. 75.
(5) 18 W.R. 408. (6) 21 W.R. 17. (7) 3 B.L.R. Ap. 67.
(8) 5 B.L.R. Ap. 25. (9) 12 B.L.R. 188. (10) 23 W.R. 298.

1887 FEB. 15. APPEAL FROM ORIGINAL CIVIL. 15 C. 214.

[217] given the best attention I was capable of to the circumstances of the case, and the respective positions of the parties," observed the learned Judge, " I have come to the conclusion that the plaintiffs are entitled to the remedy which they seek. The weight of legal precedents seems to be entirely in their favour, and, although I admit that the decision may involve some hardship upon the defendants, still, as was observed in *Lloyd* v. *Bibee Sogra* (1), this is a misfortune inseparable from a tenure of this description. There are some equities in their favour. They have gone to expense in the erection of factories, &c., but it must be presumed that they have already enjoyed a considerable profit from the indigo which they were enabled to manufacture during the term of their lease and since * * * It is a pity that the parties have not been able to come to an amicable arrangement among themselves; but, as they have not done so, their conflicting claims must be decided by legal tests, and, in my opinion, the plaintiffs have the law (and by this I do not mean law as contrasted with equity) in their favour." The Court gave the plaintiffs a partial decree with respect to the share claimed by them of the lands.

The plaintiffs and the defendants both appealed to the High Court.

Mr. *Woodroffe* (with him Mr. *Das*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Nil Madhub Sen*, Baboo *Golap Chunder Sircar* and Baboo *Nobin Chunder Ghosal*), for the plaintiffs.

Mr. *Evans* (with him Baboo *Ashutosh Dhur*, Baboo *Bhobani Churn Dutt* and Baboo *Rajendro Nath Bose*), for the defendants.

The Court (WILSON and O'KINEALY, JJ.) delivered the following judgment on the question of injunction:—

JUDGMENT.

WILSON, J.—* * * * The next group of questions that arise are, what remedy the plaintiffs are entitled to in this case. In order to ascertain that, it is necessary to determine one question first. Has there happened anything which amounts to an actual ouster as between the plaintiffs and the defendants, their co-sharers? It appears to us that there has. It has been contended that mere cultivation by one co-tenant is not necessarily ouster. It [218] may very well be so. But the question is whether on the facts of this case there has been an ouster. The facts are that, prior to the termination of the year 1290, Messrs. Watson were in possession, under one title or another, of the whole 16 annas of Sildah. While so in possession, they received the rents of the ryoti lands, and they enjoyed the khas lands according to their character. It is clear on the evidence that there are three classes of khas lands in this pergunnah: *first*, a large quantity of indigo lands which were used for indigo cultivation; *secondly*, a large quantity of lands which were mere waste; and *thirdly*, a large quantity of lands which were neither cultivated with indigo nor mere waste lands, which the tenants of the jote lands paid no rent for, but which they were allowed to cultivate with surguja and other products. Presumably, therefore, this was not the very best class of lands. That is how the khas lands were enjoyed, while the 16 annas were in the possession of Messrs. Watson. When their title to 14 annas came to an end in 1290, what did they do? They went on precisely as they did before, cultivating with indigo the same lands as before, and leaving the other khas lands just as before. They clearly were in sole possession of the whole of the indigo lands. But not only were they so, they were in exclusive possession, in the sense

(1) 25 W.R. 313.

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that the plaintiffs were absolutely excluded from them. The plaintiffs' servants went and tried to sow some of the lands, and they were excluded by force; and not only were they excluded in fact, but the defendants claimed to exclude them as a matter of right, because they set up a title in themselves to do so. They set it up in the Court below, and they insisted upon it in the grounds of appeal. They set up the case that they, as 2 anna share-holders, were entitled to cultivate the indigo lands, and to say to their co-sharers, you are not to interfere with these lands; you may, if you like, enjoy other khas lands for your shares. It follows, therefore, that on the facts of this case, there was an absolute and complete ouster by Messrs. Watson of their co-sharers from the lands as found by the Court below. It cannot be denied that the plaintiffs are entitled to a decree for ijmali possession of the lands which have been ascertained in the Court below. It is clear also [219] that they are entitled to compensation for exclusion. No question has been raised before us on appeal as to the principle on which compensation has been assessed. Therefore the amount awarded must simply be increased to bring it into correspondence with the 14-annas interests, which we find the plaintiffs are entitled to, instead of the amount which the Court below has given to them.

But the real question as to the remedy is, whether or not the injunction which has been granted can be sustained, or, if that injunction cannot be sustained, whether any narrower injunction ought to be granted. Each side in argument before us took rather extreme grounds. It was contended on one side that one co-sharer has an absolute right, as a general rule of law, to say to his co-sharer, " you shall not cultivate that land in any way without my consent," and to enforce that right, at least in the absence of any special circumstances, by claiming an injunction in a Court of law. It was contended on the other side that an injunction between co-sharers is a thing which either ought never to be granted, or at any rate only under very unusual circumstances. We are not prepared, as at present advised, and it is not necessary, to agree with either of these propositions.

The proposition contended for by the plaintiffs has for its support the language of some learned Judges of this Court in delivering judgment upon cases before them. We think it right only to say this, that we think it may well be open to consideration in a future case whether the expressions used in some of those cases, if taken as unqualified propositions of law and without regard to the context, are wholly correct.

With regard to the extreme proposition on the other side, it is based upon the construction which the learned counsel placed upon English decisions. But, though, of course, the principles on which English Courts administer the remedy by injunction must be taken to be those which the Legislature meant to affirm in the Specific Relief Act, still the circumstances of this country are very different from those of England; and it would be a dangerous thing to assume that, because the Courts in England have very rarely found it necessary to grant an injunction as between co-sharers in order to prevent multiplicity of suits, [220] or upon any other grounds, Courts in this country may not properly be somewhat less rigid in doing so. The circumstances of the country are different; the positions of co-sharers and persons with partial interests in land are very different from those in England; and the interests of part owners may here require protection by injunction in classes of cases in which it is not necessary to grant it in England. There is a large number of cases which go to show that the remedy by injunction may in this country be given in

cases between co-sharers, when the circumstances of the cases are such as to render it necessary in order to secure those objects which, according to the law, should be secured by injunction. Particularly, since the passing of the Specific Relief Act, an injunction may properly be granted, if, on a consideration of the facts of the case, the Court thinks that that remedy is necessary in order to prevent repetition of injury and multiplicity of suits.

In the present case we are to consider what injunction ought to be granted if any. The injunction asked for was two-fold: first, an injunction against growing indigo; and, secondly, an injunction against doing anything which should exclude the plaintiffs from their right to ijmali enjoyment of their shares in the lands. The injunction which has been granted corresponds with the first part of the prayer. It is not necessary in this case to decide whether there could in any case properly be an injunction, a simple and unqualified injunction, against the growing of indigo by one co-sharer of land. It is unnecessary to consider that question, because there are circumstances in this case which would lead us to say that at any rate any such injunction ought not to be granted in this case. There is the circumstance, first, that the defendants, Messrs. Watson, are owners of indigo factories as well as occupiers of these indigo lands, and those factories have been built under arrangements with the same persons from whom the parties to this suit all derive their title, and the interests which they have in mouzah Sildah have been expressly given them for the purposes of working their factories and growing indigo. Not only is that the case, but the lands now in question appear, on the evidence, to have been waste lands and brought under cultivation by Messrs. Watson as indigo [221] lands. They have not been used in any other way. Under those circumstances we think we ought not to issue an injunction restraining them absolutely from growing indigo upon these or upon any particular lands, provided Messrs. Watson can—and it is for them to find out how they can—grow indigo without excluding the plaintiffs from their equal rights as co-sharers. But we think that a narrower injunction under the circumstances of the case ought to be granted. This is a case in which there has been a continued wrong and a wrong which the defendants have attempted to justify. A continuance of that wrong and a multiplicity of suits seem to us not only highly probable, but almost certain, if we were simply to set aside the injunction. We think the proper course will be to vary the injunction so as to make it accord with that given in so many cases in this Court, by making it an injunction restraining the defendants from excluding by any means the plaintiffs from their enjoyment of ijmali possession of the lands in suit. The injuction will be in the form* given in *Lloyd* v. *Bibee Sogra* (1).

K. M. C. *Decree modified.*

* See *Stalkartt* v *Gopal Panday*, 12 B.L.R. 201.
(1) 25 W.R. 313.

1887 Nov. 30.

APPELLATE CIVIL.

15 C. 221.

15 C. 221.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

UMESH CHUNDER MUNDUL AND OTHERS (*Defendants*) *v.* ADARMONI DASI AND ANOTHER (*Plaintiffs*).* [30th November, 1887.]

Limitation Act, Art. 116—*Suit for arrears of rent—Registered contract.*

A suit to recover arrears of rent upon a registered contract is governed by sch. II, art. 116 of the Limitation Act.

[**Diss.**, 26 A. 138 (139); **F.**, 20 M.L.J. 555=7 M.L.T. 419=6 Ind. Cas. 766; 17 C.L.J. 372 (380)=19 Ind. Cas. 865 (869); **R.**, 14 M. 284 (287); 37 B. 656 (658)=15 Bom. L.R. 836 (838)=21 Ind. Cas. 315 (316); 15 Bom. L.R. 20 (25); **D.**, 17 C. 469 (471).]

BRINDABUN CHUNDER MUNDUL, with a view to carry on a business for the manufacture of salt, obtained an ijara lease for a period of twenty years from Jogindra Nath Mullick and another of four salt *bhowires* or manufacturing tracts in certain mouzahs, and executed a registered *kabuliat* in favour of the lessors, under [222] the terms of which rent was calculated to be paid at ten pie per maund on the outturn of the year, to be ascertained from the accounts in the Collector's office. On the death of Brindabun Mundul the lease was kept on by his descendants and other members of the family, on whose behalf, and in the capacity of *kurta*, Brindabun had taken the lease. A sum of Rs. 2,653 odd having become due as arrears of rent for the years 1286 and 1287 B. S., the lessors brought a suit for the amount against Umesh Chunder Mundul and the other members of the Mundul family. Jogindra Nath Mullick having since died, his widow, Adarmoni Dasi, was substituted in his place in the suit. It was contended by the defendants, among other things, that the rent for 1286 B. S. was barred by time under art. 110, sch. II of the Limitation Act. The Munsif gave the plaintiffs a decree for the whole amount of the claim, his decision on the point of limitation being as follows: " The defendant's pleader urges that this is not a suit for compensation which, according to the ordinary acceptation of the term, means unliquidated damages, whereas the rents in this case consist of ascertained sums; but the definition given in s. 73 of the Contract Act would seem to include everything which a party may recover in consequence of the loss sustained by a breach of contract (*vide* illustration *n*). In this view a suit to recover money with interest due on a registered bond has been held to be governed by art. 116, sch. II of the Limitation Act [*Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1); *Hussain Ali Khan* v. *Hafiz Ali Khan* (2). Then, again, the wording of art. 116 would seem to embrace all suits for the breach of a contract in writing registered, and it cannot be denied that a lease is a contract. If the contract had not been registered, art. 110 would undoubtedly have applied; but, it being registered, the period of limitation is enlarged by the force of the last words of art. 116 under the head—*Time from which period begins to run.* In fact, the case of *Vythilinga Pillai* v. *Thetchanumurti Pillai* (3) has set at rest whatever

* Appeal from Appellate Decree, No. 313 of 1887, against the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 1st of September, 1886, affirming the decree of Baboo Radha Kissen Sen, Subordinate Judge of that district, dated the 28th of March, 1885.

(1) 6 C. 94. (2) 3 A. 600. (3) 3 M. 76.

doubts might have existed regarding the question." On appeal the District Court, after a consideration of the cases relied upon by the [223] Court below, as also of *Prosunno Coomari Debea* v. *Sheikh Rutton Bepary* (1), *Jogjivan Javherdas* v. *Gulam Jilani Choudhri* (2), *Ganesh Krishn* v. *Madhavrav Ravji* (3), *Khunni* v. *Nasir-ud-din Ahmad* (4), agreed with the Munsif on the point of limitation and dismissed the appeal. The defendants appealed to the High Court.

1887 Nov. 30. — APPELLATE CIVIL. — 15 C. 221.

Baboo *Baikant Nath Pal*, for the appellants.

Baboo *Jagut Chunder Banerjee*, for the respondents.

The following judgments were delivered by the Court (O'KINEALY and GHOSE, JJ.):—

JUDGMENTS.

O'KINEALY, J.—This is a suit for rent on a registered contract, and the point for our consideration is whether the limitation is three years under art. 110 of the second schedule attached to Act XV of 1877, or whether it falls under art. 116, compensation for the breach of a contract in writing registered. In the former case the period of limitation would be three years; in the latter case, six years. It has been held in this Court that a suit for a sum certain, that is, a suit as it were on a promise to pay, falls within art. 116, and that view has been followed by the Bombay High Court, and in Madras it has been specifically determined that a suit for rent on a registered document falls within art. 116. Looking, therefore, at the rulings of the different Courts, it seems now difficult to come to any other conclusion than that arrived at by the Judge below. The appeal is dismissed with costs.

GHOSE, J.—I concur in dismissing this appeal. I desire only to say that I have considerable doubt as to whether a suit for recovery of arrears of rent on an agreement in writing registered is a suit for compensation for breach of a contract within the meaning of art. 116 of the second schedule of the Limtation Act. If I were unfettered by authority I should have been inclined to hold that it does not, but that it falls within Art. 110. Having regard, however, to the various rulings of the different High Courts as to the construction to be put upon art. 116, and as to the class of cases falling under it, I do not think I should be justified in differing from the views expressed therein.

K. M. C. *Appeal dismissed.*

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(1) 3 C. 696=1 C.L.R. 577. (2) 8 B. 17. (3) 6 B. 75. (4) 4 A. 255.

1887
DEC. 8.

APPELLATE CIVIL.

15 C. 224.

15 C. 224.

[224] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

SALIGRAM SINGH AND ANOTHER (*Two of the Defendants*) *v.* BABOO RAGHUBARDYAL, MINOR, REPRESENTED BY BUNSI LAL (*Plaintiff*).*
[8th December, 1887.]

Mahomedan Law, Pre-emption—Joint purchase by co-sharer and stranger, Effect of—Co-sharer—Specification of share in a deed of sale, Effect of.

Under the rule of Mahomedan law, if a sharer in an estate alienates his interest to a co-sharer and a stranger, the purchasing sharer by joining an outsider in the purchase forfeits his right as a sharer, and another co-sharer has the right of pre-emption. *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) distinguished.

Held, also, that in the case of a joint purchase made by two persons of shares in two villages, in one of which one of the purchasers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares in the aggregate purchase would not affect the rule. *Manna Singh* v. *Ramadhin Singh* (2).

[Cons., 7 O.C. 22 (27).]

RAGHUBARDYAL was the owner of certain shares in the two villages of Dehiri and Sadikpur, in the district of Gya in Behar. Sewanund, a co-sharer, conveyed under one kobala or deed of sale, and at one entire consideration, the shares which he possessed in both the villages to Saligram and Ramlochun, one taking two-thirds and the other one-third. Saligram was previously the holder of a share in Dehiri, but not in Sadikpur; and Ramlochun had no share in either. On receipt of the letter informing him of the sale, Bunsi Lal, the father and guardian of Raghubardyal, lost no time in asserting his son's right of pre-emption in respect of the shares in the presence of an assembly, and thus observed the *talb nawasibat* of the Mahomedan law. Bunsi Lal then communicated the circumstance to the purchasers, and offered to pay them the actual consideration amount for the shares. On the purchasers declining to accept the offer, Bunsi Lal entered upon the property, and further performed the ceremony of *talbish-had.* Raghubardyal then instituted a suit through his father and [225] guardian to enforce his right of pre-emption. The defendants, purchasers, raised various objections.

The Subordinate Judge decided that, inasmuch as upon the authorities of *Fakir Rawot* v. *Emambaksh* (3), *Farman Khan* v. *Bharat Chandra Shah* (4), *Sheojuttun Roy* v. *Anwar Ali* (5), *Ram Dular Misser* v. *Jhumack Lal Misser* (6), the Mahomedan law of pre-emption applied to the Hindus of Behar, the parties to the suit were governed by that law. The Court was also satisfied that the preliminary formalities prescribed by the Mahomedan law had been complied with, but dismissed the suit on the ground that the plaintiff, or his guardian, had not offered to pay the full consideration for which the defendants had purchased the shares. On appeal, the District Judge disagreed with the lower Court in its finding of fact as to the actual amount of the purchase-money, and relying

* Appeal from Appellate Decree, No. 215 of 1887, against the decree of J. F. Stevens, Esq., Judge of Gya, dated the 23rd of December 1886, reversing the decree of Baboo Kally Prosunno Mookerjee, Subordinate Judge of that district, dated the 26th of Nevember 1884.

(1) 4 C. 831. (2) 4 A. 252. (3) B.L.R. Sup. Vol. 35=W.R.F.B. 143.
(4) 4 B.L.R. F.B. 134=13 W.R.F.B. 21.
(5) 13 W.R. 189. (6) 8 B.L.R. 455=17 W.R. 264.

upon the principle laid down in *Lalla Nowbut Lall* v. *Lalla Jewan Lal* (1) that "the right of pre-emption was founded on the inconvenience, real or supposed, to the original co-sharers of permitting a stranger to join them," and upon a consideration of *Manna Singh* v. *Ramadhin Singh* (2) decreed the claim.

1887 DEC. 8. — APPELLATE CIVIL. — 15 C. 224.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, for the appellants.

Munshi *Mahomed Yusoof*, for the respondent.

JUDGMENT.

The judgment of the Court (WILSON and O'KINEALY, JJ.), so far as is material for the purpose of this report, was as follows:—

The state of facts with which we have to deal is this. The plaintiff owns shares in two villages, Sadikpur and Dehiri; and the third defendant, Sewanund, also held a share in each of the villages. Sewanund, by a kobala, dated the 3rd March 1883, conveyed his shares in both the villages to the first defendant Saligram, and the second defendant, Ramlochun. Of these two, Saligram was previously the holder of a share in Dehiri but not in Sadikpur. [226] Ramlochun had no share in either. The property is in Gya, where the parties reside, and they are Hindus. It is not disputed that the law of pre-emption, borrowed from the Mahomedans, is by custom in force among the Hindu inhabitants of Behar.

The plaintiff brought this suit to enforce against the defendants his alleged right of pre-emption, and he claimed, by virtue of that right, to have the shares in the two villages which Sewanund had sold to Saligram and Ramlochun conveyed to him on his paying the price for which they were sold. The District Judge has found what the actual consideration money was, and has given the plaintiff a decree for pre-emption on payment of that amount. The defendants in second appeal complain of that decree, and have raised several objections on points of law.

It was contended, first, that there was no right of pre-emption at all in the case. It has been settled by the decision of a Full Bench of this Court in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1), that where one sharer in an estate sells to another, a third has no right to come in and claim pre-emption as to the whole or any part of the share so sold. And it is there explained that the object of pre-emption "is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour." The present case is very different. A claim to pre-emption of shares in two villages is resisted on the ground that in one of the two villages one of the two vendees had already a share. Such a case is neither within the terms of the Full Bench decision nor within the principle on which it was based. On the other hand, in a long series of cases, the Sudder Court and the High Court of the North-West Provinces have held that if a sharer in an estate alienates his interest to a co-sharer and a stranger, the purchasing sharer, by joining an outsider in the purchase, forfeits his rights as a sharer, and that another co-sharer has a right of pre-emption—*Sheodoyal Ram* v. *Bhyroo Ram* (3); *Guneshee Lal* v. *Zarant Ali* (4); *Manna Singh* v. *Ramadhin Singh* (2); *Bhawani Prasad* v. *Damru* (5); *Harjas* v. *Kanhya* (6). [227] It is true, as pointed out by the District Judge, that in

(1) 4 C. 831. (2) 4 A. 252.
(3) N. W. P. S. D. Rep. (1860) 53. (4) 2 N. W. P. H. C. 343.
(5) 5 A. 197. (6) 7 A. 118.

1887 Dec. 8. — Appellate Civil. — 15 C. 224.

those cases the right of pre-emption did not arise directly from the Mahomedan law governing Mahomedans, nor, as here, from the same law applied by custom to Hindus, but from a written document, the *wajib-ul-arz*. But in none of the cases was the decision rested upon the special terms of the document. In all of them it turned upon the general nature of the right of pre-emption, which was understood to be pre-emption as known in the Mahomedan law. We have no hesitation in following this series of rulings; and it must be observed that in this case there is an additional complication, for not only was one of the purchasers no sharer in the village of Dehiri, but in Sadikpur both were strangers.

It was contended, secondly, that the defendant, Saligram, is at least entitled to hold such share as, under the purchase, was assigned to him in the village of Dehiri in which he had already a share. We cannot accede to this view. It is true that the kobala declares two-thirds of what was purchased to be for Saligram, and one-third for Ramlochun. But, nevertheless, there was only one transaction, one purchase at one entire consideration of the whole interest sold in both villages. We cannot split this transaction up into several, we cannot say that any particular part of the consideration was the price of two-thirds of the share sold in Dehiri as distinguished from the other one-third in that village, and the whole interest sold in Sadikpur. And this view is supported by the decision of the Allahabad Court in *Manna Singh* v. *Ramadhin Singh* (1) already cited.

K. M. C. *Appeal dismissed.*

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15 C. 227.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

Brojo Nath Chowdhry and others (*Plaintiffs*) v. Birmoni Singh Monipuri (*Defendant.*)* [25th December, 1887.]

Assam Land and Revenue Regulation (I of 1886), *s.* 59—*Rent Suit—Suit for arrears due before Regulation came into force.*

In a suit for the recovery of arrears of rent accrued due before the Assam Land and Revenue Regulation of 1886 came into force, which [228] was instituted on the 7th of July 1886, where it appeared that the plaintiff's name had been previously registered, but that the Chief Commissioner had issued no notification under s. 48 of the Regulation, directing that the registers then in existence should be deemed to be registers prepared under s. 59 of the Rgulation, and that the plaintiff's name had not been registered under the last mentioned section:—

Held, that s. 59 applies to rents accruing due after the Regulation came into force and not to rents already due on the date on which it came into force, and that therefore the suit was maintainable.

In this case the plaintiffs sought to recover rent for the year 1291 at the rate previously paid by the defendant, and for the year 1292 at an enhanced rate, after notice of enhancement had been duly served on the defendant.

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* Appeal from Appellate Decree, No. 1058 of 1887, against the decree of J. Kelleher, Esq., Judge of Sylhet, dated the 14th of March 1887, affirming the decree of Baboo Ashutosh Banerjee, Munsif of Moulvie Bazar, dated the 27th of December 1886.

(1) 4 A. 252.

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The suit was instituted in the Munsif's Court on the 7th July 1886, and one of the objections taken to the suit was that, as the plaintiffs' names had not been registered under the Assam Land and Revenue Regulation (Regulation I of 1886) the suit was not maintainable.

The other issues raised in the case are immaterial for the purpose of this report. The Munsif found as a fact that the plaintiffs' names had been registered in the Collectorate before that Regulation came into force, and that such registration was a sufficient compliance with the provisions of s. 59 of the Regulation. He accordingly held that the suit was maintainable, and gave the plaintiffs a decree for the rent of the year 1291, dismissing the suit on the merits as regards the rent for 1292.

The plaintiffs preferred an appeal against that portion of the decree which dismissed their suit for the rent of 1292, and the defendants filed a cross-appeal against the decree allowing the rent for the year 1291.

The District Judge dismissed the plaintiffs' appeal, holding that the non-registration of the names was a bar to the suit, but did not interfere with the decree of the Court below, inasmuch as the defendants' cross-appeal was filed out of time, although he stated that had there been no such objection to the latter, he would have dismissed the plaintiffs' suit altogether.

The plaintiffs now preferred this second appeal to the High Court.

Baboo *Taruck Nath Palit*, for the appellants.

[229] Baboo *Taruck Nath Sen* and Baboo *Anundgopal Palit*, for the respondent.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

NORRIS, J.—This was a suit brought by the plaintiff to recover rent from the defendant in respect of the year 1291 at the rate previously paid by the defendant, and for the year 1292 at an enhanced rate after notice.

The Munsif gave the plaintiff a decree. Against that decree the defendant appealed; and the lower Appellate Court has reversed the Munsif's decision, holding that the plaintiff's claim is barred by virtue of the provisions of s. 59 of the Assam Land and Revenue Regulation of 1886.

It is admitted that the plaintiff was duly registered under the provisions of Regulation VIII of 1880, and the question is whether, being so registered, his right has been barred by s. 59 of the Assam Regulation of 1886 to which I have referred. Section 59 says: "No person shall be bound to pay rent to any person claiming it as proprietor, lessor, manager, or mortgagee in possession of any estate, unless the name of the claimant has been registered under this chapter." The Regulation came into force on the 1st of July 1886, and the suit was brought on the 7th of July 1886, and all the rent which is sought to be recovered in this suit accrued due before this Regulation came into force.

It is argued by the learned Vakeel for the appellant that s. 59 has no retrospective force, that it does not apply to bar claims for rent due previous to the regulation coming into force.

Section 48 directs the Deputy Commissioner to keep certain registers; and s. 49 says that, until registers are prepared for any tract under s. 48, the Chief Commissioner may direct that any registers kept by, or under the control of, the Deputy Commissioner at the commencement of this Regulation, shall be deemed to be registers prepared under that section. Section 50 makes it obligatory upon certain persons to apply within six

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months for registration. Section 51 enables persons already in possession to apply for registration. So that the only section dealing with persons already registered is s. 49, which, as I have pointed out, enables the Chief [230] Commissioner to direct that any registers already in existence at the commencement of the Regulation shall be deemed to be registers under s. 48. No notification has been published by the Chief Commissioner of Assam under s. 49, directing that registers previously in existence shall be deemed to be registers prepared under s. 48. So that, unless we can see our way to holding that s. 59 does not apply to rent due before the Regulation of 1886 came into force, or else to holding that "registered under this chapter" in s. 59 means registration under this chapter where the chapter has made it compulsory—unless we can hold one of these two things, the plaintiffs' claim to this rent is hopelessly barred.

It is to be noted that there is no provision in this regulation similar to the provision in s. 20 of Bengal Act VII of 1876, which repealed, as far as Bengal was concerned, ss. 1 to 18 of Regulation VIII of 1800. If there had been such a provision, this matter would have been free from all doubt; but as matters stand one has to ask oneself the question, was it the intention of the Legislature to confiscate this rent? Did the Legislature intend that what was due and legally recoverable, as pointed out by my colleague, on the 30th of June 1886, should be hopelessly barred on the 1st of July 1886; and barred because the Legislature has taken no pains to introduce a saving clause equivalent to the provisions of s. 20 of Bengal Act VII of 1876, except so far as s. 49 enables the Chief Commissioner to do an act which would have a similar effect; or because the Chief Commissioner has not chosen to avail himself of the powers conferred upon him. We think that the proper construction to be put on s. 59 is to hold that it applies to rent becoming due subsequently to the Regulation coming into force.

That being our view of the section, we set aside the decree of the Lower Appellate Court, and remand the case to the Judge that he may investigate it on the merits.

The appellant before us must have his costs in both the appellate Courts, that is, the costs already incurred by him.

H. T. H. *Appeal allowed and case remanded.*

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15 C. 231.

[231] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

PRASANNA KUMAR BANERJEE FOR SELF AND AS EXECUTOR TO THE ESTATE OF THE LATE HEM CHUNDER BANNERJEE (*Plaintiff*) *v.* SRINATH DASS AND OTHERS (*Defendants*).* [9th December, 1887.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 153—*Appeals in rent suits—Appeal from order of District Judge.*

In certain rent suits, the amount claimed being under Rs. 100, the question was raised as to whether the plaintiff was entitled to the whole 16 annas of the rent or only to a 10 annas share thereof. Upon this point the first Court gave the plaintiff decrees for the full amount claimed, holding that the question was

* Appeals from Orders Nos. 189, 190, 191 and 192 of 1887, against the orders of C. B. Garrett, Esq., Judge of 24 Pergunnahs, dated the 17th of May, 1887, reversing the orders of Baboo Srinath Pal, Munsif of Diamond Harbour, dated the 20th of July, 1886.

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res judicata. Upon appeal the District Judge held that the question was not *res judicata,* and remanded the suits for trial on the merits. The plaintiff preferred a second appeal to the High Court.

Held, that having regard to the provisions of s. 153 of the Bengal Tenancy Act no appeal lay, as the question was not one relating to title to land or to some interest in land *as between parties having conflicting claims thereto,* nor was it "a question of the amount of rent annually payable by a tenant," these words in the section meaning the total amount of rent annually payable in respect of a holding and not the amount of rent which may be payable to any particular co-sharer in the property.

[Overruled, 17 C. 489 (490) (F.B.)]

These were analogous suits for recovery of arrears of rent for the years 1289 to 1291, and for the first two quarters of 1292. The defendants contended that the claim for 1289 to 1291 was barred by limitation under s. 31 of Bengal Act VIII of 1869, inasmuch as the suits were not brought within six months from the dates of the service of notices of the deposit of rent, and that the claim for 1292 was premature, and could not therefore be maintained, as no rent was due till the expiry of that year.

The suits were instituted on the 28th November, 1885, the amonut claimed in each suit being under Rs. 100, and upon the merits the defendants alleged that the plaintiff was only entitled to a 10 annas share of the rent and not the whole 16 annas claimed.

The Munsif decreed all the suits, holding that the question as to whether the plaintiff was entitled to the whole of the rent [232] claimed or only to a 10 annas' share thereof was *res judicata,* as the same question had been raised and decided in previous suits between the same parties.

The findings on the other issues raised in the case are immaterial for the purpose of this report.

Against that decree the defendants appealed, and upon all other questions, except that of the share of the rent to which the plaintiff was entitled, the District Judge confirmed the finding of the lower Court; but upon the latter point he considered that inasmuch as the decrees by which it was decided that the plaintiff was entitled to recover 16 annas of the rent from the defendants, and not merely 10 annas, had been set aside by the High Court, there was no longer any judgment in existence which operated to make the point *res judicata* between the parties, and he accordingly remanded the cases to the Munsif to record evidence and try that question.

Against that order of remand the plaintiff now appealed to the High Court, and at the hearing of the appeal a preliminary objection was taken —that, having regard to the provisions of s. 153 of the Bengal Tenancy Act, no appeal lay to the High Court from that order.

Dr. *Troyluckho Nath Mitter,* for the appellant.

Baboo *Sharoda Churn Mitter,* and Baboo *Nogendro Nath Chatterjee,* for the respondents.

The judgment of the High Court (Norris and Beverley, JJ.) was as follows:—

JUDGMENT.

These are appeals against four orders of the District Judge of the 24-Pergunnahs, remanding the cases to the Court of first instance to record evidence and to decide, as a fact, whether the plaintiff is entitled to collect a 10 annas' or a 16 annas' share of the rent.

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A preliminary objection has been taken that in these cases a second appeal is barred by the provisions of s. 153 of the Bengal Tenancy Act, the order in question having been made by the District Judge, and the amount claimed in the suit not exceeding Rs. 100.

It is contended that the order of remand has not strictly [233] decided any question at all. But it appears to us virtually it does decide a question. The first Court had held that the question whether the plaintiffs ought to recover 16 annas of the rent had been decided in their favour by a previous decision of the Subordinate Judge. The District Judge, however, has held that that decision was set aside by this Court, and that therefore the matter was not *res judicata*. But it appears to us that this question is not "a question relating to title to land, or to some interest in land *as between parties having conflicting claims thereto;*" nor is it "a question of the amount of rent annually payable by a tenant." We understand these words to mean the total amount of rent annually payable in respect of a jumma or holding, and not the amount of rent which may be payable to any particular co-sharer in the property. That being so, we are of opinion that there is no second appeal in these cases.

We accordingly dismiss these appeals with costs.

H. T. H. *Appeal dismissed.*

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15 C. 233.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

JIANUTULLAH SIRDAR (*Defendant*) *v.* ROMONI KANT ROY AND OTHERS (*Plaintiffs*).
PIR BUKSH MONDUL (*Defendant*) *v.* ROMONIKANT ROY AND OTHERS (*Plaintiffs*).*
[10th December, 1887.]

Evidence Act (I of 1872), s. 13—Custom—Admissibility in evidence of judgments not "inter partes."

In a suit for rent the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21⅝ inches and not one of 18 inches, as claimed by the plaintiff zemindar. Certain decrees obtained by the zemindar against other tenants in the same pergunnah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pergunnah was one of 18 inches.

Held, that such decrees were admissible in evidence under the provisions of s. 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed.

[R., 16 M. 194 (196).]

[234] THE suits which gave rise to these appeals were for recovery of rent on account of the year 1289 at enhanced rates. Originally ten issues were framed by the Munsif, who first proceeded to decide some five issues framed on objections in bar taken to the suits, and having found them in favour of the plaintiffs fixed the trial of the remaining issues on the merits for a subsequent day.

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* Appeals from Appellate Decrees Nos. 1151 and 1287 of 1887 against the decrees of Baboo Dwarka Nath Mitter, Subordinate Judge of Rungpore, dated the 25th of March, 1887, modifying the decrees of Baboo Krishna Dhone Chowdhry, Munsif of Gaibandha, dated the 27th of May 1885.

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One of the latter issues was the following: " What is the length of the cubit current in the pergunnah where the disputed land is situate, and what quantity of land is, according to that measurement, held by the defendants, and of what description?"

The plaintiffs alleged that 18 inches constituted the cubit or *hath* by which the measurement of the land should be made, while the defendants contended that the cubit prevalent in the pergunnah was equal to 21⅝ inches.

Upon this question the Munsif held that the defendants had failed to prove their assertion, and that, therefore, 18 inches must be considered to make up the cubit, that being the standard used by the Government. At the hearing of the suits the proceedings in 21 rent suits instituted against other tenants in the same pergunnah in which the cubit was taken at 18 inches were put in evidence in support of the plaintiff's allegation, and the Munsif gave the plaintiffs a decree, taking 18 inches as the length of the cubit for ascertaining the amount of the land.

The defendants thereupon appealed, and upon this point the Subordinate Judge disagreed with the finding of the Court below, and gave the plaintiffs a decree for rent of the number of bighas held by the defendants measured with a cubit of 21⅝ inches.

The plaintiffs thereupon preferred a second appeal to the High Court and the appeal came on to be heard before a Bench consisting of PRINSEP and AGNEW, JJ., who delivered the following judgment, remanding the cases:—

" The Subordinate Judge, in dealing with the question as to the length of the pergunnah *hath*, has stated that the plaintiff has not adduced any evidence on the point, though evidence of a satisfactory nature must be in his possession. As shown to us by Mr. *Evans* for the appellants, there were five witnesses who gave evidence on this point, and there is also the evidence of [235] 21 decrees which were passed against tenants, on the finding that the current *hath* was that now claimed by the plaintiff. These decrees would be evidence under s. 13 of the Evidence Act.

" It is next shown that the Subordinate Judge has incorrectly referred to the evidence of Ram Krishna; one of the plaintiff's witnesses, in that he describes this witness as stating that the *hath* of 18 inches came into vogue only during the last ten or twelve years, whereas the witness, in almost the next sentence of his deposition, has stated that that *hath* was also current before. We must, therefore, return these appeals to the lower appellate Court for trial with reference to this evidence. Costs to abide the result."

Upon the remand the Subordinate Judge stated that he had not taken the 21 decrees into his consideration, as he considered they were not admissible in evidence upon the authority of the Full Bench Ruling in *Gujju Lall* v. *Fatteh Lall* (1), but as the High Court had stated that they were admissible, he took them into consideration together with the evidence of the five witnesses referred to in the order of remand, and found, though not without some hesitation, that they turned the scale in the plaintiffs' favour, and that the pergunnah *hath* must be taken to be one of 18 inches long. He accordingly confirmed the Munsif's judgment upon this point.

(1) 6 C. 171.

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The defendants now appealed against this judgment, and the decree based thereupon to the High Court.

The Advocate-General (The Hon. *G. C. Paul*), and Baboo *Ishur Chunder Chuckerbutty*, for the appellants.

Mr. *Evans* and Baboo *Taruck Nath Palit*, for the defendants.

The points raised on the appeal are sufficiently stated for the purpose of this report, in the judgment of the High Court (NORRIS and BEVERLEY, JJ.), which was as follows:—

JUDGMENT.

These cases come before us on second appeal after having been once remanded by this Court with certain directions.

It appears that upon the first hearing the Subordinate Judge, reversing the decision of the Court of first instance, which had given the plaintiff a decree, refused to receive in evidence [236] 21 decrees which had been considered by the Munsif. He based his refusal to receive these decrees in evidence upon the authority of a Full Bench case, referred to by the Advocate-General [*Gujju Lall* v. *Fatteh Lall* (1)]. The Subordinate Judge has now, under the directions contained in the remand order, taken these decrees into consideration.

It is urged before us on second appeal, first, that in law the lower appellate Court had no right to take these decrees into consideration; and, secondly, that they really afford no proof in support of the point to prove which they were tendered and received.

With regard to the first point, we have to observe in the first place that we consider it extremely doubtful whether we can interfere with the remand order. In the second place, we think that these decrees were admissible in evidence under the provisions of s. 13 of the Evidence Act; and being admissible, that the Subordinate Judge was well warranted in coming to the conclusion that they afforded some evidence in corroboration of the plaintiff's case. The case made by the plaintiff was that the tenures held by the tenants, against whom the 21 suits were brought, were to be measured by a cubit of 18 inches; in other words, that the customary bigah of the pergunnah was a bigah of so many square yards. The contention in the written statements of the defendants who appeared was that they did not hold the quantity of land said to be in their possession, and the ground upon which they made this allegation was, as appears from the proceedings, that the landlord ought not to measure with a cubit of 18 inches, which would give a bigah of so many square yards, but that he ought to measure with a cubit of 21 odd inches, which would make a bigah of so many more square yards, that is to say, that if the customary measurement was applied to the land in respect of which the claim for rent was made by the plaintiff, it would be found that the amount due is not so much as is claimed.

It appears that in these 21 suits the tenants consented to use what the landlord claimed to be the customary [237] measurement, upon the understanding that, if it should afterwards be found that the customary measurement was as they claimed it to be, namely, with a cubit of 21 odd inches, the decrees should be drawn up in accordance with that finding. They failed to show that any such measurement was in existence; and we cannot but think that, under these circumstances,

(1) 6 C. 171.

these decrees do furnish evidence of "particular instances in which a custom was claimed."

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The two grounds of appeal taken by the learned Advocate-General therefore fail.

The appeals must consequently be dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 237.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

RASH BEHARI MUKERJEE AND ANOTHER (*Plaintiffs*) v. PITAMBORI CHOWDHRANI AND OTHERS (*Defendants*).* [5th January, 1888].

Bengal Act, IX of 1880, *ss.* 50-71—*Cesses—Rent-free lands—Notice.*

Plaintiffs sued to recover arrears of road and public works cesses on account of certain rent-free land, claiming double the amount under s. 58 of the Cess Act (Bengal Act IX of 1880). It was found that no notice of the valuation had been published as required by s. 52 of the Act, and it was held by the lower Court that the plaintiffs were therefore not entitled to recover double the amount under s. 58.

It was then contended that they were at any rate entitled to recover the amount of the cesses with interest under s. 62.

Held that the latter section did not give the holder of the estate or tenure a right to recover the cesses payable under s. 56 before publcation of notice, and that the plaintiffs were therefore not entitled to a decree, and that their suit must be dismissed.

THE plaintiffs sued to recover arrears of road and public works cesses for the years 1289—1291 on account of certain rent-free land known by the name of Sarisa Hat, and claimed to be entitled to recover double the amount of the cesses under s. 58 of the Cess Act (Bengal Act IX of 1880).

The defendants contended that as they did not receive any [238] benefit from the land for which the cesses were claimed, except the compensation known as *sayer* from the Government, they were not liable to pay the cesses, and they further alleged that no notices of the assessment or demand of the cesses had been served as required by law.

The Munsif held that there was nothing in the Act to exempt lands of the description in suit from the payment of cesses, and that the defendants were bound to pay the cesses, as the land had been assessed and the plaintiffs in whose zemindary it was situate had paid the cesses for the period in respect of which the claim in the suit was made; but inasmuch as he found that no notices had been served, he held that the plaintiffs were not entitled to recover double the amount of the cesses.

He accordingly gave them a decree under s. 62 of the Act for the cesses with interest at 12½ per cent. and the costs of the suit.

The defendants appealed, and the District Judge, confirming the finding of the Munsif as to the non-service of the notices, held that under s. 56 of the Act the plaintiffs were not entitled to recover the cesses

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* Appeal from Appellate Decree No. 545 of 1887, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 10th of December, 1886, modifying the decree of Baboo Sree Nath Paul, Munsif of Diamond Harbour, dated the 1st of March, 1886.

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at all. He accordingly reversed the decree of the Court below and dismissed the plaintiffs' suit, but without costs.

The plaintiffs then preferred this second appeal to the High Court.

Baboo *Ashutosh Mookerjee* and Baboo *Bipro Das Mookerjee*, for the appellants.

Baboo *Unnoda Pershad Banerjee*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

BEVERLEY, J.—We are of opinion that the decision of the lower appellate Court in this case is correct, and that this appeal must fail.

The plaintiffs sued the defendants for arrears of road and public works cesses alleged to be due on account of certain rent-free land, and they claimed to recover double the amount due under s. 58 of the Cess Act (Bengal Act IX of 1880). The first Court found that, inasmuch as notice of the valuation had not been published in accordance with s. 52, the provisions of s. 58 were [239] not applicable to the case; but that, although the plaintiffs were not entitled to recover double cesses under that section, they were entitled to recover the cesses with interest under s. 62 of the Act. On appeal by the defendants the District Judge has held that under s. 56 the plaintiffs are not entitled to recover the cesses at all.

It is contended before us that the Judge is wrong, and that the plaintiffs are entitled to recover the cesses under s. 62 of the Act. It becomes necessary, therefore, to examine the provisions of the Act on this subject.

Chapter IV of the Act (ss. 50—71) deals with the "valuation and assessment of lands held rent free and the payment and recovery of cess in respect thereof." After providing in what estates or tenures rent-free lands shall be included for the purposes of the Act, s. 51 proceeds to say that the holder of an estate or tenure in which rent-free lands are included shall be bound to include such lands in his return, and to pay the cesses thereon at half rates. Section 52 then provides that, on publication of the valuation-roll of such estate or tenure, a notice to the owners and holders of such lands with extracts from the valuation-roll shall be published in a prescribed form. Section 53 provides for objections to the valuation by the holders of rent-free lands. Sections 54 and 55 provide for the issue of notices in certain cases by the holder of the estate or tenure in which the rent-free lands are included. Then s. 56 says: "After publication of the extracts from the roll as provided in s. 52, and in cases in which publication of the notice mentioned in s. 54 is required, after publication of such notice, and not otherwise, every owner and holder of any rent-free land included in such extracts, and every person in receipt of the rents and profits or in possession and enjoyment of such land shall be bound to pay year by year to the holder of the estate or tenure, in the return of which such land has been included, the amount of the road cess and public works cess which may thereafter become due to such holder, calculated on the annual value of such land as entered in such extracts, or on any other annual value which may have been determined by the Collector under s. 53, at the full rate or rates which may have been fixed under [240] this Act for the levy of such cesses respectively in the district generally for the year." From this section, therefore, it is clear that it is only after publication of the notices required by ss. 52 and 54, *and not otherwise*, that the owner or holder of rent-free lands becomes liable to

pay the cesses assessed thereon; and it is no more than consonant with reason that such owner or holder should not be called on to pay until he has had notice of the amount assessed upon his lands and an opportunity of objecting to that assessment.

Omitting s. 57 as immaterial to the present case, s. 58 goes on to lay down that, if an instalment of the cess is not paid by the holder of the rent-free lands within one month from the date on which it is due, the holder of the estate or tenure may recover double the amount due with interest and costs, provided always that he has paid to the Collector the cesses due from him under s. 51. Sections 59 and 60 relate to supplementary returns, and are not material in the present case. Then come two important sections, which prescribe in what cases the provisions of s. 58 relating to the levy of double cesses in case of default shall be applicable. Section 61 says that those provisions shall be applicable to every amount which, *as provided in s.* 56, may become payable *after the fulfilment of the requirements of ss.* 52—54.

Section 62, on the other hand, says that the provisions of s. 58 shall not be applicable to any amount that may have become payable (under Bengal Act X of 1871 or under this Act) *before the fulfilment of the requirements of ss.* 52—54. But the section goes on to say that such amount may be recovered with costs and interest, provided that the owner of the estate or tenure has paid the cesses due by him to the Collector.

Now it is contended before us that the latter clause of this section gives the holder of the estate or tenure a right to recover an instalment of cess *payable under s.* 56 even before publication of notice. But this is not so, and to hold that it is so would be to say that s. 62 contradicts s. 56. Section 56 distinctly says that cesses only become payable under that section after publication of the notices required by ss. 52 and 54, and s. 62 would contradict the provisions of that section if it said that such cesses could be realised before publication of the notices.

[**241**] To understand the latter part of s. 62 aright it must be remembered that under Bengal Act X of 1871 rent-free lands were made liable to pay the cess, though the elaborate provisions regarding the assessment of such lands contained in the present Act are not to be found in that Act. By s. 3 of the present Act all cesses imposed under the previous Acts are to be deemed to have been imposed under this Act. It is clear, therefore, that an instalment of cess might be due under the Act without being due under s. 56. It might be due under a former assessment, and before any proceedings were taken under Chap. IV of this Act. Such an instalment, s. 62 says, may be recovered in the ordinary way, but the special provisions of s. 58 (as to damages for default) will not apply to it. Or, again, we may suppose the case of a new assessment or re-valuation of the estate or tenure including the rent-free lands. Section 56 provides that the new rates shall not become due till after the due publication of the required notices; but under s. 62 (read with s. 56), the holder of the estate or tenure could recover the cess at the old rates.

In the present case, it is not contended that any cess has become payable otherwise than in pursuance of the provisions of s. 56 of Bengal Act IX of 1880; and we think the Judge is right in holding that, the required notices not having been published, no cess has become payable under that section.

The Judge remarks that the case is a hard one for the zemindar, as it is not his duty either to serve the notices or to preserve the evidence of

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the service; but the Judge has apparently overlooked the provisions of s. 54, which requires notices to be published by the holder of the estate as well as by the collector in cases like the present.

The appeal must be dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 242.

[242] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

ASHANULLA (*Objector*) *v.* THE COLLECTOR OF DACCA (*1st Party*) AND RAJENDRA NARAIN ROY, BAHADUR, AND OTHERS (*Claimants*).* [5th January, 1888.]

Limitation Act. 1877. *s.* 5, *and sch. II, art.* 156—*Appeal—Review, Exclusion of time taken up with—Practice.*

The mere presentation of an application for review, where it is not shown that the grounds therefor are reasonable and proper is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed.

[F., 1 L.B.R. 313 (314); R., L.B.R. (1893—1900) 204 (205); 2 C.W.N. 461 (462): 3 C.L.J. 545=10 C.W.N. 986=33 C. 1323; 100 P.R. 1910=43 P.L.R. 1911=8 Ind. Cas. 1156.]

THIS was an appeal filed on the 1st December 1886 against the decree of the District Judge of Dacca in an apportionment case under the Land Acquisition Act X of 1870, dated the 26th June 1886.

The land, the subject of the apportionment case, belonged to a *shikmi* tenure formerely held by one J.P. Wise, and was registered in the Collector's office under Act XI of 1859.

The pergunnah was purchased by Nawab Ashanulla Khan at an auction sale held for arrears of rent; and the purchaser claimed to be entitled to the whole of the compensation awarded by the Collector. The other claimants, the talukdars, objected to the purchaser receiveing any of the compensation money on the ground that he had not taken any steps to avoid their under-tenures. The District Judge held that the objection was a good one, and directed the compensation money to be divided amongst the talukdars, and passed a decree to that effect on the 26th June, 1887.

On the 7th September 1886, the Nawab presented a petition for review of the judgment of the District Judge; this application was on the 17th November 1886 refused.

It appeared from a perusal of the grounds on which this review was sought for that the matters relied on were in reality grounds for an appeal, and not of review.

[243] On the 1st December 1886, the Nawab filed his appeal against the decision of the District Judge, dated the 26th June 1886, the appeal being admitted subject to any objection that might be taken at the hearing as to the appeal being out of time.

At the hearing Baboo *Doorga Mohun Doss*, for the respondents, objected that the appeal was out of time.

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* Appeal from Original Decree, No. 315 of 1886, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 26th of June 1886.

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Baboo *Kuloda Kinker Roy* for the appellant contended that the time taken up by his application for review should be excluded in calculating the period of limitation.

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and TOTTENHAM, J.) was delivered by

PETHERAM, C. J.—We think that this preliminary objection must prevail. The objection is that the appeal has been filed too late. The decree was dated the 26th June 1886, and the appeal was filed on the 1st December of that year. The limitation provided for filing such appeals is 90 days, subject to the proviso in s. 5 of the Limitation Act. That proviso is: "Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period."

The ground upon which the appellant seeks to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed time is that he says that on the 7th September 1886, he presented an application for review, that the application was not refused until the 17th November following, and that his time having been taken up by that application the time for appealing was thereby extended.

If we were shown that there were any good grounds for the review, or that the application was, under the circumstances, a reasonable and proper one, although it was eventually refused, we might think that the fact that he was prosecuting the review was a reason why we should be satisfied that there was sufficient ground for his not presenting the appeal within the time limited. But in this particular case we are not shown, in the first instance, that there were any grounds for a review, for when we come to examine the grounds of the application for review we find [244] that they are all grounds of appeal, and none of them a ground for review; and, therefore, if we were to hold that the presentation of an application of this kind was a sufficient ground for not presenting the appeal within time, we should have to hold that the presentation of every application for review, whether it were groundless or unreasonable, or whether there was anything in it or not, in itself extended the time for preferring the appeal. In our opinion it is impossible to hold anything of the kind. We think that where it is not shown that there were reasonable grounds for making the application for review, the mere presentation of it is not a reasonable or sufficient ground for not presenting the appeal within time, and therefore this preliminary objection must be given effect to and this appeal dismissed with costs.

T. A. P. *Appeal dismissed.*

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Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

IN THE MATTER OF ACT XV OF 1859, &c.
IN THE MATTER OF D. H. R. MOSES. [20th January, 1888.]

Patent—Act XV of 1859, s. 24—Licensee, Application by, under s. 24 of Patent Act—Petitioner under Patent Act and licensee having no separate interest.

A licensee under a patent cannot, as between himself and the patentee, challenge the soundness of the patent during the continuance of his license.

Case in which the petitioner on the record in a proceeding under s. 24 of Act XV of 1859 was found to have had no real interest in the matter apart from that of the licensee; and in which the petition, having been taken to be in reality that of the licensee, was dismissed accordingly.

THIS was a rule, obtained on the 26th May 1887, on the application of one David Hay Ralph Moses, calling upon Walter Thomson and James Mylne to show cause why the Court should not declare that they had not acquired any exclusive privilege in respect of an alleged invention or new application for simple and cheap machinery for expressing sugarcane juice described in a certain specification dated 28th June 1874, and amended specification of the 18th March 1882; and why any pretended or asserted exclusive privilege acquired by them should not be revoked on [245] the grounds—(*a*) that the alleged invention was not a new invention within the meaning of the Patent Act of 1859; (*b*) that the said Walter Thomson and James Mylne were not the true inventors; (*c*) that their petition and declaration of the 6th January 1874, and subsequent petition and declaration of 4th November 1881, relating to the said alleged invention and the original and amended specifications and declarations, contained wilful and fraudulent misstatements.

The petition on which the above rule was obtained purported to have been made, and was verified on information and belief (although the name of no informant was therein set out), by "David Hay Ralph Moses of Benares, temporarily residing at No. 6, Humayon Place, in the town of Calcutta."

In showing cause against the rule James Mylne filed, on the 27th October, 1887, an affidavit, in which he alleged that the application was not the *bona fide* application of the said David Hay Ralph Moses, but was in truth and in fact the application of one Neil Fox, who was, and had been for some years, a licensee under himself and Thomson for the manufacture, and sale, and hiring out of mills made according to the exclusive privilege belonging to himself and Thomson; and that the said Neil Fox had in 1885 or 1886 complained that his profits as such licensee had been curtailed by persons infringing such exclusive privilege, and against whom he (Fox) had claimed protection by the patentees; and that on their refusal to protect him the said Neil Fox had applied to the patentees for compensation for the loss of profit he had sustained, and had threatened to attack such exclusive privilege unless he was protected as aforesaid; and that the said patentees had declined to do anything. The deponent (Mylne) further alleged that the application was made in fulfilment of the threat last referred to; and that Messrs. Watkins & Co., the attorneys on the record for the petitioner, were the attorneys instructed by the said Neil Fox, and were in fact instructed by him.

Subsequently to the hearing of the argument of counsel on this rule Mr. Moses was orally examined, and stated in chief that he was a coolie contractor, having his place of business at Benares; that his interest in the matter was that he since 1886 was desirous of introducing into the market a sugar mill made by one [246] Rogers, but which was kept out of the market by reason of the patent obtained by Thomson and Mylne; that he had not seen Roger's mill, but it had been explained to him by the said Neil Fox; that the petition was made on information furnished to him by his attorneys; that Fox was the original mover in the matter and had introduced him to the attorneys; that he (Moses) had paid Rs. 1,000 to Fox as costs, there being an arrangement that after the legal proceedings were over Fox and himself and Rogers should square accounts, equally dividing the costs among them.

On cross-examination he stated that he had known Fox six or seven years; that Fox had told him about Roger's mill; that he first heard of legal proceedings being taken in April 1887; that Fox had told him that he was working up the case, but had said that he had been advised that he was debarred from moving the Court under the Patent Act; that he (Moses) then volunteered, having an interest in the matter, to make the present application; that he had asked for an indemnity for costs, but that he had not obtained one; that he had not seen Messrs. Watkins & Co. since May 1887 with regard to the present application, nor had he communicated with them on the subject.

Mr. *Woodroffe*, Mr. *Pugh*, Mr. *Phillips* and Mr. *Evans*, in support of the rule.

Mr. *Hill*, Mr. *Allen* and Mr. *Stokoe* to show cause.

Mr. *Woodroffe*.—There are three preliminary objections to the hearing of this application, *viz.*, (*a*) that the question of novelty is *res judicata;* (*b*) that the application is barred under the provisions of art. 178 of the Limitation Act; and (*c*) that the real applicant is a licensee.

[The case having been decided on the third objection alone, the arguments on the first and second objections are not reported.]

The right which is given to a subject to make such an application as the present must be reasonably construed; the application is not made by Moses, but is in reality that of Fox. There is no reply made to Mylne's allegation on this point. Fox is a licensee, and a licensee cannot dispute a patent—*Clark* v. *Adie* (1).

[247] *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) shows that the proceeding cannot be taken in the name of Moses.

Mr. *Hill*, *contra*.—Moses had an interest; he had the same interest as every other member of the public. [PETHERAM, C.J.—He has no interest capable of being valued.] The Act does not say that that is necessary. Besides this, he had a special interest, inasmuch as there were other sugar machines which he wished to push forward, but which were prevented from being used by reason of the present patent.

In an action for royalties contracted to be paid under a license the licensee cannot dispute the patent having had the benefit of the consideration; but there is no authority to the effect that he cannot take proceedings to set aside the patent altogether as a fraud on the public. There are two wholly independent relations existing between the patentee and the licensee—one created by the contract between himself and the patentee,

(1) L. R. 3 Ch. D. 134 (142)=on appeal L. R. 2 H. L. 423.
(2) 4 De G. F. & J. 126.

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and the other created by the patentee obtaining the patent. The existence of the former relation does not affect the right of the licensee to put an end to the latter, nor will he by so doing get rid of his liability to pay royalties under the license. Moreover the licensee may put an end to the relation created by his contract with the patentee, and he has done so in this case —*Neilson* v. *Fothergill* (1) and *Lawes* v. *Purser* (2). As regards Moses' right to apply the case of *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) has no application. That was in reality a suit by a hostile Steam Boat Co., and the man who did bring the suit had imposed upon the Court; there is nothing of that kind here.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

PETHERAM, C.J.—This is a proceeding under s. 24 of Act XV of 1859 for the purpose of obtaining a declaration that no exclusive privilege to manufacture sugarcane mills according to a specification has been obtained under a patent dated 10th February 1874. The rule for the purpose of this application was obtained in the month of May last, and was returnable [248] within twelve days from date of issue, but from that time the matter has, for various reasons, stood over until the present time.

The patent in respect of which this enquiry comes before us is, as I said just now, dated the 10th February 1874, and consequently it will expire on the 10th February 1888, that is to say, in about three weeks from this date, so that, in case there is no application for the renewal of this patent, the specification under enquiry will come to an end in three weeks, and the whole of this enquiry and the whole of the time and money which has been spent upon it will have been useless, unless the consequences of the enquiry were for some reason one which would not be affected by the expiration of the patent.

The matter coming before us in that way, three preliminary objections are taken by Mr. Woodroffe to our going into the enquiry, for the purposes of the Act, to ascertain whether this is a valid patent by reason of want of novelty, or whether the specification itself is so by reason of the provisions of the Act not having been complied with.

The preliminary objections which Mr. Woodroffe has taken are—first, that the matter is *res judicata* in the sense that there has been before this another application of the same kind in respect of this very patent which was decided in favour of the patentee, and that there has been a second trial in which this matter was in issue, and was also decided in favour of the patentee. The second objection is that the person who appears upon this record as the petitioner is not the petitioner at all, and that his name has only been used for the purposes of the petition, which has been presented in the interests of and really by a gentleman of the name of Neil Fox, who is the person actually interested in the matter, and that the petition is really his petition, and that Mr. Neil Fox is not in a position to institute these proceedings and to carry them through, because he is the licensee of the patentees here. He holds a license from them under which he manufactures the very machines in question, and, therefore, so far as the petition is concerned, he is estopped from denying the validity of the patent. The third and last objection which was taken

(1) Webster's Patent Cases, 290. (2) 6 El. & Bl. 930 (3) 4 De G. F. & J. 126.

by Mr. Woodroffe is that this proceeding is barred by limitation, such an application as this being within the 178th [**249**] article of the second schedule of the Limitation Act and the time beginning to run from the date when the patent was granted.

We do not think it necessary to say anything whatever with reference to the first and third of these objections. They are objections on which a great deal might be said on either side, but we do not think it necessary to express any opinion as to the law with reference to them or as to the validity of those objections with reference to this case, because, in our opinion, the second objection taken by Mr. Woodroffe, coupled with the evidence which we have had before us, as to the nature of the interests of the various parties to this application, is fatal to the further maintenance of this application.

Mr. Woodroffe undertakes, in the first instance, to show that this application is really an application by Mr. Neil Fox, and that that being so he is precluded, by his position as licensee of the invention, from challenging the soundness of the patent, and, in support of that view, he cites the case of *Clark* v. *Adie* (1). That was a case in which Mr. Clark was attempting to challenge the patent which had been obtained by Mr. Adie and Mr. Clark was in the same position which, Mr. Woodroffe alleges, Mr. Neil Fox occupies in this case; in other words, he had agreed with the patentee to manufacture machines which were the subject of the patent under a license from him, and to pay a royalty for all such machines, the consideration for the royalty being that the patentee agreed with the licensee that he would take no proceedings for the infringement of the patent; and in that case the Lord Chancellor uses these words: "The appellant is a licensee who has taken a license to work a patent granted to the respondent Mr. Adie, a patent which is dated the 30th October 1866, and which subsequently became subject to a disclaimer and memorandum of alteration by Mr. Adie of 10th August 1870. Therefore as between the appellant, the licensee, and the respondent Mr. Adie, the patentee (whatever strangers might have to say as to the validity of this patent) the question of validity must be taken as that which the appellant is unable to dispute. So far as he is concerned, he must stand here, admitting the novelty of the invention, admitting its utility, and [**250**] admitting the sufficiency of the specification." These words of Lord Cairns are perfectly general as to the position of a licensee. He there states the law to be, that a person who occupies that position and has undertaken to manufacture machines as being the subject of an invention which has been patented, and so to make a profit out of the patent, must be taken as having admitted the validity of the patent, and as being a person who cannot, as between himself and the patentee, dispute the validity or novelty of the invention or any other circumstances which go to make a valid patent.

Therefore it seems to us that this case establishes the position, and that is what we should have expected it to do, because it does not seem there could be any doubt what the law would be, that a person who occupies that position and makes a profit out of the patent cannot afterwards, as between himself and the patentee, say that this thing is invalid as against the world. So that, taking the law from that case, it follows that if Mr. Woodroffe succeeds in showing that this is a proceeding instituted by Mr. Neil Fox, and for his benefit, and if he establishes that Mr. Fox is a

(1) L. R. 2 H. L. 425.

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license of this patent under the patentees, who are the respondents in this rule, he is precluded from questioning it, and that therefore this rule must be discharged on that ground.

Several cases have been cited by Mr. Hill on the other side, but what those cases deal with is the question of the rights and powers of a licensee after the license has expired, or when it has been repudiated, or when it has terminated in any way; and what they have decided is this that, although a man may hold the position of a licensee at one time, if that license has expired by effluxion of time, or has come to an end for any reason, he is at liberty to challenge the patent. But in this case we do not think that these authorities have any application, and for this reason, that both Mr. Mylne and Mr. Neil Fox himself, in the affidavits filed in this case, swear that at the time when these proceedings were instituted he, Mr. Neil Fox, held a license to work this patent. Therefore we have his own statement and the statement of one of the patentees that this license was existing at that time, and as he only could have terminated it, and has not done so, it is clear that when this proceeding was [251] instituted Mr. Neil Fox did hold the position of licensee, and if it appear that this proceeding is his it must fail for that reason.

The person who appears as the petitioner is a Mr. Moses, and it was apparent from the record itself, and also from the affidavits and from the admissions made to us by the counsel for the petitioner, that it was doubtful whether Mr. Moses had any real interest in the matter, and whether it was not Mr. Neil Fox who was, as a matter, of fact, really interested in it. Fortunately Mr. Moses has been called, and he has told us his own story, and having heard his story I am bound to say that he has on the whole stated it with candour. It does not seem to me that he has concealed any of the real facts and circumstances from us; and having heard him, and believing his story, I have not the slightest doubt that this application is really an application for and on behalf of Mr. Neil Fox, and that Mr. Moses has nothing to do with it, except in the matter of costs. The story which Mr. Moses tells us is a straightforward one. He says: "I am a coolie contractor. It was my intention to extend my business, and having heard from Mr. Neil Fox that there was a possibility of sugaracane mills coming into the market which would be successful as a rival to the sugarcane mills of Messrs. Thomson and Mylne, I told him that I should like to add sugarcane mills to the rest of my business." Some months afterwards Mr. Moses heard that Mr. Fox had taken these proceedings, that he had retained solicitors, that he had got together information, and that the matter was proceeding; but he also heard that it was not convenient that the proceedings should go on in the name of Mr. Neil Fox, because he was the licensee, and thereupon Mr. Moses says that he at once volunteered that his own name should be used. Now, I said just now, I thought Mr. Moses was candid in giving his account of the circumstances, but I do not think that remark is quite applicable to this statement of his, because it is doubtful whether Mr. Moses at once volunteered that his name should be used. Having regard to the nature of the interest he was to have in the patent, and having regard to the fact that he had never seen Mr. Roger's sugarcane mill, it does not seem likely that he would have volunteered the use of his name. It seems more likely that [252] the suggestion that his name should be used came from some one else. However, in the result, he did allow his name to be used as the petitioner. He also said that he was to find a portion of the expenses, and he did contribute Rs. 1,000 to the expenses by a cheque on the Delhi and

London Bank. However that may be, the fact still remains that Mr. Neil Fox was the person who was really interested in the matter, who had instituted these proceedings in pursuance of a threat which he had made some time before, and he was the person who took the most active part altogether; and even supposing that Mr. Moses and Mr. Rogers had some interest in this matter, and were under some agreement with Mr. Fox by which the profits, if there were any, were to be shared between them all, still the fact that they associated Mr. Fox with them in this matter is in itself sufficient to make it impossible that this proceeding could succeed, because as to a third of the interest in this venture it belongs to a person whose mouth is shut and who cannot challenge this patent. Under these circumstances we must deal with this application as if Mr. Fox's name appeared as the petitioner, at all events jointly with Mr. Moses, and if we do so, it will be clearly our duty, within the doctrine of the case of *Clark* v. *Adie*, to say that this petition could not be maintained, because one of the petitioners and the most active of them being a licensee his mouth was closed in such a way that he was not in a position to dispute the validity of the patent. Under these circumstances, as I said before, I think we must hold, at all events, that—Mr. Neil Fox, who was interested in this matter as a joint petitioner with the person whose name appears on the record as the petitioner, being a licensee and as such is estopped from challenging the validity of the patent—this rule must be discharged with costs on scale No. 2.

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One other word as to the advisability of our taking the course we have done. I have to say that we do this, because, whatever the merits may be, and whether this is the best patent or whether this invention has any novelty, and whether this is a patent which might have been got rid of years ago, all these matters stand where they were, and no harm is done. This patent will come to an end in three weeks' time, and the paten [**253**] tees have put it on record that they have no intention of making an application to renew it. This rule, therefore, as I said before, will be discharged with costs.

Rule discharged.

Attorneys for the applicant: Messrs. *Watkins & Co.*

Attorneys for the patentees: Messrs. *Sanderson & Co.*

T. A. P.

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ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SURENDRO KESHUB RAY (*Plaintiff*) *v.* DOORGASOONDERY DOSSEE AND ANOTHER (*Defendants*).*

APPLICATION OF SARODAPERSAUD SOOR. [13th February, 1888.]

Management of estate by the Court—Summary enforcement of contract made by the Court—Izarah lease—Lessee, Application by, though no party to the suit—Application by a person not a party to a suit.

A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be.

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* Suit No. 402 of 1884.

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Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit under an order in which the Court had derived its power of management.

Case in which the Court passed summarily such an order on the application of a lessee not a party to the suit in which the order completing the agreement for lease had been passed, and at a time when such suit was no longer in existence.

[D., 36 C. 52 (56)=128 C.W.N. 1023=1 Ind. Cas. 470.]

SUMMONS before a Judge in chambers, dated 9th January, 1888, issued at the instance of one Sarodapersaud Soor, requiring one Ranee Doorgasoondery Dossee to show cause why a certain izarah granted to him for a term of five years in terms of an offer made by him and accepted by the Receiver of the Court should not be forthwith completed, and the draft thereof submitted to the Registrar for approval in terms of a certain order dated 16th September, 1886; and why certain Government Securities for Rs. 20,000 deposited by him with the said Receiver as part security for the performance of the covenants contained in the said izarah should not be retained by the said Receiver pending the settlement of the said izarah and the execution thereof by the said Ranee Doorgasoondery Dossee, or in the alternative why the said Government Securities should not be [**254**] made over by the said Receiver to the Bank of Bengal for safe custody pending the completion of the said izarah, and why the said Government Securities should not thereafter remain in the custody of the said Receiver or of the said Bank, as the case may be, during the term of the said izarah, to be dealt with only subject to the order of the Court.

The facts were as follows: The suit in which this summons was obtained was brought by the plaintiff to establish his right to a share in the property of the late Bejoy Keshav Roy, and in it the Receiver of the Court was appointed Receiver of the property, the subject-matter of the suit. On the 15th August, 1885, a decree in such suit was passed in favour of the plaintiff.

On the 16th September, 1886, an order was made in the suit which amongst other matters directed that the Receiver should be at liberty to accept an offer made by Sarodapersaud Soor for an izarah lease of all the properties appertaining to the estate of the late Bejoy Keshav Roy (other than the family dwelling-house and Baitakhana) for a term of five years from the date of Pooneah in the month of Assur 1293 to the date of Pooneah in the month of Assur 1298 at an annual rental of Rs. 75,000; the order further directing that all necessary parties as the Registrar should direct should join in the said lease, and that the Registrar should approve of the said lease and execute the same in the name of the plaintiff and the infant defendant, and in the name of the defendant Doorgasoondery Dossee, the widow of Bejoy Keshav Roy, in the event of her refusing to execute the same. This offer was accepted by all the parties to the suit.

On the 18th September, 1886, Sarodapersaud deposited with the Receiver Government Securities to the amount of Rs. 20,000 as security for the due performance of the covenants of the said izarah, and paid to the Receiver Rs. 20,000 on account of the said izarah rent for the current Bengali year; whereupon the Receiver granted to him amulnamahs addressed to the tenant of the property authorizing the collection of rents by the said Sarodapersaud. Sarodapersaud entered into possession under his lease, and paid rent to the Receiver.

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On the 27th April, 1887, the appellate Court reversing the decree of the 15th August, 1885, dismissed the suit and directed [255] the discharge of the Receiver on the passing of his accounts, the result of this decree of the appellate Court being that the defendant Doorgasoondery Dossee was declared entitled to the property of her late husband.

On the 28th December, 1887, the Receiver made over the estate to Doorgasoondery Dossee and gave notice to the tenants of the estate of his having done so, referring them in all matters relating to the estate to the defendant Doorgasoondery Dossee.

Up to this last date the izarah lease had not been completed, notwithstanding numerous applications made by Sarodapersaud for that purpose.

On the above facts the summons of the 9th January, 1888, set out above, was issued at the instance of Sarodapersaud.

The correspondence set out in the affidavits used on the hearing disclosed that the delay occurring in the completion of the lease was not caused through the default of Sarodapersaud, nor by the wilful default of any of the parties to the suit.

Mr. *Woodroffe* (with him Mr. *Bonnerjee*) to show cause.—The proper remedy is by suit for specific performance; if a suit for such a purpose had been brought the facts would show laches. A lessee cannot apply by motion in a suit in which he was no party. Moreover, the suit having abated, although thereby the right of the parties is not altered, yet their remedy is gone, and therefore there could be no application in the suit. The Civil Procedure Code alone regulates the practice on the original side of the Court.

Mr. *Hill, contra.*—The rules of the High Court with regard to applications by summons, such as the present, are to be found in *Belchambers' Rules and Orders*, pp. 201, 202, and such rules merely embody the English practice. The proper mode of enforcing the right to the lease is by motion —see *Daniell's Ch. Pr.* 1096, 1103: and the application may be entitled either in the action or the matter—see *Daniell's Ch. Pr.*, p. 966 and *Daniell's Forms*, No. 865: the title is merely set out for convenience of reference to the record. A purchaser seeking relief against a vendor would proceed in this way, and would not, for instance, [256] be permitted to bring an action for any document of title, the possession of which he was claiming—*Stubbs* v. *Surgon* (1); *Sugden's Vend. and Purch.*, 107. Again a purchaser under a decree not a party to the suit may be restrained, upon motion, from committing waste—*Casamajor* v. *Strode* (2), and a lessee is in the same position as a purchaser. It is wholly immaterial that the party applying is not a party to the suit. As regards laches debarring me from my right, see *Fry on Specific Performance*, pp. 477, 478. I submit the order of the 16th September, 1886, is a decretal order, and is not affected by the dismissal of the suit.

ORDER.

TREVELYAN, J.—This suit was brought in 1884 for the purpose of establishing the plaintiff's right to a share of the property left by the late Rajah Bejoy Keshav Roy.

At an early date in the suit the Court Receiver was appointed Receiver of the property, the subject-matter of the suit.

(1) 4 Beav. 90. (2) 1 Sim. & St. 381.

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On the 15th August, 1885, a decree was made in favour of the plaintiff.

On the 16th September, 1886, this Court made an order, the effect of which has been much discussed at the hearing of the present application. That order provided that the Receiver should be at liberty to accept the offer made by Baboo Sarodapersaud Soor for a lease to him of all the properties appertaining to the said estate with certain exceptions for a term of five years from the date of Pooneah in the month of Assur 1293 at the annual rental of Rs. 75,000. It was further ordered by the same order that all necessary parties as the Registrar of this Court should direct do join in the lease, and it was further ordered that the Registrar do approve of the lease and execute the same for and in the name of the plaintiff and the infant defendant, and cause the same to be registered; and it was further ordered that the Registrar do also execute the lease for and in the name of the defendant Ranee Doorgasoondery Dossee in the event of her not executing the same on the same being duly tendered to her for that purpose.

[257] Sarodapersaud's offer was accepted by the Receiver and acted upon by both parties. On the 18th September, 1886, Sarodapersaud Soor deposited with the Receiver Government Securities of the nominal value of Rs. 20,000 as security for his due performance of the covenants of the izarah, and on the same date paid the Receiver the sum of Rs. 20,000 on account of the izarah rent for the then current Bengali year 1293, and the Receiver thereupon granted to him amulnamahs, the effect of which was to put him in possession of the property. Although the proposed lessee obtained possession and the Receiver obtained rent from him no lease has yet been executed.

I am satisfied from the correspondence that the delay has not been caused by any default on the part of Sarodapersaud Soor. On the other hand I do not think that there has been any wilful default on the part of any of the parties to the suit.

On the 27th April, 1887, a decree was made by the Appeal Court dismissing the suit. The result of such decree is that the defendant Ranee Doorgasoondery is declared entitled to the property of her late husband.

This summons was taken out on the 9th of January, 1888, by Sarodapersaud Soor; it requires the defendant Doorgasoondery Dossee to show cause why the izarah should not be completed, and the draft submitted to the Registrar for approval, and also why the Government Securities for Rs. 20,000 deposited with the Receiver as part security for the performance of the covenants of the izarah should not be retained by the Receiver pending the settlement of the izarah and the execution thereof by the Ranee, or in the alternative why they should not be made over to the Bank of Bengal for safe custody pending the completion of the izarah, and to show cause why such securities should not thereafter remain in the custody of the Receiver or of the Bank, as the case might be, during the term of the izarah to be dealt with only subject to the order of this Court.

With respect to the execution of the izarah there are three questions for me to determine:—

1. Will the Court entertain an application by a proposed lessee with whom a contract for a lease has been made for the execution [258] of a lease, or is it necessary that in order to enforce his right he should bring a suit for specific performance?

2. Supposing such application to be possible when a suit is pending does the dismissal of the suit prevent such an application?

3. Are the circumstances of this case such as to justify the Court in refusing an order for the execution of the lease? 1888 FEB. 13

I do not think there can be any real doubt as to the determination of the first question. ORIGINAL CIVIL.

The Court in managing property pending suit, and in managing property which is being administered by the Court, has occasionally to sanction leases, and to require the execution of such leases. Summary orders are made in England for the execution of leases not only by the parties to the suit, but also by the lessee, and I find that in a case cited at p. 1063 of Daniell's Chancery Practice—*Carne* v. *Brancker* (1)—an enquiry was directed as to the damages which a lessee who had repudiated his contract should pay. On reference to the report of that case I find that the lessee happened to be a party to the suit, but this circumstance I do not think makes any difference. In that case the Master of the Rolls declined to order specific performance, but damages afforded apparently a complete remedy against the lessee. The contract for a lease is made with the Court, and as pointed out by Lord Justice Giffard in the case I have mentioned, the approval by the Judge of the offer constitutes the contract. I think that a Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. 15 C. 253.

With regard to the second question, it must be remembered that the contract was completed and acted upon before the suit was dismissed, and in the ordinary course the lease would also have been signed before that event happened.

It is admitted that the rights of the lessee are not affected by the dismissal of the suit, but it is contended that his remedy is altered. I do not assent to this contention. The lease is wholly independent of the result of the suit. I do not think that the fact that the Court has ceased to manage the property takes from it the power of enforcing the performance of subsisting [259] contracts made by it. The dismissal of this suit only determines the rights of the parties *inter se*, and I do not think that the dismissal of the suit would any more than any other form of decree affect the remedies of the lessee.

With regard to the third question I do not think that there are any circumstances in this case which would justify me in refusing an order for the execution of a lease. In terms of this summons I make such order.

As to the security deposited by the lessee, he so deposited it with the Court, and relying on the safety which would be ensured by its being kept by the Receiver. I do not think it would be right to require the lessee to leave the money with the Ranee, who has a limited interest only.

The securities deposited by the lessee with the Receiver will be paid into Court to the credit of an account to be entitled "Andool Raj Lease Security Account." The interest can be, from time to time, paid out to the lessee, but the principal cannot be paid out except on notice to the lessee and to the Ranee, or in case of her death the person or persons then entitled to the property subject to the izarah. The Ranee must pay the costs of this application. I certify for counsel.

Attorneys for Sarodapersaud: Messrs. *Morgan & Co.*

Attorney for Doorgasoondery: Baboo *M. D. Sen.*

T. A. P.

(1) 17 W. R. (Eng.) 342 (837).

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CIVIL REFERENCE.

15 C. 259.

15 C. 259.

CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt. Chief Justice, and Mr. Justice Macpherson.

RAM PITAM SHAH (*Plaintiff*) *v.* SHOOBUL CHUNDER MULLICK AND OTHERS (*Defendants*), AND OTHER SUITS.* [8th February, 1888.]

Notice of action—Bengal Act IX of 1871, *s.* 27—*Tolls paid in excess of powers given—Suit for refund of money.*

In certain suits brought against a Toll Collector for the refund of money alleged to have been exacted by him improperly as toll under Bengal Act IX of 1871, the defendant pleaded that no notice of suit in accordance [260] with s. 27 of that Act had been given: *Held,* that such notice not having been given the suits should be dismissed.

Waterhouse v. *Keen* (1) followed.

[D., 37 B. 243=14 Bom. L.R. 1148 (1153)=17 Ind. Cas. 876 (878).]

THESE were suits brought by certain dealers in coke against the members of the firm of Messrs. Mullick and Co., for the refund of certain tolls alleged to have been exacted in excess of the powers given by Bengal Act IX of 1871, rnd the notifications made thereunder, on carts laden with coke on their way from the station premises belonging to the East Indian Railway Company in Howrah to Calcutta, and on empty carts on the return journey from Calcutta to Howrah station.

Messrs. Mullick & Co. were the holders of a lease granted by the Port Commissioners, running from March 1885, to April 1886, giving them the right to levy tolls for the user of the Howrah bridge in accordance with the provisions of Bengal Act IX of 1871.

On the 28th December, 1874, the Lieutenant-Governor of Bengal, in accordance with powers granted to him by s. 3 of Bengal Act IX of 1871 for that purpose, by notification in the Gazette, exempted from the payment of the tolls authorized by Bengal Act IX of 1871, until further orders, all passengers and goods conveyed on the East Indian Railway at Howrah, and all carriages and persons using the Howrah bridge for the purpose of going to or returning from the station of the East Indian Railway at Howrah.

And subsequently by a further order directed that from the 1st January, 1875, until further orders, the following fees should be leived on goods and passengers conveyed on the railway of the East Indian Railway into and from the station of Howrah, *viz.* :—

	Rs.	A.	P.
On every 100 maunds of goods	1	0	0
On every passenger	0	0	3

which fees when collected were, it appeared, paid over to the Port Commissioners.

By a further order of the Lieutenant-Governor of Bengal dated the 24th October, 1877, the terminal fee of Re. 1 per 100 maunds on coal was abolished as and from the 1st November, [261] 1877; and therefore from that date coal laden carts coming from the Howrah station and using the bridge were liable to pay the tolls leviable under Bengal Act IX of 1871.

* Reference No. 4A. of 1887, by Baboo Krishna Mohun Mookerjee, Officiating Judge of the Sealdah Court of Small Causes, dated the 19th May, 1887.

(1) 4 B. & C. 200.

On the 28th July, 1885, the Lieutenant-Governor of Bengal, under powers conferred upon him by s. 3 of Bengal Act IX of 1871, exempted from payment of tolls, leviable under the tariff of Bengal Act IX of 1871, until further orders, all passengers and goods conveyed on the East Indian Railway, and also all carriages and persons using the bridge for the purpose of going to or returning from the station at Howrah, such exemption, however, not applying to the case of any carriage which, nor to that of any person who, using the bridge for the purpose of going to the station, did not directly and without deviation return therefrom; all such carriages and persons being liable to pay the same tolls as were levied from carriages and persons not using the bridge for the purposes aforesaid. This notification cancelled the notification of the 28th December, 1874.

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15 C. 259.

Having regard to these orders and notifications the following proviso was inserted in the lease granted by the Port Commissioners to Messrs. Mullick & Co.: "Nothing hereinbefore contained shall be construed as authorizing or empowering the said lessees to levy any tolls, fees or charges on any carriages or persons using the said bridge for the purpose of going to or returning from the station of the East Indian Railway Co., at Howrah, or the premises of the said Company situated at Sulkeah, or on any other persons or carriages exempted under the provisions of Bengal Act IX of 1871 from such tolls, fees or charges."

The dealers bringing these suits had duly paid the terminal fee of one rupee per hundred maunds on all coke brought by rail to Howrah, but notwithstanding Messrs. Mullick & Co. had demanded and levied a toll on the bullocks and carts (exclusive of the load) belonging to the plaintiffs when crossing the bridge from Howrah station to Calcutta, and also on their bullocks and carts when returning empty from Calcutta to the depot of these dealers in the station premises at Howrah; that it had been the custom to make this charge, it appeared, on carts carrying goods other than coke, coal alone being excepted.

Whereupon the plaintiffs brought these suits, which were heard [262] together, for the purpose above mentioned, but without having given notice of suit as directed by s. 27 of the Howrah Bridge Act.

Messrs. Mullick and Co., the defendants, amongst other matters (which are unnecessary for the purposes of this report), pleaded that the suits would not lie, inasmuch as no notice of suit, in accordance with s. 27 of Bengal Act IX of 1871, had been served upon them.

The Judge of the Court of Small Causes at Sealdah, before whom the suits were tried, on the facts and construction of the lease and notifications found in favour of the plaintiffs, and held that as the defendants had acted beyond the scope of their authority in exacting these tolls they were not entitled to notice before suit; but in giving the plaintiffs a decree made the same subject to the opinion of the High Court on, amongst others, the following point: Whether under the circumstances of the case the defendants were entitled to notice under s. 27 of Bengal Act IX of 1871.

Mr. *O'Kincaly*, for the plaintiffs.—The defendants in exacting the tolls were not acting under the Howrah Bridge Act, but under their lease; they are not therefore entitled to notice. But assuming that they were acting under the Act, they are still not entitled to notice, as the suits are in *assumpsit* for return of the money paid—*Umphelby* v. *McLean* (1) which

(1) 1 B. & Ald. 42.

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is a case on all fours with the present cases. The case of *Waterhouse* v. *Keen* (1), which will be relied upon by the other side, was not treated as one for money had and received, but as one for a wrong done for which damages were given. The present suits do not come within the class of suits in which notice is necessary—see *Shahebzadee Shahunshah* v. *Ferguson* (2).

The *Advocate-Genral* (Mr. *Paul*), for the defendants.—The tolls were exacted under the Act; and whether under protest or distress notice is necessary—*Waterhouse* v. *Keen* (1); *Midland Railway Company* v. *Withington Local Board* (3).

OPINION.

The opinion of the Court (PETHERAM, C.J., and MACPHERSON, J.) was delivered by

PETHERAM, C. J.—These are actions brought by various carriers or coke merchants for the purpose of recovering tolls, which [263] have been levied from them for passing over the bridge, in excess of the powers created by the Act and the notification of the Lieutenant-Governor. The facts of these cases are as follows: At the Howrah station large quantities of goods come in which have to be brought into Calcutta by vehicles which pass over the bridge, in respect of which tolls are levied. When that bridge was constructed provision was made by the Legislature for the levying of tolls, and for the issuing of notifications by the Lieutenant-Governor with reference to those tolls; and one of the provisions was, that certain charges might be made for railway-borne goods coming to Howrah which were to be paid by the Railway Company, and when paid that was to be sufficient, and the goods were to be brought into Calcutta across the bridge without the payment of any extra toll.

Now the cases in respect of which the question arises are cases which come within that provision, so that if they come within the terms of the statute and the terms of the notification the owners of the goods or the persons dealing with them are entitled to bring them into Calcutta without extra toll, and are also entitled to the use of the bridge for the purpose of vehicles which are engaged in carrying the goods to Calcutta if those vehicles come within the statute and the notification. An objection is taken by the Advocate-General in answer to these actions that under s. 27 of Act IX of 1871 no suit of this kind can be maintained against the present defendants, who are the lessees of the Port Commissioners, unless they have had notice given to them within the meaning of the section. The section is in these words: "No suit or other proceeding shall be commenced or prosecuted against any person for anything done or professing or purporting to be done in pursuance of this Act without giving to such person a month's previous notice of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends, nor after the expiration of three months from the accrual of the cause of suit or other proceeding.

It is contended on behalf of the plaintiffs that this section does not apply to the case, because it is said that the mere levying of toll is not anything done within the meaning of this section which must mean some wrong committed in prursuance of [264] the powers of the Act for which damages are payable. The learned Advocate-General, on the other hand, contends that these tolls are leviable under the powers of the

(1) 4 B. & C. 200. (2) 7 C. 499. (3) L. R. 11 Q. B. 788.

Act, and whether they are paid under protest, or after levying of distress, or whether they are paid without distress, that Act applies and they are entitled to notice; and he cites in support of that view a case of *Waterhouse* v. *Keen* (1), and also the case of *Midland Railway Co.* v. *Withington Local Board* (2). The case of *Waterhouse* v. *Keen* (1) is directly in point. The facts of that case are almost identical with those of the present case, and as that case is law at the present day I think it is a binding authority upon us; and in the case of the *Midland Railway Co.* v. *Wihtington Local Board*, which was a case in the Court of Appeal, and was decided by the present Master of the Rolls sitting with Lindley, L.J., and Fry, L. J., though the facts of that case are not absolutely identical with the facts of this case, or with the facts of the case of *Waterhouse* v. *Keen*, the learned Judges in that case expressly affirm the latter decision. That being so, and the facts of the earlier case being, as I said, almost identical with those of the present case, we are of opinion that that decision is binding upon us, and consequently we hold in accordance with that decision that the defendants were entitled to notice of action; and it being admitted that notice of action was not given, we think that these suits must for that reason be dismissed.

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T. A. P. *Suits dismissed.*

15 C. 264.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

BHIKUMBER SINGH (*Plaintiff*) v. BECHARAM SIRCAR (*Defendant*). BHIKUMBER SINGH (*Plaintiff*) v. GOTI KRISTO DAS (*Defendant*).* [27th January, 1888.]

Right of Suit—Slander—Privilege of witness—Slander uttered by witness whilst under examination in a judicial proceeding.

A witness in a Court of Justice is absolutely privileged as to anything [265] he may say as a witness having reference to the enquiry on which he is called as a witness.

The plaintiff sued to recover damages for slander, the statement complained of being alleged in the plaint to have been made by the defendant while being examined as a witness during the hearing of a case before a Magistrate. It was found that the statement was made in answer to questions put to the defendant as a witness and allowed by the Court as relevant to the case. The plaintiff alleged that the statement was made maliciously, that the defendant bore him a grudge, and that it was to give vent to that grudge and to injure his reputation that the statement was made.

Held, that the plaint disclosed no cause of action, and that the suit had been properly dismissed.

[F., 17 B. 127 (128); 17 C.W.N. 544 (561)=17 C.L.J. 105 (113)=18 Ind. Cas. 737 (741); **Appl.**, 27 C. 262 (263); **Appr.**, 11 A.L.J. 193 (194); **R.**, 15 M. 63 (65); 3 L.B.R. 265 (267); 29 A. 685=4 A.L.J. 605=A.W.N. (1907) 235; **D.**, 17 C.W.N. 297 (298)=14 Cr. L.J. 100 (102)=18 Ind. Cas. 660 (662)=40 C. 433.]

THESE two appeals arose out of two suits brought by the plaintiff to recover damages for slander under the following circumstances. A

* Appeals from Appellate Decrees Nos. 702 and 703 of 1887, against the decrees of G. E. Porter, Esq., Judicial Commissioner of Chota Nagpur, dated the 12th of January 1887, affirming the decrees of A. L. Clay, Esq., Subordinate Judge and Deputy Commissioner of Manbhoom, dated the 9th of March 1886.

(1) 4 B. & C. 200. (2) L. R. 11 Q. B. 788.

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charge of extortion was brought by one Modhu Adhekari against a Sub-Inspector of Police named Poresh Nath Sen, and during the investigation of such charge before the Magistrate of Manbhoom the accused called and examined Becharam Sircar, the defendant in appeal No. 702, who was also a Sub-Inspector of Police, and Goti Kristo Das, defendant in appeal No. 703, who was a Head Constable. They were examined on oath, and in the course of giving their evidence they made certain statements reflecting on the character of the plaintiff, who was the Tekait of Jeypore. Becharam Sircar stated that "of all the persons living within the police jurisdiction the Tekait's character is the worst," and Goti Kristo Das stated that "the Tekait received stolen property and committed murder."

The plaintiff alleged in his plaints that these statements were made in the Police Court of zillah Manbhoom on the 14th September 1885, with a view to vent some grudge which the defendants bore against him and to injure his reputation, and that they were made maliciously and in open Court in the presence of many persons, and that in consequence thereof his reputation had suffered and his feelings been hurt. He accordingly claimed damages from the defendants.

The latter in their written statements pleaded that as they had been cited as witnesses in the Police Court, and bound to appear as such and give true evidence, which they did, they were not liable to be sued by the plaintiff on account of such statements. [266] They denied that they bore the plaintiff any grudge or that the statements complained of had been made maliciously, and on the contrary pleaded that, as they had come to know from various police reports and proceedings in Court that the plaintiff was a man of bad character, they stated so in the witness-box.

At the hearing of the suits before the Deputy Commissioner it was contended that witnesses giving evidence in a judicial proceeding are protected from suits for damages in respect of any statements then made by them, even if such statements are false and malicious.

The issues fixed for trial will be found in the judgment of the High Court.

The Deputy Commissioner held that the suit was not maintainable upon the authority of the Privy Council ruling in *Gunesh Dutt Singh* v. *Mugneeram Chowdry* (1); and dismissed them with costs.

Upon appeal the Judicial Commissioner delivered the following judgment, confirming the decree of the lower Court:—

"I think there can be no doubt, on the authority of the Privy Council ruling referred to by the lower Court, that this suit cannot be maintained. It is urged on appeal that the libel complained of was irrelevant, and the Court is referred to Collett on Torts, pages 53 and 54; but not only was this point never raised in the Court below, but, as a matter of fact, it appears to me that the questions apparently put to the defendant and the answers made by him were quite relevant to the case under enquiry. The facts were this: A complaint of extortion, etc., was made by one Modhu Adhekari against a Sub-Inspector of Police named Poresh Nath Sen. The accused cited as his witnesses Becharam Sircar, another Sub-Inspector of Police, and Goti Kristo Das, a Head Constable. They were examined on oath, and made certain statements reflecting on the character of the plaintiff, who is the Tekait of Jeypore. These statements were undoubtedly made in answer to questions put to

(1) 11 B. L. R. 391=17 W. R. 283.

the witnesses by the accused or his pleader, and allowed by the Court as relevant to the case. The statements are general ones, and I am clearly of opinion that the defendants in their character of witnesses are protected." 1888 JAN. 27.

[267] The plaintiff now preferred these second appeals to the High Court. APPELLATE CIVIL.

Mr. *Bell* and Baboo *Kali Kishen Sen*, for the appellant.

Baboo *Golap Chunder Sircar*, for the respondent in both appeals 15 C. 264.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—These are appeals from the decisions of Mr. Porter, the Judicial Commissioner of Chota Nagpur.

The plaintiff brought two separate suits against the two defendants to recover damages for slander. His cause of action he alleged to be this, that the defendants being summoned as witnesses on behalf of a Police Sub-Inspector, who was being prosecuted for extortion, used, in the course of giving their evidence, one of them, that is, the defendant in No. 702, the words: "Of all the persons living within the police jurisdiction of this district the Tekait's (meaning the plaintiff's) character is the worst," and the other, the defendant in No. 703, the words: "The Tekait received stolen property and committed murder." The plaintiff alleged that these statements were made in the Police Court of zillah Manbhoom on the 14th September 1885. He alleged that they were made maliciously; that the defendants bore the plaintiff a grudge; and it was to give vent to that grudge and to injure the plaintiff's reputation that the words in question were uttered.

The written statements alleged that the defendants were cited as witnesses in the Police Court, and were bound to appear there as such witnesses, and to give true evidence, which they did. They also denied that the words were used maliciously. They denied the existence of any enmity between the plaintiff and defendants; and they also denied that the plaintiff had sustained any damages by reason of the words being used.

The Deputy Commissioner, before whom the case came on for trial in the first instance, framed the following issues: "*First*, whether or not the suit can proceed without previous notice? *Second*, whether or not the defendant as a witness giving [268] evidence in a judicial proceeding is absolutely protected from a suit for the damages? *Third*, whether plaintiff has sustained substantial injury by reason of false statements maliciously made by defendant, and is entitled to recover damages; if so, to what amount? Or whether the defendant, having made the said statements *bona fide*, and being bound to make them as a witness, is not liable to a suit for damages, and is entitled to his costs?

The Judicial Commissioner in the course of his judgment says "These statements (that is to say, the statements made by the defendants) were undoubtedly made in answer to questions put to the witnesses by the accused or his pleader, and allowed by the Court as relevant to the case."

It has been objected on second appeal that there is absolutely no evidence on the record to warrant this conclusion arrived at by the Judicial Commissioner.

1888 JAN. 27. — APPELLATE CIVIL. — 15 C. 264.

It appears to us that the plaint as framed discloses no cause of action. The case *Seaman* v. *Netherclift* (1) lays down that "a witness in a Court of Justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness." And we think that the allegation in the plaint that the alleged slanders were uttered by the defendants in giving their evidence in the Police Court shows that the words in question were made use of by the defendants as witnesses in a Court of Justice with reference to the enquiry on which they were called as witnesses. That being so, the plaint discloses no cause of action.

Secondly, we are of opinion that the proceedings show that the parties went to trial upon the basis of the assumption that the alleged slanderous statements were made in the witness box, and were made by the defendants in giving their evidence in the course of judicial enquiry to which they were properly summoned. And we think that there can be no doubt that the Judicial Commissioner must have had before him, if not actual evidence at any rate admissions of the parties at the time the appeals were argued in this Court which would justify him in the observations he has made with regard to the circumstances under which the alleged slanders were uttered.

[269] For these reasons we are of opinion that there is no ground for interfering with the judgment of the lower appellate Court in either of these cases. We accordingly dismiss the appeals with costs.

H. T. H. *Appeals dismissed.*

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15 C. 269.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

QUEEN-EMPRESS *v.* ITWARI SAHO.* [29th August, 1887.]

Verdict of jury—Sessions Judge, Opinion of—Criminal Procedure Code, s. 307—High Court, Power of,

In the exercise of its powers under s. 307 of the Code of Criminal Procedure, the Hight Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so, the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight.

Reg. v. *Khanderav Bajirav* (2); *Empress* v. *Mukhan Kumar* (3); *The Empress* v. *Dhunum Kazee* (4); *Queen-Empress* v. *Mania Dayal* (5); *The Queen* v. *Ram Churn Ghose* (6); *The Queen* v. *Sham Bagdi* (7); *The Queen* v. *Hurro Manjhee* (8); *The Queen* v. *Wuzir Mundul* (9); *The Queen* v. *Nobin Chunder Banerjee* (10), referred to.

ITWARI SAHO was placed on his trial in June 1887, before the Court of Sessions at Patna, charged with having in April 1885, sold as genuine to Lalla Sahu a forged Government Currency Note No. $\frac{P}{39}$ 26150 for Rs. 50. Some three months after the alleged date of sale, it was discovered in the Bank of Bengal at Lucknow that the note was a forgery. On enquiry, the

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*Criminal Reference No. 8 of 1887 made by T. M. Kirkwood, Esq., Sessions Judge of Patna, dated the 20th of June 1887.

(1) L. R. 2 C. P. D. 53. (2) 1 B. 10. (3) 1 C. L. R. 275.
(4) 9 C. 53. (5) 10 B. 497. (6) 20 W. R. Cr. 33.
(7) 13 B. L. R. Ap. 19=20 W. R. Cr. 73.
(8) 14 B. L. R. Ap. 2=21 W. R. Cr. 4. (9) 25 W. R. Cr. 25.
(10) 13 B. L. R. Ap. 20=20 W. R. Cr. 70.

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note was traced by means of the endorsements upon it to a merchant [270] of Rajapore in the district of Banda, to whom it had been sent by Lalla Sahu in payment of a current account for cotton bought. It was alleged that the note, when it passed into the hands of Lalla Sahu, bore the following endorsements: (1) Note sold by Sanichar Saho Teli to Lakha Saho; (2) note sold by Lakha Saho to Damri Saho and Sanichar Saho; (3) note sold by Damri Ram Sanichar Ram, Suris of Bardari, to Lall Ram. The first two were said to form one entry, but none of the entries bore any date. On further investigation it was found that there was an entry in Lalla Saho's book under the heading "account with Nowrattan Das Dwarika Prosad, of Rajapore, Sambut 1941," to the following effect: "Rs. 140, Second day of the first part of Bysakh, Rs. 50 note purchased from Damri, Sanichar, Itwari, Suris of Badari, one note No. 26150, small number 39 Rs. 90, nine notes." Itwari was then searched for but not found, and not until March 1887 was arrested by the chowkidar of Luckhiserai at Kugra, eight miles from that place. Itwari Saho, it was discovered, had two brothers, Damri and Sanichar. By these, jointly with him, a business in the name of Damri Ram Sanichar Ram was carried on in Behar, in Bardari Bazaar, where they had a place of business, and also in Luckhiserai. Itwari was the only one of the three who could write, and was in the habit of writing for the firm in the business carried on by them. He was chiefly in Luckhiserai where the principal place of business was; but he travelled about from place to place in the transaction of business. At the trial the prisoner was defended by two vakeels. He called no witnesses. He simply denied the sale, and said he had been separate from his brothers for three years. Upon the conclusion of the evidence and argument, the Sessions Judge explained the case to the jury, a body of five, who, after retiring for half an hour, returned, and in answer to questions put by the Judge, the foreman stated, (1) they were unanimous that the note was forged; (2) three found it not proved that the prisoner sold the note, not proved that the second endorsement on the note was written by him, two found that he did sell the note and wrote the endorsement; (3) three found it not proved that he absconded, two found it proved that he did; (4) four found that the first endorsement was written by the same hand as the [271] second, one found the contrary The two who found the prisoner did sell the note had come to no finding whether he did so knowing it to be forged, and the jury was then desired to retire—the two, who found prisoner had sold the note, to find whether he did so knowing it to be forged, and as to all the jury for a finding whether the sale to Damri Sanichar stated in the first endorsement took place. In answer, the foreman said: "Only one, myself, finds it proved that accused when he sold the note knew it to be forged." They all found that the sales stated in the first endorsement never took place. The findings amounted to an acquittal by the majority, and the Sessions Judge disagreeing with the verdict submitted the case to the High Court under s. 307 of the Code of Criminal Procedure.

Mr. *C. Gregory*, for Itwari Saho.

Baboo *Ram Churn Mitter*, for the Crown.

The judgment of the Court (Prinsep and Pigot, JJ.) was as follows:—

JUDGMENT.

This case comes before us under the provisions of s. 307, Criminal Procedure Code. The charge against the prisoner was that on April 1st,

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1885, he, at Naga Serai, Behar, dishonestly sold as genuine a forged valuable security which purported to be a currency note for Rs. 50 issued on behalf of the Government of India, which he knew or had reason to believe to be a forged document, and thereby committed an offence against ss. 467-471, Indian Penal Code. The prisoner was committed for trial on March 31st, 1887. He was tried at the Patna Sessions on the 16th, 17th and 18th June 1887. There was no question seriously raised as to the fact that the note, which the prisoner was charged with having dishonestly sold, was a forgery. The jury unanimously found that it was, and the appearance of the exhibit leaves no doubt of this. The questions raised in the case were: (1) whether the prisoner sold the note as alleged; and (2) whether he did so knowing, or having reason to believe, it to be forged. The findings of the jury, to which we shall presently refer in detail, amount, in effect, to an acquittal by a majority.

The prisoner has two brothers, Damri and Sanichar. By them, jointly with him, a business in the name of Damri Ram, Sanichar [272] Ram was carried on in Behar in Bardari Bazaar where they had a place of business, and also in Luckhiserai. The prisoner was the only one of the three who could write. It is in evidence that he habitually wrote for the firm in the business carried on by them. He frequented Behar, where he was well known. He was chiefly in Luckhiserai, where their principal place of business was, but he travelled about from place to place in the transaction of business. Lakhaprosad or Lallaprosad, the principal witness for the prosecution, is a cotton-seller in Behar. He deposes to having purchased the forged note from the prisoner. He says he has known the prisoner for 10 or 15 years. He had never before this occasion purchased notes from him, but had done so from his brother Damri Ram. He says prisoner came to his house, which is about a mile from his (Lakha's) shop and near to the prisoner's house, in Behar, and offered him the note for sale; that he agreed to buy it, and asked prisoner to endorse it, but as he had no ink in his house, he took him to the house of Bandu (witness No. 4); that Bandu had no pen and ink, whereupon they went to Tita Ram's (witness No. 5), and that the prisoner endorsed the note at that place in the presence of Tita Ram, Monohar Dass and Dipu Halwai (witnesses Nos. 6 and 7). He says he then paid prisoner the Rs. 50, took the note, and went to his shop, meeting on the way, while prisoner was still with him, Uzir Makouri (witness No. 8), who he says, was told then of the purchase, and who in his evidence says that he then saw the note, and the endorsements on it, in the street. Lakhaprosad says he never saw prisoner after this. The endorsement (Exhibit X) said to have been made by prisoner on this occasion is as follows: " They are ' note ' sold by Damri, Ram, Sanichar Ram, Tari of Bardari, to Lall Ram." There is no date to it. The witness says that at the time of the sale there was already on the note the endorsement (Exhibit W), which is written on it, and which is as follows: " Note sold by Sanichar Saho Teli to Lakha Saho, note sold by Lakha Saho, to Damri Saho and Sanichar Saho." This is all one entry (as the translator calls it), and there is no date to it. As to this endorsement, the jury, upon the evidence, have unanimously found that the note was never in Lakha Saho's possession, and that Sanichar Teli never sold it. There can be no doubt that W is a forgery.

[273] Witnesses Nos. 5 and 8 corroborate Lalla as to W's having been already on the note when the sale took place, and also as to the fact of X having been written by prisoner, and, as to the latter, No. 7 does the same. But No. 5, Tita Ram, in his evidence mistook W for X, and

identified W as the endorsement written by prisoner, and the evidence of all the witnesses, Nos. 4 to 7, who depose to having witnessed the sale, and of No. 8, who saw the note in the street, is open to damaging comment, as showing a recollection, strangely minute and precise, of circumstances which occurred long ago, and which there was no reason for their committing to memory.

The witness Lakhaprosad says that, on the purchase of the note, he at once despatched it in a registered cover to his servant, Tara Ram, to Rajapore in zilla Banda, with other notes of Rs. 10 each, amounting in all to Rs. 140. Tara Ram stays at Rajapore at the place of business of one Nowrattan with whom Lakha has dealings. Lakhaprosad says that at the time he despatched the notes he made an entry (Exhibit H in the case) in his book. It is as follows: On a page headed "account with Nowrattan Das, Dwarikaprosad of Rajapore, Sambat 1941 Rs. 140, second day of the first part of Baisakh, Rs. 50 note purchased from Damri, Sanichar, Itwari Suris of Bardari, one note No. 26,150 small number 39, Rs. 90, nine notes. He says the object of that entry was to show what notes he despatched to that firm in payment of any purchases. The note bears an endorsement (Exhibit Y in the case) "Lall Pershad by the pen of Tara Ram." There is no date to it. The endorsement is in Tara Ram's handwriting. It is followed by an endorsement in these words: "Signed by Nowrattan Ram, Dwarikaprosad by the pen of Ramnarain Gomastha," no date. There is no proof as to the handwriting of this entry. With reference to the date of Exhibit H, second day of the first part of Baisakh, Lakhaprosad says this would be 1942. The entry comes after entries for Chait 1941. That would be on or about 1st April 1885. A number of entries of purchase of notes follow this entry. The first is 11th Baisakh. All, save one, record the number of the notes purchased as H does.

The note was found to be forged, and in July 1885 the police [274] visited Lakhaprosad's shop in Behar. He showed them Exhibit X in his book, went with them to the thannah, was there shown the note, and said he had sent it to Rajapore: that he had bought of Damri Sanichar and Itwari (the prisoner), and that Itwari was the person who actually sold it. Search was then made for Itwari, but he was not found until March last, when he was arrested by the chowkidar of Luckhiserai, at Kugra, eight miles from that place.

The evidence as to the fact of the sale by the prisoner is that of the witnesses we have above referred to, Lakhaprosad, and witnesses Nos. 4, 5, 6, 7 and 8, who corroborate him; Nos. 5, 6 and 7 depose to having seen prisoner endorse the note No. 8, Uzir Saho, who met Lakha and prisoner in the street, says he then saw the endorsement. He says, too, that he knows prisoner's writing well, and that X is in his handwriting. There was contradictory evidence as to whether W was in prisoner's hand or not.

As to guilty knowledge, the fact, if proved, that W, the forged endorsement, to prisoner's firm, was on the note when he sold it, would be conclusive if unexplained. A part of the case for the prosecution was that prisoner had absconded when it became known in Behar that the note had been found to be forged. This was about three or four months after the sale by him is said to have taken place. His absconding under these circumstances, and keeping or being out of the way until arrested one and three-quarter year afterwards, would strengthen, if unexplained, the presumption of guilty knowledge. The prisoner was defended by two vakeels.

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He called no witnesses. He simply denied the sale and said he had been separate from his brothers for three years.

The case was, we think, explained to the jury in satisfactory manner by the Sessions Judge. The jury, after retiring for half an hour, returned, and in answer to questions put by the Court, the foreman stated: They were unanimous the note was forged. Three found it not proved that prisoner sold the note; not proved that X was written by him. Two found that he did sell the note and wrote X when he sold it. Three found it not proved that he absconded; two found it proved that he did. Four found [275] that W was written by the same hand as X; one found the contrary. The two who found prisoner did sell the note had come to no finding whether he did so knowing it to be forged. They were then desired to retire; the two, who found prisoner had sold the note, to find whether he did so, knowing it to be forged; and as to all the jury, for a finding whether the sale to Damri Sanichar stated in W took place. In answer the foreman said: "Only one, myself, finds it proved that accused when he sold the note knew it to be forged." They all found that the sales stated in W never took place. These findings amount to an acquittal by a majority. With this the Judge wholly disagrees, and submits the case under s. 307.

It is argued for the accused that the verdict cannot be set aside unless it can be shown to be perverse and manifestly wrong, and that as there are certainly infirmities in the evidence for the prosecution in the present case, the jury cannot be said to have been perverse in rejecting the whole case made against the prisoner. *The Empress* v. *Dhunum Kazee* (1), *Queen-Empress* v. *Mania Dayal* (2), and *Soloman* v. *Bitton* (3), were cited by the pleader for the accused. The vakeel for the prosecution relied on *Empress* v. *Mukhun Kumar* (4) amongst others. *The Empress* v. *Dhunum Kazee* (1) and *Queen-Empress* v. *Mania Dayal* (2) were cases in which the Court did not disagree with the verdict. In each case, the Court, on the whole, approved of the verdict. They are not authorities for the position that the Court, although disagreeing with the verdict, will not set it aside unless it appears to be perverse. In *Reg* v. *Khanderav Bajirav* (5) West, J., says, referring to s. 263 of the former Code of Criminal Procedure: * * * "The whole case is opened up, * * * the functions of both Judge and jury are cast upon the Court and this differentiates our position very widely from that of the Courts in England." That very learned Judge adds: "Notwithstanding this difference however * * * * * we still desire to be guided, as far as may be, by the analogies of the English law. It is a well-recognized principle that the Courts in England will [276] not set aside the verdict of a jury unless it be perverse or patently wrong, or may have been induced by the error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers." We think that the argument founded on these words may be pressed too far. No doubt, the manner in which English Courts deal with the verdict of a jury in civil cases, as for instance *Belcher* v. *Prittie* (6), must always to some extent assist the Courts in this country in the exercise of the duty imposed upon them by law of considering under s. 307, in criminal cases, the verdict of a jury here: a body similar in some respects to the jury in England and intended, so far as can be, to discharge similar functions. But we think the degree of influence to be

(1) 9 C. 53. (2) 10 B. 497. (3) L. R. 8 Q. B. D. 176.
(4) 1 C. L. R. 275. (5) 1 B. 13. (6) 10 Bing. 408.

given to this consideration must depend in some measure upon the closeness of the analogy which may exist between the nature and functions of the English and of the Indian tribunals. Apart from the circumstance that the English law on this subject relates to civil, and the Indian to criminal cases, exclusively, the analogy is not always a close analogy. The unanimous verdict of a jury of twelve is in respect of weight a different thing from the decision by a majority or even from the unanimous decision of a body of five or seven or nine. The Indian Courts are expressly made Courts of Appeal on facts; the functions of the English Court in this branch of the law go no higher, in cases where verdicts are set aside, than the ordering of a new trial. The present Lord Chancellor says in the last case decided in the House of Lords on this subject—*Metropolitan Railway Co.* v. *Wright* (1): "If a Court not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all, can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves." We refer to the passage, because it marks in vigorous language, in the early portion of it, the distinction between the two classes of tribunals to which the English and the Indian Courts do, in this matter respectively, belong; and perhaps in the latter indicates that Courts which have to decide [277] on facts can hardly abstain from examining all the evidence and forming their own view of it. The case in which these observations were made seems rather to modify the terms of the old English rule as stated in *Reg* v. *Khanderav Bajirav* (2). The word " perverse " is no longer approved. Lord Fitz Gerald in *The Metropolitan Railway Co.* v. *Wright* (1) says: "If my recollection does not mislead me, we have departed in this house in several instances from the old rule which introduced the element of 'perversity,' and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory but unreasonable and unjust. The question, thus, for your Lordships' consideration is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust." Lord Herschell, L. C. says: "The verdict ought not to be disturbed unless it was one which a jury viewing the whole of the evidence reasonably could not properly find." A rule which should apply by analogy to the consideration of cases under s. 307, the principle laid down by the Lords, would seem somewhat less peremptory and confined than one framed upon the terms of the older cases. But we own that we should find it difficult, apart from any authority in this Court, to hold (at any rate as to s. 307) that any rule founded upon such an analogy should be adopted in restriction of the exercise of the discretion of the Courts. There is an essential difference between the functions of the Courts in the two cases. The English Court has no power of finding on facts in any case. That is a power expressly given to, or rather imposed upon, the Indian. A complete analogy between the two will arise, if the latter refuses to exercise that power. In *Reg* v. *Khanderav Bajirav* (2) it is to be observed that the language of the Court is very carefully guarded, more so than that which has been (at least in the head-notes of cases) subsequently used,—" we desire to be guided, as far as may be, by the analogies of English law," " we adhere generally to this principle;" and later on " it is our duty to satisfy ourselves that the verdict is proper or at least sustainable."

(1) L. R. 11 App. Cas. 156. (2) 1 B. 13.

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In *Mukhun Kumar* (1) four cases are referred to by Markby, J., [278] in his judgment—*The Queen* v. *Ram Churn Ghose* (2); *The Queen* v. *Sham Bagdi* (3); *The Queen* v. *Haroo Manjhee* (4); *The Queen* v. *Wuzir Mundul* (5). There was one not referred to by him—The *Queen* v. *Nobin Chunder Banerjee* (6). In the first and fifth of these cases, the verdict of the jury was set aside. In the second and third, in which there does not appear from the short reports to have been argument in Court, the verdict was sustained. In the fourth, *Wuzir Mundul's case* the Court expressly agreed with the jury and sustained the verdict. In these cases the learned Judges expressed substantially the same view, which, to use the words of the last case, *Wuzir Mundul's*, is that " the verdict of a jury should not be interfered with, except where there is a gross and unmistakeable miscarriage of justice." Markby, J., while agreeing generally with the opinions expressed by the learned Judges in these cases, points out that " we cannot lay down any fixed rules for the exercise of the discretion " of the Court. Chief Justice Garth in his judgment dissented from the view taken in *Wuzir Mundul's case*. He states his opinion as follows: " In the consideration of this case two questions have suggested themselves to my learned brothers and myself, which appeared to be of very general importance. First, how far this Court is justified, in a case referred under s. 263 of the Criminal Procedure Code, in convicting a prisoner contrary to the express and unexplained finding of a jury; and, secondly, whether this Court has power under that section to order a new trial. With regard to the first of these questions, it appears to me that by that section the Legislature intended to vest in the High Court a very large discretion; and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled. The verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined, ought always, in my opinion, to command its proper weight; and the more unanimous their verdict may be, and the less likely to have been induced or influenced by pre- [279] judice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as, for instance, where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority; or where it is manifest, from the conduct of the jury or otherwise, that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with Mr. Justice Macpherson and Mr. Justice Morris in *Wuzir Mundul's case* (5) ' that the verdict of a jury should not be interfered with, except where there is a gross and unmistakeable miscarriage of justice.' Nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence, without giving to the verdict of the jury its proper weight. Each case in my view of the section should depend on its own circumstances." We agree in thinking that this passage states, as closely as it would be safe to do, the sort of weight which should be given to the verdict of a jury in a case referred under s. 307; and would but add to what is said by the Chief Justice

(1) 1 C. L. R. 275.
(2) 20 W. R. Cr. 33.
(3) 13 B. L. R. Ap. 19=20 W. R. Cr. 73.
(4) 14 B. L. R. Ap. 2=21 W. R. Cr. 4.
(5) 25 W. R. Cr. 25.
(6) 13 B. L. R. 20=20 W. R. Cr. 70.

this further consideration that, having regard to the terms of the section, the opinion of the Judge, who has had, as well as the jury, an opportunity of observing the witnesses, and has also had an opportunity of watching the whole course of the trial, must have due weight given to it.

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In *Mukhun Kumar's case* the Court set aside an acquittal, convicted of murder, and sentenced the accused to be hanged. It was in every way a decision which must be supposed to have been present to the mind of the Legislature when the new Code of Criminal Procedure was passed. There is no indication, however, in that Code of any intention that the discretion of the Court should be limited in the manner approved of in some of the older cases, and disapproved of in *Mukhun Kumar's case;* and we think that the Legislature must have intended that the powers conferred by s. 307 should be fully—as they must, no doubt, be [280] cautiously—exercised. We have referred to a large number of unreported cases under s. 263 of the Code of 1872, subsequent to 1878 and under s. 307 of the present Code of 1882, the latest being in February of this year before Petheram, C. J., and Cunningham, J., with the result that the Judges have not expressed themselves so as to limit the exercise of the discretion of the Court in each case coming before it.

We have given in this case full weight to the verdict, and to the opinion of the Judge and the reasons given by him for it; and we now state our opinion. Upon the cardinal point in the case, namely, the sale by prisoner, the Judge and two jurors hold it proved. The three other jurors say it is not proved. We think the latter are wrong. We have considered the evidence with care, and we think their view can only be justified by attributing an excessive weight to those unfavourable comments to which, to a certain extent, the evidence for the prosecution is open. Tita Ram's evidence, no doubt, is discredited. The evidence of Monohur and of Wazir, as well as that of Tita Ram, is suspiciously minute. But in this country it is not always safe wholly to discard evidence, a part of which may be open to suspicion. It may be that the details given by the witnesses for the prosecution of the circumstances of the sale are suggested to them by one who remembers the transaction better than they can do. But it is not unlikely, if the sale did take place, that they should have some sort of recollection of it. The " goolmal " about the note occurred not very long—about three or four months—after the alleged sale, and caused much stir in Behar. We cannot see any good reason for wholly rejecting these witnesses, though we should not rely on their evidence alone. But without it, we think, the case against the prisoner is supported by strong evidence. The names of Damri and Sanichar were certainly on the note when it was sent by Lalla to Rajapore, in the district of Banda. There can be only one conjecture, and it would be only a conjecture, suggested as a reason for doubting this part of the case, namely, that Lalla himself is guilty. But this, apart from anything else, is negatived by his acts at the time. He puts the note in circulation in his own name, through his servants in Rajapore. He records the number of the note in his book. We [281] have examined the entry H closely; we have heard it criticised in argument. We see no reason to doubt its genuineness. When the note is found to be forged Lalla at once admits that he sold it. He says at once he got it from prisoner. Either Itwari's name is fraudulently inserted in H by Lalla, to support this story, or H strongly corroborates him. Now if Itwari's name was so inserted, it can only have been by writing the whole page over again. An examination

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of the page, and of the position of Itwari's name in it, where it is partly in one line and partly in another, and where the entries all fit in exactly, shows this. What time was there for Lalla to do this? Supposing he had time and opportunity to do it, why should he do it? Why not name Damri and Sanichar? If Lalla's story is false, he must, unless he is in league with the police so as to have had an opportunity given him of concocting H, have heard of the notes being forged before the police went to his house, have prepared H for the purpose of charging Itwari, have had his story ready then, and have then, or since, secured the complicity of the other witnesses in a nefarious conspiracy. Why should he? There is no reason suggested for his naming Itwari untruly. Assuming it te be a matter of absolute indifference to him, whether or not he commits forgery, perjury and subornation of perjury, why should he take all this trouble? Again the note, after having passed through several hands, was stopped by the Bank at Lucknow. It is not sugested that Lalla had any dealings or communication with Lucknow, and therefore it is very unlikely that he heard more of this note after he despatched it until it was put into the hands of the police.

In expressing dissent from a conclusion upon facts come to by other minds, we are indisposed, when we can avoid it, to use epithets as a mode of signifying that dissent. We should not say that the three jurors are either perverse, or manifestly wrong, or unreasonable. But we do say, that we think the evidence so much preponderates against their opinion, that we disagree with their verdict. We think it proved that Itwari sold the notes. We also agree with the two jurors who found that he had absconded. The evidence, we think, proves this. We cannot account for the negative finding on this point of the other three [282] save on the supposition that they supposed that to establish this it was necessary that proof should be given that he had been actually seen in the act of absconding, which is not the case. His absconding, under the circumstances, is itself strong evidence of guilty knowledge. But W. is conclusive. It is immaterial whether he wrote it or not. It seems probable that he did, though he should not find against the opinion of the jurors on this point. But he sells a note purporting by an endorsement on it to have been sold to his firm, and it is proved that it was not sold to his firm by the persons named in the endorsement. The conclusion is irreistible. Upon the evidence, we find that he sold the note knowing or having reason to believe it to be forged. We convict him, therefore, under ss. 467 and 471, Indian Penal Code. As to the sentence, the offence is a very serious one, and is calculated to do almost incalculable injury to the public. For the protection of the mass of the trading community whose whole business would become disorganised by such a crime as this unless severely repressed, we think it necessary to impose a very severe sentence, and we sentence Itwari to rigorous imprisonment for seven years.

K. M. C. *Verdict set aside and accused convicted.*

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1887 Dec. 2.

Appeal from Original Civil.

15 C. 282

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, and Mr. Justice Tottenham.

OKHOYMONEY DASEE (*Plaintiff*) *v.* NILMONEY MULLICK (*Defendant*).* [2nd December, 1887.]

Will—Construction—Gift over on failure of prior devise.

A testator made the following disposition by his will: "I appoint my brother *N* sole executor of my estate and effects after my decease, who shall pay all my debts and collect all outstandings. My wife is supposed to be in the family way. Should she bring forth a male, in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed [283] from my estate. I also wish that she should receive a legacy of a Government 4% promissory note for Rs. 2,000 on her attaining proper age. *In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother.* My wife is to receive a Government 4% promissory note for Rs. 1,000 as a legacy, and is to be maintained from my estate if she continues to live in our family dwelling house under my brother's protection."

The child with which the widow was *enciente* turned out to be a daughter: *Held,* that the clause in italics was one purporting to give the property, and not only the management of it, to *N*, the power of management having already been given him in appointing him executor; that the provisions for maintenance of the widow, and for the marriage expenses of the daughter, tended to show (putting aside the legacies) that the widow and daughter were not to take the larger estate which they would have successively taken as heiresses and that the wife of the testator not having borne to him a son, and the apparent intention of the testator having been to give the estate to *N*, if the son did not take, or if the estate to the son failed by reason of his not attaining proper age, the gift over to *N*. on the principle laid down in *Jones* v. *Westcomb* (1), took effect on failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift.

[F., 33 C. 947=3 C.L.J. 502=10 C.W.N. 695.]

APPEAL from the decision of Mr. Justice Trevelyan, dated the 11th July, 1887.

This was a suit brought on the 14th December, 1885, by one Okhoymoney Dasee, the widow of Hurrynarain Mullick, against Nilmoney Mullick, a brother of her late husband and sole executor of his will, to set aside the will of her late husband, or in the alternative to have it declared that, notwithstanding the will, she was, in consequence of a failure in the provisions thereof, entitled to the property referred to therein as heiress.

Hurrynarain died on the 25th December 1860, having made a will in the English language, which was as follows: "I, Hurrynarain Mullick, of Colootollah, in the town of Calcutta, in sound mind make this my last will and testament, and appoint my brother Nilmoney Mullick the sole executor of my estate and effects after my decease (which God forbid) who shall pay all my legal debts and collect all my outstandings. That my wife is supposed to be in the family way; should she bring forth a male issue in that case he will be the sole heir of my property and [284] effects on his attaining proper age. If, on the other hand, she is

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* Original Civil Appeal No. 26 of 1887 from a decision of Mr. Justice Trevelyan, dated 11th July 1887.

(1) 1 Eq. Cas. Abr. 245.

1887 Dec. 2.

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delivered of a female child, all the expenses of her marriage and maintenance till that period should be defrayed from my estate. I also wish that she shall receive a legacy of a Government four per cent. promissory note for Company's rupees two thousand on her attaining proper age. In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother Nilmoney Mullick.

"My wife is to receive a Government four per cent. promissory note for Company's rupees one thousand as legacy, and she is to be maintained from my estate if she continues to live in our family dwelling-house under my brother's protection. Company's rupees two hundred is to be given to the District Charitable Society of Calcutta."

Hurrynarain at his death left him surviving the defendant, his eldest and only surviving brother, and the plaintiff, who was then of the age of fifteen, and who was then *enciente*, his sole widow, and she in due course, after the death of the said Hurrynarain, gave birth to a daughter named Soudaminee, who in March 1872 was married to one Manick Lall Dhur, to whom she bore a son Vasudev, on the 1st November 1884.

On the death of Hurrynarain the defendant took out probate, of the said will, and took possession of all the property, moveable and immoveable, of which Hurrynarain had died possessed.

On the 14th December 1885, the plaintiff brought this suit against Nilmoney for the purposes above mentioned, alleging certain matters, other than those mentioned above, for the purpose of showing that limitation did not run against her, but which facts it is unnecessary to set out for the purpose of this report, which is one on the construction of the will of Hurrynarain.

The defendant claimed to be entitled under the will to the property left by Hurrynarain, but contended that whether or no the will gave the property to him, yet in any case the plaintiff's suit was barred by limitation.

Mr. Justice Trevelyan, before whom the case came on for hearing, after stating that the two points for decision were, (1) what was the true construction of the will of Hurrynarain, and (2) was the plaintiff's claim barred by limitation, was of opinion on [285] the first point that the will should be treated rather as a Bengali will than as an English one; that the class of cases headed by *Jones* v. *Westcomb* (1) did not have any real application to the case, the real question in determining the construction of the will being what was the intention of the testator. That it was clear that, unless the heiress was distinctly disinherited by the will, and her heritage clearly given to some one else, she must succeed on the issue as to what was the construction of the will.

That the clause "in case my son dies before attaining proper age all my estate and property should be taken possession of by my brother Nilmoney Mullick," did not show any intention by the testator to give his brother any beneficial interest in the property, Bengali wills making usually a clear distinction between possession and ownership; a right of ownership being denoted by the word *malik*, or in the case of a will, like the present, by its English equivalent *owner* or *proprietor*, and the gift made more evident by some such expression as "*no one shall raise any objection;*" that, on the other hand, where mere possession of an executor or manager was intended to be conferred, an expression such as *dakhilikar*, or its English equivalent possession, was used; but that

(1) 1 Eq. Cas. Abr. 245.

the word *possession*, as used in the present will, meant the *possession of an executor or manager*, and that there being no beneficial gift to Nilmoney Mullick, there was an intestacy as to the residue of the property, and that, therefore, the plaintiff was entitled to succeed as heiress. But, on the second point, *viz.*, that of limitation, the learned Judge held that the plaintiff's suit was barred except so far as the legacy of Rs. 1,000 was concerned, under s. 123 of sch. II of the Limitation Act, and therefore dismissed her suit.

The plaintiff appealed on the point of limitation, and the defendant preferred a cross appeal on the ground that an erroneous construction had been put upon the will, the devise over being good.

The Advocate-General (Mr. *Paul*) Mr. *Pugh*, and Mr. *Bonnerjee*, for the appellant.

Mr. *Woodroffe*, Mr. *Hill*, and Mr. *Stokoe*, for the respondent and cross-appellant.

[286] Such of the arguments of Counsel on either side as did not refer to the question of construction of the will have been omitted, the decision of the appellate Court turning only on the point of construction.

The Advocate-General (Mr. *Paul*) and Mr. *Pugh* opened on the question of limitation.

Mr. *Woodroffe* for the cross-appellant and respondent.—The Court below, whilst holding rightly on limitation, has erred on the construction of the will in not holding that the estate vested in the defendant under the will. The testator did not mean his son to take unless he attained majority, nor did he mean that any daughter that should be born should take the property. The defendant was in possession as executor from the moment of the testator's death; the words " taken possession of " indicate that the possession which was to be taken by the defendant in a certain event was of a different character from that under which he was holding before; the wife's legacy clause stands apart from the other portions of the will; there is nothing to sever the maintenance from the legacy if she continued to live in the family dwelling-house. As to the meaning of the words " in case my son dies before attaining proper age," *see* Tudor's, L. C. on Real Property, 769; *Jones* v. *Westcomb* (1), which lays down that a devise is good even if the contingency on which the devise is to take effect does not happen; *see* also *Warren* v. *Rudall* (2). There cannot be a devise over after a devise to a non-entity; the testator cannot have proposed that if there was no son that the son non-existent should attain 21. Section 116 of the Succession Act illustrates a case of the same class as *Jones* v. *Westcomb* (1), and that section has been incorporated into the Hindu Wills Act. *See* also *Hall* v. *Warren* (3); *Avelyn* v. *Ward* (4); *Macknînon* v. *Sewell* (5). I submit the clause in the present will should be read " in the event of my wife not having a son at all, or not attaining full age, to my brother."

[The Court here called upon Mr. *Pugh* on the question of construction.]

[287] Mr. *Pugh*.—The English authorities are no guide, save so far as laying down the principle that you are to see what are the intentions of the testator. I submit (1), unless there are clear works disinheriting the heir, he cannot be disinherited; (2), that there is no gift in the words

(1) 1 Eq. Cas. Abr. 245. (2) 4 K. & J. 603. (3) 9 H. L. 420.
(4) 1 Ves. 420. (5) 2 My. & K. 202.

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"taken possession of;" (3), that there was no intention on part of testator to disinherit his widow and daughter; and (4), that there is no beneficial gift to Nilmoney, possession being treated as distinct from ownership.

There cannot be in Hindu law a contingent gift of this kind with no intervening estate; a gift of the fee, not to come into operation until ten years after the death of the testator, is void, inasmuch as there is an intermediate estate, and the heir would have come in, and he cannot be turned out again. An estate cannot be left without an owner even for a time—*see Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (1). The right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. Mayne, paras. 422, 515. [WILSON, J.—The question is not whether there is an intention to disinherit the heir, but whether there is an apparent intention to give to some one else.] In the case of *Lallubhai Bapubhai* v. *Mankuvarbai* (2), the words of the will were stronger than the words here, and it was held that the heir was not disinherited. Section 116 of the Succession Act is not intended to interfere with the *Tagore case*, that section included cases of lapse, which are not included in the English cases on which the section is supposed to be founded. A second gift never takes effect unless the first gift has become indefeasible—*see* Theōbald on Wills (3rd Ed.), 446.

[PETHERAM, C. J.—The case of *Doe d. Hunt* v. *Moore* (3) seems to be in point.] In Montriou's Hindu Law, p. 129, there is a form of a will given in which the testator wished to cut out his daughter and daughter's son.

JUDGMENT.

The judgment of the Court was delivered by

WILSON J., (PETHERAM, C. J., and TOTTENHAM, J., concurring)—This was a suit brought by one Okhoymoney Dasee, the [288] widow of a person named Hurrynarain Mullick, who died on the 25th December 1860, having previously made his will. She claims to be entitled to her husband's property as his heir, and asks in the first place, practically, that the will be set aside. Then in the alternative she prays, notwithstanding the will, to have it declared that there has been a failure in the provisions of the will, and, consequently, an intestacy under which she is entitled.

The defendant is a brother of the deceased, and claims to be entitled under the provisions of the will of the deceased to the property left by him. A second defence was raised, *viz.*, that whether the will did or did not give the property to the defendant, the plaintiff's suit is barred by limitation.

The learned Judge who heard the case came to the conclusion that, notwithstanding the terms of the will, the plaintiff as his heiress-at-law was really entitled to his property, the property not passing to the defendant under the will; but he held, on the other hand, that the plaintiff's suit was barred by limitation, and accordingly dismissed the suit. Before us the argument has gone on both of these questions, and I propose to deal with the principal question—the question which goes to the merits of the case, *viz.*, under the will and in the events that have happened, who really did become entitled to this property? The terms of the will, so far as they are material, are these: "I appoint my brother Nilmoney

(1) 2 B. L. R. O. C. 11. (2) 2 B. 388. (3) 14 East 601.

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Mullick my sole executor of my estate and effects after my decease, who shall pay all my legal debts and collect all outstandings;" and then it goes on: "My wife is supposed to be in the family way. Should she bring forth a male issue, in that case he will be my sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage and maintenance till that period should be defrayed from my estate. I also wish that she shall receive a legacy of a Government four per cent. promissory note for Company's rupees two thousand on her attaining proper age." Then comes the important clause: "In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother Nilmoney Mullick." He then goes on: "My wife is to receive a Government four per cent. [289] promissory note for Company's rupees one thousand as legacy, and she is to be maintained from my estate if she continues to live in our family dwelling-house under my brother's protection." He also gives Rs. 200 to the District Charitable Society, and there the will ends. The precise portion of the will which we have now to construe is that in which he says, in case the son dies before attaining majority all his estate should be taken possession of by his brother Nilmoney Mullick. But that clause cannot be construed unless it be read in connection with the other clauses of the will.

The first question with reference to that clause is: Is it a clause purporting to give any property to Nilmoney at all, or, is it, as the learned Judge in the Court below has held, only a clause relating to management. I think it is a clause purporting to give the property, and I think so principally for these reasons. By appointing Nilmoney as executor of the will, and directing satisfaction of certain charges out of the property, I think, whatever may be the legal position of an executor according to the ordinary rules of Hindu law, he meant to give the executor such powers of management as were necessary for discharging those duties which he has imposed upon him by the will. Amongst those duties is the duty of providing for the maintenance of the widow, and the maintenance and marriage expenses of the daughter. And that maintenance was to be provided by Nilmoney, and by nobody else, as appears clearly from the condition as to the widow residing under his protection in the family dwelling-house. Thus by appointing Nilmoney as executor of this will he had, as it seems to me, already given him all the power of control that was necessary for the purposes of the will. To me it appears that if you read the latter clause which is said to be one of mere management, as a clause of mere management, you practically give no effect to that portion of the will, because, as I said before, all the powers necessary for carrying out the trusts of the will had been given already, and no powers of mere management not necessary for the purposes of the will could be given as against an heir-at-law who claims not under the will but adversely. The result would be to reduce the provision to a dead letter, and we ought not to construe the clauses of a will in such [290] a way as to bring about that result, if we can construe them in such a way as to make them operative. There are other clauses of the will tending to show that the words in question are a gift of property. In the first place, I do not agree with the learned Judge who heard the case in thinking that the specific legacies and bequests given to the widow and daughter afford no indication that the property has passed away from them. I think the provision for the maintenance of the widow and marriage expenses of the daughter tend to show, putting aside the legacies, that they were not to take the larger

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estate which they would take successively as heiresses, and which would of course include everything that was given them. The clause, again, which says that the widow is to be maintained if she continues to live in the family dwelling house, and under the protection of the brother, seems to me very strong to show that the brother was to be her protector by reason of his possessing the property. I think, therefore, that the clause is a clause purporting to convey the property and not to give the mere management of it.

The next question, then, is, has that clause taken effect in the events which have happened? In order to see that we have to read that clause with the prior clause purporting to give an estate to the son who the testator hoped might be born. I think it is important that in this country we should certainly not be more strict in construing wills than are the Courts in England. On the contrary, I think it is our duty, and it has been so laid down repeatedly by the Privy Council, to endeavour in the case of every will to find out what the real intention of the testator was which he intended to express in his will, and to look to that rather than to the precise language he has used. Here is a man about to die leaving his wife pregnant; he is unable to tell whether the child which is in the mother's womb is a boy or a girl, and he has a brother. He, therefore, makes a will giving the property to the child in certain terms, and then gives a gift over to the brother. If we can give effect to the apparent general intention of the testator to give his estate to the child, if the child should be a boy, and to the brother if a boy did not take, or if the estate to the boy failed, we are bound to do so [**291**] in accordance with the principle repeatedly laid down and acted upon in the Courts in England in construing wills, and especially in the well known case of *Jones* v. *Westcomb* (1), and other cases which may all be found collected in Williams on Executors, Part III, Book III, Chapter 2, s. 6. Consequently, I think, we are bound to hold that the gift over to the brother takes effect on failure of the first gift, in whatever mode that failure takes place, even if it be not in the precise manner expressed in the terms of the gift. The precise mode contemplated in the terms of the gift was the son's dying before reaching his 21st year: I think we should give effect to the gift over when the first gift fails by the male child never existing.

Then what were the gifts to the child and to the brother? Speaking for myself, applying the principles on which, I think, wills should be construed, and reading the two gifts together, I should feel little hesitation in saying that, if the event had turned out as the testator hoped, the effect of the will would have been to give a vested estate to the child from the testator's death, with a gift over to the brother on that estate failing for any cause. If this be so, it seems to me to follow that the first intended estate failed at the time of the testator's death. There was an uncertainty about the fact, because it could not then be known what was the sex of the child in the mother's womb, but the child was a girl and not a boy; and therefore the estate, which it was intended to give to the possible boy, failed, and failed then. The consequence was that the second gift in favour of Nilmoney took effect then. But supposing this not to be the true construction of the will, and supposing the testator ought to be considered to have contemplated giving a vested estate to the child on his birth, still I think the result would be the same, for I think

(1) 1 Eq. Cas. Abr. 245.

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the gift over to Nilmoney operated so as to pass to him everything that did not pass under the first gift. In any view of the case, therefore, it appears to me that this is a clause purporting to give the property to Nilmoney; that in the events which have happened that gift has taken effect, and did so on the death of the testator, although the fact could not be ascertained until the birth of the child.

[**292**] As regards that part of the case which relates to the question of limitation, on which the Judge in the Court below decided the case, I desire to guard against saying anything which could seem like dissent from the view which the Judge has expressed. In the view that we have taken of the principal question it is unnecessary to deal with that question. I think that this appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellant: Messrs. *Sen & Co.*

Attorneys for respondent: Messrs. *Watkins & Co.*

T. A. P.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, and Mr. Justice Tottenham.

SOROLAH DOSSEE (*Plaintiff*) *v.* BHOOBUN MOHUN NEOGY AND OTHERS (*Defendants*).
UNNOPOORNAH DOSSEE (*Plaintiff*) *v.* BHOOBUN MOHUN NEOGY AND OTHERS (*Defendants*).* [23rd January, 1888.]

Hindu law, Partition—Bengal School of Law—Partition by sons—Mother's share on partition—Succession to share given to a mother on partition.

Under the Bengal School of Law the share which a mother takes on partition among her sons is not taken from her husband's estate either by inheritance or by way of survivorship in continuation of any pre-existing interest, but is taken from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound; and on her death that share goes back to her sons from whom she received it.

[F., 27 C. 77 (80); 11 C.W.N. 239 (242); **Commented upon**, 28 M. 1 (8); **R.**, 19 C. 26 (33); 20 C. 682 (686); 27 C. 551 (553); 6 C.W.N. 905 (911); 31 C. 1065= 8 C.W.N. 763; 9 C.L.J. 128 (130)=3 Ind. Cas. 304; 12 C.W.N. 808=8 C.L.J. 489; **D.**, 36 C. 75=12 C.W.N. 1002=1 Ind. Cas. 523.]

APPEAL from the decision of Mr. Justice Trevelyan, dated 2nd April 1887.

On the 10th September 1868, one Rajendar Chunder Neogy, a Hindu, governed by the Bengal School of Law, died intestate, leaving him surviving three sons—Ram Chunder, Bhoobun Mohun and Hurry Doss, and also a widow named Rakhal Money Dossee and his mother Goluck Money Dossee.

On the 19th September Ram Chunder died intestate, leaving him surviving Unnopoornath Dossee, his sole widow and heiress.

In 1868 Unnopoornah brought a suit against Bhoobun Mohun, Goluck Money, Hurry Doss and Rakhal Money Dossee for [**293**]

* Original Civil Appeal No. 18 of 1887, against the decision of Mr. Justice Trevelyan, dated 2nd April 1887.

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partition of the estate of Rajender Chunder Neoghy, and obtained therein a decree on the 18th March 1869, under which a one-fourth share was allotted to her, and another one-fourth share to each of her brothers-in-law, and the remaining fourth share to Rakhal Money. Rakhal Money died on the 18th February 1884. Subsequently to her death, disputes having arisen between Hurry Doss and Bhoobun Mohun as to the source from which certain properties in the possession of Rakhal Money at her death had been derived, Hurry Doss brought a suit against Bhoobun Mohun for the purpose of ascertaining his right in the properties belonging to the estate of Rakhal Money; and at or about the same time Unnopoornah brought a suit against Bhoobun Mohun and Hurry Doss for a declaration that she was entitled to a one-third share of the properties allotted to Rakhal Money under the partition decree of the 18th March, 1869.

On the 14th June 1886, Hurry Doss died, and before these suits came on for hearing Sorolah Dossee, the sole widow and heiress of Hurry Doss, was put upon the record in his place.

These two suits were by an order of Court amalgamated and heard together, and on the 2nd April, 1887, the following judgment was delivered therein by Mr. Justice Trevelyan:—

In these cases the only matter which it is necessary for me to consider involves a question of Hindu law which, except in a case before Mr. Justice Pigot, to which I shall hereafter refer, does not seem to have ever been determined. The question is, what on her death becomes of the property allotted to a Hindu mother on a partition between two of her sons and the widow of a third son.

Rajender Chunder Neoghy died intestate on the 10th September 1868, leaving three sons—Ram Chunder, Bhoobun Mohun and Hurry Doss, and a widow Rakhal Money. On the 19th of the same month Ram Chunder died, leaving a widow Unnopoornah. Unnopoornah brought a suit for partition against her two brothers-in-law and her mother-in-law, and on such partition a one-fourth share was allotted to her, another one-fourth to each of her brothers-in-law, and the remaining one-fourth to her mother-in-law. Rakhal Money died on the 18th February 1884, leaving [294] her two sons surviving her. One of these, Hurry Mohun, has since died. The question here is whether the one-fourth share which was allotted to her on partition is to be divided between her surviving son Bhoobun Mohun and the widow of Hurry Doss, or between Bhoobun Mohun the widow of Hurry Doss and Unnopoornah. There is no Hindu text expressly in point. It was for some time a question whether the share which a Hindu mother took on partition between her sons was her *stridhun*, or whether she had a life, or rather a limited, interest therein. It is now established law that she has not in such property any greater estate than that of a Hindu widow, a Hindu daughter, or a Hindu mother who succeeds to her son's property; it is also clear that it is not *stridhun*.

The question which I have here to determine was raised in a case of *Suttya Suttye Ghosaul* v. *Suttyanund Ghosaul*, before Mr. Justice Pigot; and although it was unnecessary to decide the question, Mr. Justice Pigot expressed an opinion that on the mother's death her share would revert to the then heirs of her husband. That learned Judge in expressing this opinion did not give any reasons for his opinion, and such opinion was not necessary for the purpose of deciding the particular application. With every possible respect for that learned Judge's opinion, I feel myself unable to follow it in the present case.

In the last edition of his *Vyavastha Darpana*, Shama Churn Sircar says this at paragraph 598: "This share which is given to a mother on the partition as above is given to her in lieu of maintenance, and means allowing also for the performance of religious acts; and it reverts after her death to those heirs of her husband out of whose portion that share was allotted to her;" and Jagannatha says: "She cannot alienate the above or apply it to a purpose other than that for which it is given her by them who were bound to maintain her from her husband's estate, and who will receive it back after her death when it is no longer required to be so set apart." This shows, I think, that the share reverts to the persons out of whose shares it was allotted. On the death of Rajender Chunder Neogy the whole of his estate vested in his sons, and on the death of Ram Chunder his undivided one-third share vested in Unnopoornah. I do not [295] find any authority for saying that on a partition a portion of the shares of the sons is divested. The sons have to maintain their mother out of the property which they derive from their father, and on partition they have to give her a share as a security and provision for her maintenance. When the necessity for maintenance ceases, *i.e.*, when she dies, the property must, it seems to me, go back to the persons who were bound to maintain her, and who in pursuance of that obligation made over the property to her. In the absence of any clear authority in the Hindu law I do not see how I could hold that the effect of partition would be that Unnopoornah would lose all right in the property. I think she gets the same share as she would have got if her mother-in-law had died before the partition. The share allotted on partition is merely a security for the maintenance to which the mother-in-law was entitled out of the estate. I must hold that Unnopoornah is entitled to a one-third share of the property which was allotted to her mother-in-law. The other questions were disposed of by me at the hearing.

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Sorolah Dossee appealed.

Mr. *Woodroffe* and Mr. *Evans*, for the appellant.

Mr. *Bonnerjee* and Mr. *Chatterjee*, for the respondent.

Mr. *Woodroffe*.—The question before the Court is to whom does the share allotted to a mother on partition descend—whether to the heirs of her husband, from whom such share was taken, or to such heirs of her husband as are living at the time of her death. To answer this question it should be considered how it is that the mother's right to a share on partition accrues; the answer would go some way towards solving the point in this case. I say there is by virtue of the marriage of the wife a seizin by her in her husband's property; she has an interest existing prior to partition. The husband is one with the wife—*Dayatattwa*, p. 40, Ch. VI. The wife on the death of her husband does not lose her rights, because the right asserts itself not by reason of the widow being mother of sons, but as widow of her husband; and therefore when the widow dies the heirs are to be sought for as though the husband had died without [296] male issue. In the case of *Lakhsman Ramchandra Joshi* v. *Satyabhamabai* (1) it is held that a widow before partition has an equity to a provision which the Court will enforce to guard her against attempted fraud; this view is also taken in *Bilaso* v. *Dina Nath* (2). The *Dayabhaga*, Chapter IX, s. 1, para. 26, lays down that there is no proof of the position

(1) 2 B. 494.

(2) 3 A. 90.

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that the wife's right in her husband's property, accruing to her from her marriage, ceases on his demise.

A widow has a sufficient interest in her husband's estate to come in and object to probate being granted to a particular person—*Brinda Chowdhrain* v. *Radhica Chowdhrain* (1). The passage from Shama Churn cited by the lower Court is not to be found in *Jagannatha*, but the words used by *Jagannatha*, have an entirely different meaning—see *Colebrooke's Digest*, Vol. III, p. 23. Jagannatha says: "She may not part with her right except for necessity." Now how could she do so if there was a vested remainder in the heirs of the propositus? At page 391 of West and Buhler (2nd Ed.) the authors discuss the nature of the mother's estate in the portion allotted to her on partition of her husband's estate. If the partition had been by the father, the share taken by the wife would go back to the heirs of the father. As to whether the share given to the mother should or should not be considered to be *stridhun*, see West and Buhler (2nd Ed.), p. 356. In Bengal it has been decided that it is not *stridhun*, but in Allahabad it is otherwise—see *Bhugwandeen Doobey* v. *Myna Baee* (2). Originally sons could not participate in their father's estate so long as the mother was alive, but as an inducement to her to permit them to so participate, a share was allotted to the mother. The texts which bear upon this subject will be found in Colebrooke's *Digest*, Vol. II (Mad. Ed.), 247. It has been stated, no doubt, that the share which is given to a woman on partition by sons after her husband's death reverts on her death to the heirs of her husband out of whose portion the share was taken—see *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi* (3), but such statement [**297**] was *obiter* and the point was not alluded to by counsel, as it did not bear upon the questions in the case. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (4) shows that a mother is entitled on partition to a share either by way of maintenance or as a portion of the inheritance. Mayne in paras. 213, 214 suggests that the origin of this is not to be traced to the necessity of providing for after-born children, but rather that the widow has an interest in the property. The case of *Nobin Chunder Chuckerbutty* v. *Gurupersad Dass* (5) gives a reason why on the death of a female the heirs of the male propositus living at her death should be sought for to discover the proper succession. In the unreported case of *Suttya Suttye Ghosaul* v. *Suttyanund Ghosaul*, suits Nos. 568 and 699 of 1887, decided by Pigot, J., the very question now before the Court arose; there was there a partition directed between a daughter and sons, and Pigot, J., said that he would have held (if it had been necessary to base his judgment on that point) that the share of the mother went on her death to the heirs of her husband living at the time of her death.

In Colebrooke's Digest, Vol. III, p. 22, in the note to text 87, the question is put, "whether the share of the wife be equal with that of a son, or with that of another wife, are wives entitled to the use only of the share which they receive, or have they independent power over it?" The answer is: "Although sons had no previous ownership in their father's estate, yet as they have independent power after partition, since the father's property is divested, so wives also have independent power, for a text declares that property is common to the husband and wife (text 415), and she therefore has ownership even prior to the partition." Again on p. 25: "As for what is argued that when the husband's property is

(1) 11 C. 492. (2) 11 M. A. 507 (514). (3) 13 C. 336 (341).
(4) 9 W. R. 61 (62). (5) B. L. R. Sup. Vol. 1008=9 W. R. 505.

divested the property of the wife, originating therein, is also annulled, there are no grounds for this induction, for there is no ordinance to that effect like the text 415, which serves to prove the right of the wife to be co-existent with the husband's." Again in *Macnaghten's Consid. Hindu Law*, p 73, it is said "a mother who takes upon partition and the widow who succeeds to her husband's property stand on the same footing with regard to their [298] interests in the estate." I submit therefore that the share allotted to a mother on partition goes on her death to the heirs of her husband alive at her death.

Mr. *Evans* on the same side.

In the case of *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi*, (1) Counsel's attention was not turned to the point now before the Court, and the judgment does not thoroughly go into the matter; but on p. 341 a general explanatory statement on the point is made. That statement is no obstacle to a free consideration of the point; the matter was *obiter*. The result of Trevelyan, J.'s judgment is that a widow takes no more than a life interest and that there is a vested reversion in the sons. It was known a long time ago that a widow was entitled to a share on partition, and many of the authors of the Mitakshara School thought that she took a full estate which on her death went to her heirs; but in Bengal the weight of authority showed that it went to the heirs of her husband. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (2), although a Mitakshara case, is a guide as the grounds on which the share is allotted are the same as those mentioned in the Dayabhaga. I cannot attach any legal meaning to the words in Trevelyan, J.'s judgment, "that Rakhal Money took her share as security for her maintenance;" there is no security, as she could alienate it for necessity.

The case of *Bhugwandeen Doobey* v. *Myna Baee* (3) deals incidentally with a mother's share on partition, and Colebrooke, Vol. III, p. 31 (original edition), in the note to text 89, shows that a mother may alienate her share on partition for necessity.

In *Bhugbutty Daee* v. *Chowdry Bholanath Thakoor* (4), it was held that a widow had a vested estate, and not only an estate of a Hindu widow, and that case shows the difference between such estates; the Court points out that the widow's right to income is absolute. The case of *Moniram Kolita* v. *Kerry Kolitany* (5), points out the undesirability of a widow ceasing to be a full owner on committing adultery, and points out the great evil of [299] allowing the theory that a widow's estate is divested by want of chastity.

In West and Buhler, p. 67 (note) (Ed. 1884), it is pointed out that by partition wholly new rights come into existence, the continuity of succession being entirely broken up. At page 297 of the same edition a general discussion of the nature of a widow's estate and the rights she takes in property in any way acquired by her is to be found; on page 237 it is said that rights of property are to be determined by birth and marriage. At p. 781 (note) reference is made to the succession of the share given to a mother on partition. On p. 319 (note) it is said that the closest resemblance to the estate of a Hindu widow is to be found in that of the widow under the old Teutonic law in the property enjoyed by her as dower. The Court is, however, now asked to create a new estate, or to deny that a widow has any proprietary right at all.

(1) 13 C. 336 (341). (2) 9 W. R. 62. (3) 11 M. I. A. 507 (514.)
(4) 2 I. A. 259. (5) 7 I. A. 151=5 C. 776.

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Mr. *Bonnerjee* for the respondent.—The argument of the other side that the two brothers are entitled to the mother's share, because by marriage husband and wife are one—the wife on death of her husband not losing her right, such right asserting itself not by reason of the widow being mother of sons, but as widow of husband, and that therefore when widow dies the heirs are to be sought for as though the husband had died without male issue—is fallacious; that idea gained ground from para. 45, chapter IX, Menu, but such unity of the husband and wife is only regarding religious and domestic matters. Property is secular and not religious—see *Mitakshara*, Ch. I, s. 1; *Stokes Hindu Law Books*, p. 367, paras. 8 and 9. Now how does property descend when a person dies leaving a widow and one son by her? In such case, if the argument of the other side is correct, part of the property would be in the widow; but the texts show this is not so—*Dayabhaga*, Ch. XI, s. 1, para. 26; *Stokes. Hindu Law Books*, p. 309, para. 26. Succession devolves on the widow by failure of sons and other male descendants—*Dayabhaga*, Ch. XI, s. 1, para. 31; also para. 33. The doubt expressed by Sir Barnes Peacock in *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss* (1) is explained by Dwarka Nath Mitter, J., [**300**] in *Gûru Gobind Shaha Mondal* v. *Anand Lal Ghose Mazumdar* (2)—a case which shows a widow is utterly excluded by sons who deal with the property. The case of *Bhagabati Dasi* v. *Kanailal Mitter* (3) shows that a son takes an absolute estate from his father, and that the widow is only entitled to maintenance. That case goes to the length that if the heir sells, a *bona fide* purchaser would be unaffected by anything short of a specific charge (p. 229); so that until a widow's maintenance is fixed or being fixed, there is no lien having the character of a proprietary right in the widow's claim to maintenance. The *Dayabhaga* in Chapter I, paras. 38 and 44, says: "There are two periods of partition—one when the father's property ceases, the other by his choice—while his right of property endures." Here the partition was after the father's death, *i.e.*, after his property had ceased. Such a partition is dealt with in *Dayabhaga*, Ch. III, s. 1. There is nothing in the *Dayabhaga* which compels a father to give anything to his wife who has issue. Here the mother took her share on partition from her sons as maintenance, and such share should go back to the sons on her death. With regard to the origin of the share given to a mother by her sons on their partition, see *Colebrooke's Digest*, Vol. III, p. 488, para. 415. As to text relating to partition after death of a father, see *Dayabhaga*, Ch. III, ss. 1, 5, 16. If the mother has separate property she has only half a share, which indicates that it is not the property of the husband, but property of the sons which is partitioned.

Bearing in mind that an equal share is given to a mother on partition by sons, because "she is most venerable," it will be possible to understand what Mitter, J., means in *Sheo Dyal Tewaree* v. *Judoonoth Tewaree* (4) when he says "the mother and grandmother can never be recognized as owner of a share until division is actually made, they having no pre-existing right in the estate except a right of maintenance."

With regard to the rights of a step-mother under Bengal law, a sonless wife, if there is no partition in the father's lifetime, is not entitled to a share on step-sons' partition, but to maintenance; [**301**] but if partition is in the father's lifetime she takes a share—see *Damoodur*

(1) B. L. R. Sup. Vol. 1008=9 W. R. 505.
(2) 5 B. L. R. 15 (37).
(3) 8 B. L. R. 225.
(4) 9 W. R. 62.

Misser v. *Senabutty Misrain* (1). There is an unreported case, decided by Mr. Justice Wilson, referred to in *Kristo Bhabiney Dossee* v. *Ashutosh Bosu Mullick* (2), but it does not seem to have been followed by Trevelyan, J. The case of *Cally Churn Mullick* v. *Janova Dossee* (3) follows the Supreme Court cases although not approving of them; also the cases of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (4) and *Bilaso* v. *Dina Nath* (5) show that the widow is only entitled to a share as maintenance but they do not determine what is to happen to the property after the mother's death. For rules of succession, which are all governed by express texts of law, see *Dayabhaga*, Ch. XI, s. 2, paras 1, 23; Ch. XI, s. 4, paras. 1, 2; Ch. XI, s. 5.

The other side say the property goes to the heirs of the husband alive at the death of the mother, but why should they add " alive at the death of the mother." There is no text or case to that effect; besides, the heirs of the husband must be his heirs alive at the time of his death. The mother taking a share does not take it as stridhan, for if she took it as stridhun it would go to her stridhun heirs. The *Dayabhaga* does not lay down any rule for succession to a mother's property. But that her property does go back to the sons I submit is clear; if not, Shama Churn's statement will have to be got rid of, and also the case of *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dasi* (6). Shama Churn says " the mother's share is given to her for maintenance, and reverts after her death to the heirs of her husband from whom she took it." I submit the lower Court is not wrong in relying on this passage. Jagannatha is to that effect. Now on partition where there are two branches of a family (two mothers) a step-mother in Bengal does not participate with step-sons —see *Cally Churn Mullick* v. *Janova Dossee* (3). Assuming this decision to be good law, let us see if Shama Churn is correct, for if the argument of the other side is correct it is impossible to say why the mother's share should depend on the number of her own sons only.

[**302**] A vested reversion is not unknown to the Hindu law—see *Jai Bansi Kunwar* v. *Chattar Dhari Singh* (7). As regards the case of *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi* (6), even if the remarks be *obiter*, the opinion of a learned Judge on a difficult point of law on which there are no authorities should be considered; it however was necessary for the Court in that case to state what the general law on the subject was, and therefore I say the remarks are not *obiter*. As to a grandmother's share on partition, see *Puddummookhee Dossee* v. *Rayee Monee Dossee* (8); *Rayee Monee Dossee* v. *Puddummookhee Dossee* (9). I submit that when a man dies leaving a son, his entire estate descends to that son as his heir, and if more sons than one, to all the sons equally. If the sons partition and the mother is alive the mother takes a share in lieu of maintenance. It is by the action of the sons that the mother has a proprietary right to the share given her, but only so far as to give her maintenance out of it; and when she dies it goes back to those persons from whom the shares were taken.

JUDGMENT.

Judgment was delivered by WILSON J. (PETHERAM, C.J., and TOTTENHAM, J., concurring).

(1) 8 C. 537 (542). (2) 13 C. 39. (3) 1 Ind. Jur. N. S. 284.
(4) 9 W. R. 62. (5) 3 A. 88. (6) 13 C. 336.
(7) 5 B. L. R. 181. (8) 12 W. R. 409. (9) 13 W. R. 66.

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WILSON, J.—The facts out of which the controversy in this case arises are these—Rajender Chunder Neogy died intestate on the 10th September, 1868, leaving three sons, Ram Chunder, Bhoobun Mohun and Hurry Doss, and a widow Rakhal Money, the mother of the three sons. Ram Chunder died immediately after his father, leaving a widow Unnopoornah as his heir. Unnopoornah sued for partition, and the property which had been that of Rajender Chunder was divided into four parts, of which one was allotted to Unnopoornah, one each to Bhoobun Mohun and Hurry Doss, and one to their mother Rakhal Money. Rakhal Money died on the 18th February, 1884, leaving her two sons Bhoobun Mohun and Hurry Doss and her daughter-in-law Unnopoornah surviving. Hurry Doss had since died leaving his widow Sorolah his heiress. Two suits were thereupon brought, the details of which it is not necessary to examine, and were heard together before Trevelyan, J. The question [**303**] for decision is shortly stated by the learned Judge to be " whether the one-fourth share which was allotted to Rakhal Money on partition is to be divided between her surviving son Bhoobun and the widow of Hurry Doss or between Bhoobun, the widow of Hurry Doss, and Unnopoornah."

The learned Judge decided that Unnopoornah was entitled to an equal share with the other two claimants; he held that when on a partition between sons a share is allotted to their mother " when she dies the property must go back to the persons who were bound to maintain her, and who, in pursuance of that obligation, make over the property to her." Against that decision Sorolah, the widow of Hurry Doss, has appealed. The only other case with which we are acquainted in which the same precise question arose is an unreported case heard before Pigot, J., in which that learned Judge, though he did not base the decision of the matter before him on that ground, expressed a decided opinion, after argument, to the effect that on the death of the mother her share goes to the persons who at the time of her death are the heirs of her husband. We have to say on this appeal which is the correct view.

The contention on the part of the appellants may be summarized thus. A wife by marriage takes an interest in her husband's estate, and that interest does not cease for all purposes upon his death, even if he leave sons. Although partition be made by the sons after the father's death, it is still the father's estate that is partitioned. The share allotted to the mother is not a new estate created by the partition, but the partition defines and gives effect to the right which has all along been in her. She takes it by inheritance, and accordingly, like all property inherited by a widow as such, it goes on her death to those who are then the heirs of her husband.

The contention on the other side was, that a wife during her husband's life is ordinarily entitled only to be maintained by him; that after his death her right as against her sons is no greater; that the share which is allotted to her on a partition between her sons is allotted in lieu or in satisfaction of the general claim to maintenance which she has previously had; and that on her death that share reverts to those who [**304**] were liable for her maintenance, and out of whose estate the share was taken.

In order to estimate the correctness of either of these views it is necessary, I think, to enquire briefly what is the nature of the interest that a wife takes in her husband's estate during his life, and as against his sons after his death; what is the nature of the estate that the sons take

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by inheritance from their father; and how these two interests are to be reconciled with, or are controlled by, one another.

It is specially important to bear in mind while examining these questions that we have to do with the Bengal law, not the Hindu law of any other schools. As to the nature of the right of a widow, when her husband has left sons, the various schools differ, or may differ widely. Thus, according to the Bengal school, a widow can claim a share on partition if her sons divide the patrimony amongst themselves. In Southern India this seems not to be so. In Bengal the right to a share is given only to a mother as against her own sons, a childless widow has no such right against her step-sons. It is by no means clear that this is so under all the schools. In Bengal it is settled that the share allotted to a mother does not become absolutely hers, so as to pass to her stridhun heirs. The Privy Council in *Bhugwandeen Doobey* v. *Myna Baee* (1) point out that under the Benares law this is an open question. And turning to the other aspect of the matter, the interest taken by the sons as heirs, the principle governing inheritance is not wholly the same under the Bengal school and the other schools; the rules of inheritance are not always the same; and it may well be doubted whether the conceptions embodied in the ordinary terminology of the subject are the same in the different schools. There is reason for saying that the very word *Daya*, or Inheritance, has been used by some authors in a sense not co-extensive with that which it bears under the Bengal law.

The title of the wife is based ultimately upon two propositions; that a wife takes by her marriage an interest in her husband's estate and that on a partition of the ancestral estate between sons their mother takes a share equal to a [305] son's share. The text often referred to and cited by Jagannatha (s. 415, 1 Col. Dig. p. 541, Madras Edition) says: "Wealth is common to the married pair." Jimuta Vahana (Dayabhaga, Ch. XI, s. 1, para. 26) speaks of "the wife's right in her husband's property accruing to her from her marriage." The Daya Tattwa, Ch. VI (I cite from the English Edition of Golap Chundra Sarkar, Calcutta, 1874), says: Section 7.—"Also in discussing wife's right her right is declared to extend during his lifetime to every property, belonging to her husband; also in the Shradha Veveka it is declared 'that property lies between husband and wife,' *i.e.*, belongs to two masters, namely, husband and wife." Section 10.—"Therefore, as the prohibition, namely, 'there is no partition between husband and wife,' implies the existence of previous property, consequently the common right of both over the same property is indicated." Section 11.—"Otherwise, in the absence of the common right of both, partition itself would be unreasonable; consequently there would not have been the prohibitory proposition." Section 12—"This is also the meaning of the unity (of husband and wife) declared by Laghu Harita, 'because she attains to unity (with her husband) through clarified butter, sacred texts, offerings and religious observances." All the Bengal authorities accept the rule embodied in the text of Vrihaspati cited in the Dayabhaga, Ch. III, s. 2, para. 29: "When partition is made by brethren of the whole blood, after the demise of the father, an equal share must be given to the mother, for the text expresses, 'the mother should be an equal sharer." But again, if there be any tenet of the Bengal law laid down clearly and without hesitation, it is, that sons, grandsons or great grandsons in the male line take the whole

(1) 11 M. I. A. 514.

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estate of their ancestor, take it on his death, and take it by inheritance in the strictest sense of the term.

We have thus three propositions which, whatever their meaning may be, all rest upon unquestionable authority—that a wife takes by marriage an interest in her husband's property; that sons take by inheritance the whole of their father's estate; that upon a partition between sons of their father's estate their mother takes a share equal to a son's share. It seems to me desirable to enquire how the first and second of these propositions are related, [306] to one another, for on this depends the principles by which we should be guided in applying the third proposition, and the conclusions which we should draw from it.

I propose first to examine shortly the nature and characteristics of a wife's interest in her husband's estate on the one hand, and of a son's interest in his deceased father's estate on the other, looked at from a purely practical point of view, discarding as far as may be all controversial matter, and postponing all questions of principle or theory.

If we look at the matter thus it will appear that a wife's interest in her husband's estate is of a very indeterminate character; she may take everything, or she may take very little, according as events turn out. As long as her husband lives she is ordinarily entitled merely to be maintained by him, and cannot claim any share of his estate or any voice in its management. He has full power of alienation while he lives; and, subject to any question of her maintenance, full power of disposition by will. Should he, however, during his life elect to partition his estate between himself and his sons, it would seem that a wife should be allowed a share equal to a son's if she be without male issue, but not otherwise. When her husband dies she may survive him, and there may be no sons, grandsons or great grandsons in the male line, and then she takes the whole estate as heir. She may survive and have no sons, but there may be sons by another wife, in which case she is entitled, and will ever remain entitled, to maintenance, and no more. She may survive and have, one son, in which case her right is, and as long at least as her son lives must always remain the same, a right to maintenance. She may survive and have several sons, and in this case, as long as her sons continue in the normal condition of a joint family, she is entitled to maintenance only; but if her sons partition among themselves she takes a share; and the same thing results if her grandsons partition. Thus, whatever the principle applicable to the matter may be, the wife's interest in her husband's estate resolves itself in fact into a right to maintenance, except in the absence of lineal male heirs, in which case she takes the inheritance, and in two cases—one occurring in her husband's lifetime, the other after his death—in which she takes a share.

[307] The wife's right to maintenance after her husband's death is, in one sense, undoubtedly a charge upon the estate, and she may sue to enforce it and have it secured. But it is not a charge in the fullest sense of the term, because it does not in every case necessarily bind any part of the property in the hands of a purchaser. If there be two groups of sons by different mothers, and those groups separate each from the other, the maintenance of a widow is a charge on her own sons' property, not on her stepsons'. If her sons do partition it has long been the settled law in Bengal that her share is taken out of their shares, not out of her step-sons. And she has in no case a right herself to initiate a partition.

The nature of her right in the share when allotted was long a subject of controversy. Writers of high authority maintained that it

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vested in her absolutely and passed after her death to her heirs as stridhun. It is now settled in Bengal that this is not so, but that on her death it goes back in some sense to her husband's family. It is settled, also, that the mother has, at any rate, no greater right of alienation over a share so allotted than over property inherited from her husband. There is some authority at least for supposing that she has no less power.

It thus appears that a mother's interest in a share allotted to her is at least very closely analogous to, if not identical with, that which she takes in property inherited from her husband, while many of the other incidents connected with her right point in a different direction.

Looking from the same point of view at a son's rights in the estate which he inherits from his father, there can be no doubt that for all ordinary purposes the son is absolute owner of his father's estate, and can do what he pleases with it.

I propose next to enquire on what principle Bengal lawyers have dealt with the two seemingly conflicting propositions, that a wife takes an interest in her husband's estate by marriage, and that his lineal heirs in the male line take his whole inheritance, and the inferences that they have thence drawn, or constrained us to draw, as to the nature of a mother's interest in a share alloted to her. The question is dealt with by *Jimuta Vahana* in Ch. XI, s. 1. The chapter relates to " the succession to the estate of [**308**] one who leaves no male issue," and the section to " the widow's right of succession." In maintaining that right he has begun by citing in s. 2 the text of Vrihaspati that " a wife is declared by the wise to be haif the body of her husband equally sharing the fruit of pure and impure acts." Of him whose wife is not deceased half the body survives. How then should another take his property while his body is alive? Let the wife of a deceased man who left no male issue take his share, notwithstanding kinsmen—a father, a mother, or uterine brother—be present. In the course of the discussion he cites, § 15, certain texts in favour of the brother's claim, and rejects them. In § 19 he states a view put forward by supporters of those texts—" some reconcile the contradiction by saying that the preferable right of the brother supposes him either to be not separated or to be re-united, and the widow's right of succession is relative to the estate of one who was separated from his co-heirs, and not re-united to them." He examines and refutes various arguments put forward in support of that view. Particularly he says in § 25: " But it is said this inference is deduced from reasoning. Thus, in the instance of re-union (or in that of a subsisting co-parcenary), the same goods which appertain to one brother belong to another likewise. In such case, when the right of one ceases by his demise, those goods belong exclusively to the survivor ,since his ownership is not divested. They do not belong to the widow, for her right ceases on the demise of her husband; in like manner as his property devolves not on her, if sons or other (male descendants) be left." In § 26, Jimuta Vahana gives his answer to this: " That argument is futile. It is not true that in the instance of re-union and of a subsisting co-parcenary what belongs to one appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole, for there is no proof to establish their ownership of the whole, as has been said before (when defining the term partition of heritage). Nor is there any proof of the position that the wife's right in her husband's property accruing to her from her marriage ceases on his demise. But the cessation of the widows'

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right of property, if there be male issue, appears [309] only from the law ordaining the succession of male issue." Shortly stated, the view expressed in this passage seems to me to be this: that neither son nor brother takes by survivorship so as on this ground to exclude the widow, but that each takes when he does take by inheritance; and that the reason why the widow takes after the son, but before the brother, is because the existence of the son puts an end to her right derived from marriage, but that the existence of a brother does not do so. It is thus an essential part of the argument that upon the death of a husband, leaving male issue, his wife's interest in his property acquired by marriage ceases, and the issue take the whole, while, if the husband die without male issue, the wife's interest does not cease. And the author thus negatives the view that the share which she takes on a partition between her sons comes to her either by inheritance from her husband, or in continuation of any interest previously vested in her.

The difficulty of reconciling an interest taken by a wife by reason of marriage with the exclusive inheritance of her son has been felt by other minds later than Jimuta Vahana, and his mode of reconciling them has not always been considered satisfactory. The remarks of Peacock C.J., in *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1) illustrate this. But, satisfactory or not, the doctrines of the Dayabhaga are the law which we have to administer; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumudar* (2).

The right of a mother to take a share upon a partition between her sons and the incidents of that right are much considered by Jagannatha. The discussion is to be found mainly in Book V, Chapter II, ss. 83 to 89. In the course of that discussion most of the points which I have already mentioned as settled points under the Bengal law may be found stated. Upon other points opinions are cited from authors of that and other schools; but it is not always easy to collect what the view of the learned author himself is. The part of the discussion most directly relevant to the present case occurs in the notes to s. 87, in the paragraph beginning with the words " whether the share be equal, etc." (2 Col. Dig., p. 250, Madras Edition, 1874). The precise question there [310] under discussion is, whether the share allotted to a wife or mother on partition becomes hers absolutely with free power of alienation, and passes to her own heirs, or whether it is subject to the restraint upon alienation usually incident to property taken by women by inheritance from males, and reverts to the estate of the husband or father. This question has since been answered in Bengal in the latter sense, at any rate in the case of an allotment to a mother. In the course of the discussion opinions are cited from many authors bearing more or less closely upon the question now before us. But those authors belong to various schools, and their views are very conflicting. At the close of the discussion Jagannatha says (p. 252): " Such is the answer given by some lawyers to the question proposed." He then cites a passage from Bhavadeva, and adds: " Although the mother survived, the son has property in the paternal estate after the demise of his father, of whom the principal right was predicated; and the mother's right, which is subordinate, neither resists nor is resisted by any other. Accordingly though the first wife has property in her husband's estate, another, subsequently married, has also property in the same estate."

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(1) 9 W. R. 505 (508)=B. L. R. Sup. Vol. 1008. (2) 5 B. L. R. 15.

In a later part of the Digest, Book V, Chapter VIII, s. 414 (p. 541, Madras Edition, 1874), Jagannatha recurs to the subject; and, speaking clearly with reference to the passage from the Dayabhaga already cited, he says: "According to the opinion of Jimuta Vahana, since the wife has an interest in the wealth of her husband during his life, and since there is nothing to annul her property after his decease, how can her husband's brother and the rest in any instance have claim to the estate? To this it is answered no, for it is established that her property is actually lost by the lapse of her husband's right. Accordingly the property of the wife is divested even when the effects are given away by her lord. Those who affirm that the allotment of a share to the mother, when partition is made among sons, is founded on her ownership of the father's estate, because she was his wife, accordingly contend that a share of the distributed wealth must be allotted to a wife of the father, whether she has or has not a son, and whether partition be made before or after the death of the father." Whatever uncertainty there may be **[311]** about the earlier passages of the Digest, this passage seems to me to assert that a wife's interest in her husband's estate is actually lost by the lapse of her husband's right which, having regard to the words of Jimuta Vahana on which Jagannatha bases his reasoning, seem to mean by the death of the husband leaving lineal heirs in the male line. And he confirms this by showing that the contrary view—the view "that the allotment of a share to the mother, when partition is made among sons, is founded on her ownership of the father's estate, because she was his wife"—would lead to conclusions which the Bengal school of lawyers has always rejected.

Some more recent Bengal authorities remain to be considered. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1) and the other appeals disposed of with it arose out of proceedings taken by means of several suits for the partition of an estate. Among the sharers were an uncle and nephew, and one Golaba, the mother of one and grandmother of the other, claimed a share. By the decree it was awarded to her; but no actual allotment had been made and no separate enjoyment had, when Golaba died before the appeal came on for hearing. A person alleging herself to be devisee of Golaba came forward to claim her share. The case was one governed by the Benares school of law, and she relied, I suppose, upon the contention which the Privy Council showed to be open in 11 Moore's I.A. at p. 514. Loch and D. N. Mitter, JJ., held that the bare decree gave Golaba no title, and therefore the question as to the devolution of any share of hers did not arise. In delivering judgment D. N. Mitter, J., said: "It is quite clear that the share which ought to have been allowed to Golaba was merged in the general estate, conceding, for the sake of argument, that she was entitled to any share under the Hindu law as it is administered in the Benares school. The text of the Mitakshara that has been referred to merely says: 'Of heirs dividing after the death of the father let the mother also take a share,' or in other words, the mother or grandmother as the case might be, is entitled to a share, when sons or grandsons divided the family estate between themselves. But the mother or the grandmother can never be recognised as **[312]** the owner of such a share until the division has been actually made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of he recognized modes of acquiring property under the Hindu law. But partition in her

(1) 9 W. R. 61.

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case is the sole cause of her right to the property. It follows therefore that the effect cannot precede the cause." The Court seems to me here to lay down, and to lay down not by way of dictum, or mere expression of opinion, but as the ground of decision, that when a mother takes a share on partition her title arises from the partition alone, and that she had no pre-existing vested right except a right of maintenance. And if this be so under the Benares law, it seems to be more clear that it must be so under that of Bengal, because the Bengal law is more positive in restricting the morther's right than the Benares law.

In the last edition of Shama Churn Sircar's Vyavastha Darpana, s. 598, the learned author says: "The share which is given to a mother on the partition as above is given to her in lieu of maintenance, and means allowing also for the performance of religious acts, and it reverts after death to those heirs of her husband out of whose portion that share was allotted to her." The writer goes on to cite a passage as from Jagannatha; but there is some mistake here, for there is no such passage in the Digest, and the opinion expressed must therefore be taken simply as that of Shama Churn Sircar.

In the late case of *Kedar Nath Coondo Chowdhry* v. *Hemangini Dassi* (1) the actual point for decision was whether a widow, after a partition between her own son and sons of another wife of her husband, could claim to have her maintenance charged on the estate of her step-sons, and it was held by the Chief Justice and Ghose, J., that she could not. In the judgment which was delivered by Ghose, J., it is said at page 341: "When the Hindu law prescribes a share being allotted to a woman after her husband's death, upon a partition among her sons, it is a share which is given to her simply in lieu of maintenance, and not because she is a co-parcener in the estate, or that she has any pre-existing rights, and the share which is thus given to her reverts [313] upon her death to those heirs of her husband out of whose portion the said share was taken." And in support of this are cited the passages just mentioned from Shama Churn Sircar, a case in Strange's Hindu Law and the case already mentioned of *Sheo Dyal Tewaree* v. *Judoonath Tewaree*.

We were referred in argument to West and Buller's Hindu Law of Inheritance, 3rd edition, pp. 67, 237, 297, 303 and the following pages, 781, 819, where an immense number of conflicting opinions gathered from writers of all schools of Hindu law are brought together bearing upon the mother's right to a share in a partition between sons, and the subject is discussed in many aspects. But I do not find any expression of opinion by the learned authors which assists us in ascertaining the Bengal law upon the question now before us.

Much stress was also laid upon the case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2). The question in that case was as to the extent to which, and the persons against whom, a mother has an actual charge for her maintenance upon the ancestral estate of her sons, where no partition has taken place between them. So far the case does not directly bear upon the point before us. But West, J., in his judgment examines the whole subject of a widow's right in connection with her husband's estate very fully, and he examines it under the Bengal system of law as well as the others. The passage most directly bearing upon the matter before us is at page 507. Speaking of the mother's right

(1) 13 C. 336.

(2) 2 B. 494.

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to an allotment, on a partition between sons or their representatives, he says: "This is to be referred to the wife's right in her husband's property acquired by her marriage. As to this there is no proof, the Dayabhaga says Chapter IX, s. 1, para. 26 'that it ceases on her husband's death. But the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue.' Jimuta Vahana in this way makes out that, while the widow's right to her husband's whole share or whole estate subsists in spite of the survival of other undivided co-parceners, it is extinguished by the superior right of a son, grandson, or great grandson, through the operation of the special texts in their [314] favour. In Bengal, then, it seems that the widow has a complete proprietorship, subject to restriction on waste, as against other co-parceners; no proprietorship at all as against sons. Yet in Bengal, as in the provinces governed by the Mitakshara, 'when partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother.' The mother's ownership, which has, according to this view, been extinguished, revives again on a partition amongst her sons. Their ownership in the meantime is complete." Great weight is due to any opinion of that learned Judge on a question of Hindu law; the opinion, however, here expressed did not form the ground of decision, but is upon a ponit collateral. I should not have ventured to comment upon the language used in thus stating a proposition the substantial correctness of which is not open to doubt, but that the precise words have been relied upon in argument. As those words have been relied upon, I must say that I think it is more in accordance with the text of the Dayabhaga in the passage cited, and with the current of the Bengal authorities to say, not that on partition an old right revives, but that on partition a new right arises.

The case of *Bilaso* v. *Dina Nath* (1) was also relied upon. The question in that case was whether, under Mitakshara law, a mother's right to claim a share on partition was good, not only against her sons, but against a purchaser at an execution sale of the undivided interest of one of the sons. That question was answered in the affirmative. It is unnecessary to enquire whether the same rule would prevail in Bengal; some of the reasoning on which the decision was based would not, I think, be applicable in a case governed by Bengal law.

The conclusion which I draw from the Bengal authorities is that a wife's interest in her husband's estate given to her by marriage ceases upon the death of her husband leaving lineal heirs in the male line; that such heirs take the whole estate; and that the share which a mother takes on a partition among her sons she does not take from her husband, either by inheritance, or by way of survivorship in continuation of any pre-existing interest; but that she takes it from her sons in lieu of, [315] or by way of provision for, that maintenance for which they and their estates are already bound. I think it follows as a necessary inference that, on her death, that share does not descend as if she had inherited it from her husband, but goes back to her sons from whom she received it. And this is the conclusion drawn by Shama Churn Sircar and by Ghose, J., in the passages already cited.

It is true that throughout the controversy which once prevailed in Bengal, and which still, perhaps, exists in some other schools of law, as to whether a mother takes her share absolutely or only for life, we constantly

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(1) 3 A. 88.

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find the question asked in this way,—whether her share goes on her death to her heirs or the heirs of her husband. Such expressions in such a context do not, I think, afford us any assistance; it would have been irrelevant to the matter in hand to enquire what heirs of the husband take. And I have therefore not thought it necessary to examine those various opinions in detail. The heirs of the husband might be, as the appellant contends, those who would have been his heirs if he had died when his widow died. They might be all those who at his death were in fact his heirs. They might be all those among the latter group who by inheritance, followed and defined by partition, took the particular property in question, and out of whose shares the mother's allotment was taken. The two latter groups would, in the present case, be identical. But, as will be shown later on, it might be otherwise if there were sons by different mothers. The last of these three views, I think, is the true one on principle and on authority.

If we were to accept the view contended for by the appellants, and hold that when a mother dies the share, allotted to her on a partition between her sons, goes to the heirs of her husband to be ascertained at her death, we should be led, of necessity, to come consequences which it is difficult to accept. We must, in the first place, either say that, on the death of a father, his sons do not inherit his whole estate, a doctrine which seems to me wholly repugnant to the Hindu law current in Bengal; or else we must say that the same property can descend by inheritance twice from the same man to male heirs. Secondly, we must say that two different groups of male persons may be the heirs of the same man.

[316] Incongruities, it was contended, also follow from the opposite view. It was said that the view involves the idea of a life estate in the mother with a vested reversion in her sons or their representatives, and that such a combination of interests, arising by operation of law, is not elsewhere known to the Hindu law. This may be so, but such a combination is certainly admissible when it arises by act of the parties, and this was freely admitted; and I am disposed to think that the apparent difficulty arises mainly from the application of the language of English law to the affairs of persons living under Hindu law.

A second incongruity pointed out as arising from the same view, is, to my mind, of somewhat greater weight. In the treatises with which we are familiar, property vested in Hindu women is regarded as of two kinds; property inherited from a male person, which descends to those who are his heirs at the date of the death of the female inheritor; and stridhun, which descends to her own heirs. The share allotted to a mother on a partition among her sons is confessedly her property; yet on the view in question it neither is stridhun, nor descends as property inherited from a male. I think this an argument not without force. Perhaps the answer may be that woman's property is ordinarily treated of under head of inheritance, and therefore a kind of property, which on her death is not a subject of inheritance, might naturally not be discussed. It may be observed in this connection that the rule which I think the true one, though not a rule of inheritance, follows the analogy of the law of inheritance, for it makes a mother's share revert on her death to the last male owners.

If we are at liberty to consider this matter from the point of view of convenience, there can, I think, be no doubt which rule is the more convenient. In the present case there has been only one group of sons, and the question is merely whether the mother's share is to go back to all

her sons or their representatives, or only to her surviving sons. But there may well be two groups of sons by two mothers. And the rule contended for by the appellant would, on the death of either mother, who had obtained a share on a partition amongst her sons, take her portion [317] which had been carved out of her own son's share alone, and divide it rateably between sons and step-sons.

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I think the view taken by the learned Judge who heard the case is correct, and that this appeal should be dismissed with costs.

Appeal dismissed.

Attorney for appellant: Baboo *G. C. Chunder.*

Attorneys for respondents: Baboo *O. C. Gangooly*, Mr. *H. H. Remfry*, and Baboo *Preonath Bose.*

T. A. P.

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15 C. 317.

APPELLATE CIVIL.

Before Mr. Justice Norris. and Mr. Justice Beverley.

RAMJANEE BIBEE AND OTHERS (*Plaintiffs*) *v.* AMOO BEPAREE (*Defendant*).* [9th January, 1888.]

Bengal Tenancy Act (VIII of 1885), sch. III, *art 3—Limitation—Suit by occupancy ryot to recover possession from Trespasser, Limitation for.*

Art. 3, sch, III of the Bengal Tenancy Act (Act VIII of 1885) relates to suits brought by an occupancy ryot against his landlord and not to a suit brought against a third party who is a trespasser.

[**R.**, 15 C.P.L.R. 125 (126); **D.**, 24 C. 40 (43).]

THIS suit was brought by the plaintiffs to recover possession of certain lands on the allegation that the defendant had dispossessed them in Bysack 1291 (April—May, 1884). The land in suit, was alleged to have been the jote of one Sahoo Peadah, the husband of Ramjanee Bibee, the principal plaintiff, and to have been inherited by her on his death and sold by her to plaintiff No. 3. The defence was that the plaintiffs' claim was barred by limitation; that the land never formed the jote of Sahoo or the plaintiff Ramjanee; that the plaintiff never paid rent for the land and had no title to it, but that it was the jote of one Nazir, and the defendant had purchased it at an auction sale in execution of a decree against Nazir, and had since been in possession of it under a settlement with the talukdar.

[318] The suit was instituetd on the 7th Jaunary 1886, and the Munsif gave the plaintiffs a decree.

The Subordinate Judge, however, reversed that decree and dismissed the suit with costs. He found that there could be no doubt that the land was the jote of Sahoo, but that Sahoo had died more than twelve years before the institution of the suit, and that it had not been proved that the plaintiffs had been in possession within twelve years. He further found that, although it was not proved that the land had been the jote of Nazir, still that no rent had been paid for the land by the plaintiffs since 1280, and that it must therefore be taken that they had abandoned the land; and

*Appeal from Appellate Decree, No. 708 of 1887, against the decree of Baboo Nilmadhab Bandopadhya, Subordinate Judge of Tipperah, dated the 18th of January 1887, reversing the decree of Baboo Shoshi Bhusan Sen, Munsif of Comillah, dated the 22nd of September 1886.

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as the defendant held under a settlement with the talukdar he was entitled to retain possession.

Against that decree the plaintiffs preferred this second appeal to the High Court.

Munshi *Shumsul Huda*, for the appellants.

Baboo *Hurry Mohun Chuckerbutty*, for the respondent.

At the hearing of the appeal an objection was taken that the suit was barred by the special limitation of two years provided by art. 3, sch. III of the Bengal Tenancy Act (Act VIII of 1885).

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We are of opinion that upon the facts found by him the Subordinate Judge was justified in dismissing the plaintiffs' suit.

The suit was brought to recover possession of certain lands in which the plaintiffs alleged they had acquired a right of occupancy. The lower appellate Court has found that, although the plaintiffs had title to the land, still they have not actually cultivated it for twelve years, and have not paid rent for it since 1280, that is, for about eleven years. From these facts the Subordinate Judge drew the inference that the land had actually been abandoned by the plaintiffs, and that the landlord was justified in letting it again to another tenant. We are not prepared to say that this decision is erroneous.

An objection has been taken that this suit was barred under the special provisions contained in art. 3, sch. III of the [319] Bengal Tenancy Act, which provides a limitation of two years for a suit to recover possession of land by an occupancy ryot. We are of opinion that that article relates only to a suit brought by an occupancy ryot against his landlord, and not to a suit by a tenant against third parties who are trespassers.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 319.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

MANOHUR KOYAL (*Plaintiff*) *v.* THAKUR DAS NASKAR (*Defendant.*)*
[11th January, 1888.]

Contract Act (*IX of* 1872), *ss.* 62, 63—*Novation—Contract Novation of—Satisfaction of Contract.*

The plaintiff sued to recover the sum of Rs. 1,173 due on a bond. It was found as a fact that after the due date of the bond an arrangement was come to between the plaintiff and the defendant by which the plaintiff agreed to accept, in satisfaction of what was due to him at the time of the arrangement, Rs. 400 in cash and a fresh bond for Rs. 701, payable by instalments; and it was further found that the plaintiff never intended to or agreed to accept the naked promise of the defendant to pay the Rs. 400 and to give the bond for Rs. 701. The defendant did not pay the Rs. 400 or give the bond, but pleaded that there

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* Appeal from Appellate Decree No. 897 of 1887, against the decree of H. Beveridge, Esq., Additional Judge of 24-Pergunnahs, dated the 30th of March 1887, modifying the decree of Baboo Amirto Lal Pal, Second Subordinate Judge of that district, dated the 17th of June 1886.

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15 C. 319.

had been a novation of the original contract by reason of the subsequent agreement, and that the suit being based on the original contract could not be maintained, and he relied on the provisions of ss. 62 and 63 of the Contract Act in support of his contention.

Held that neither section had any bearing on the case, and that upon the breach by the defendant of the terms which he had made, and upon the non-performances by him of the satisfaction which he had promised to give, the parties were relegated to their rights and liabilities under the original contract, and that consequently the plaintiff was entitled to the relief he claimed.

Held, further, that s. 62 of the Contract Act is merely a legislative expression of the common law, and the provisions thereof do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to.

[**Appl.**, U.B.R. (1897-1901), Vol. II, 21 (23); **R.**, 1 S.L.R. 101 (102); 20 B. 636 (644); 4 L.B.R. 365; 7 M.L.T. 392=20 M.L.J. 383=6 Ind. Cas. 758=(1910) M.W.N. 191=34 M. 156; **D.**, 1 L.B.R. 170 (171).]

[**320**] THIS was a suit to recover the sum of Rs. 1,473 under the following circumstances:—

On the 20th Falgoon 1288 (3rd March 1882) the defendant executed a bond in favour of the plaintiff for the sum of Rs. 801 and a second bond, which was unregistered, for the sum of Rs. 75, the conditions of both bonds being that the defendant was to repay the principal amounts with interest thereon at the rate of Re. 1-8 per cent. per mensem in the month of Magh 1289 (January-February 1883), and that in default of his paying the amounts on the last-mentioned date he was to pay interest on the amounts then due, being the principal and interest, at the rate of 24 per cent. per annum until realization.

The money was not repaid in the month of Magh 1289 (January-February 1883), and it was the case of both the plaintiff and the defendant that an arrangement was then come to between them, that the amount then due was to be taken at Rs. 1,100 but the other terms of the arrangement were in dispute between the parties. The plaintiff alleged that it was agreed between him and the defendant that on the latter giving him Rs. 400 in cash and executing a kistibundi for Rs. 700 he would accept the same in satisfaction of all sums due to him on the bonds, but that, although the defendant did execute and cause to be registered a kistibundi for the amount arranged, he never delivered it to him nor paid him the sum of Rs. 400. He accordingly brought the present suit to recover the sum of Rs. 1,473, being Rs. 801 the amount of the original registered bond, together with Rs. 144, being the interest up to Magh 1289, and Rs. 528 being the amount of interest due on the two last mentioned sums at the rate mentioned in the bond up to the month of Joisto 1292 (May-June, 1885), the suit being instituted on the 10th June 1885.

The defendant's case was that the settlement by which his liability was fixed at Rs. 1,100 took place in Falgoon 1291 (February-March 1885) that the conditions were that he was to pay Rs. 400 in cash then and the remaining Rs. 700 in Bysack then next (April-May 1885), and in the event of his being then unable to repay the Rs. 700 he was to execute a kistibundi for the [**321**] amount; that he had paid the Rs. 400 in Falgoon, and caused the payment to be endorsed on the back of the original bond; and that, being unable to pay the Rs. 700 within the prescribed time, he had executed the kistibundi, and caused it to be registered, but on the plaintiff not returning the original bond he had not delivered the kistibundi. ...

The plaintiff's case was that the original bond had been destroyed by worms, and he filed an attested copy with his plaint.

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The Subordinate Judge disbelieved the defendant's version of the settlement, and found in favour of the plaintiff, and that the Rs. 400 had not been paid as alleged by the defendant.

The defendant in his written statement contended that the suit could not be maintained, inasmuch as there had been a novation of the original contract under s. 62 of the Contract Act, and that the plaintiff was therefore restricted to his right to sue for the amount due under the kistibundi, and this contention was relied on at the hearing of the suit, when it was further argued that it was not necessary for the new contract to be completed before it could be substituted for the original contract.

Upon this question the Subordinate Judge held on the facts that there had been no new contract completed, as the Rs. 400 had not been paid and the kistibundi never delivered, and that until the new contract was completed it could not be said that the former contract had been terminated. He accordingly gave the plaintiff a decree for the full amount claimed.

On appeal the Additional District Judge modified that decree. Upon the facts he came to the same conclusion as the Court below, but differed with the Subordinate Judge upon the question of law.

Upon the latter question the judgment of the Additional District Judge was as follows:—

" The legal point is more difficult. It turns upon the construction of s. 62 of the Contract Act. The Subordinate Judge ocnsiders that the words 'agree to substitute' used there have not their ordinary meaning, and that it cannot be said that the old contract was terminated until defendant had paid the Rs. 400 and delivered the kistibundi. But I do not think this [**322**] view is correct. It seems to me that the words 'agree to substitute' must be taken in their ordinary sense. There is a case quoted in Sutherland's edition of the Contract Act [*Rajah Kallipersad Singh* v. *Grant* (1)] which supports my view. There is no doubt in this case the parties did agree to substitute a new contract for the old one. Plaintiff in his third paragraph says expressly that at the intercession of certain respectable fellow-countrymen he agreed to accept Rs. 400 in cash and a kistibundi for the remainder. Defendant says the same thing, and so do the witnesses.

" The old contract need not therefore be performed, and defendant is only bound to pay Rs. 400 in cash and Rs. 700 by instalments. The fact that he has broken this new contract does not entitle plaintiff to fall back on the old one."

He accordingly found that as the instalments were not due under the kistibundi when suit was brought the plaintiff was only entitled to a decree for the Rs. 400, and accordingly gave him a decree for that amount.

Against that decree the plaintiff preferred the present appeal to the High Court, and the defendant preferred a cross-appeal against the finding as to the non-payment of the Rs. 400.

Baboo *Lall Mohun Dass* (for Dr. *Troyluckho Nath Mitter*), for the appellant.

Baboo Nil Madhub Bose, for the respondent.

Baboo *Lal Mohun Dass*, for appellant—According to English law, if a creditor, after a debt has become due, accepts a smaller sum in satisfaction of the whole debt, the debtor is not thereby discharged, and the creditor has the right of suing the debtor again for the residue. This doctrine has

(1) 2 Hay 329.

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been recently affirmed by the House of Lords in *Foakes* v. *Beer* (1) upholding the authority of *Pinnel's Case* (2) and that of *Cumber* v. *Wane* (3). In this case there was no actual satisfaction by payment of any smaller sum, and therefore *a fortiori* [**323**] plaintiff is entitled to recover his original debt. The Court below is not right in applying s. 62 of the Indian Contract Act to this case. The new contract cannot extinguish the old one unless the new contract be based upon a new consideration. Illustrations (*a*), (*b*) and (*c*) to s. 62 clearly show this.

The doctrine of consideration is as much a part of the law of contract in this country as it is in England. Under s. 25 of the Indian Contract Act an agreement made without consideration is, except in certain specified cases, wholly void. Even according to English law the new contract cannot effect a valid novation unless it is founded upon a new consideration—*Lynn* v. *Bruce* (4).

It follows as a corollary from the doctrine of consideration that where before breach of a contract exoneration is purchased for a less amount than that contracted to be paid, the debtor is wholly discharged, because wherever the creditor receives his debt before it is due there is always an appreciable advantage to him which forms the consideration for the discharge. Therefore, as the new agreement in this case was admittedly neither founded upon a new consideration nor entered into before breach, s. 62 does not apply.

Section 63 of the Indian Contract Act closely approaches the facts of the present case, but that section also does not apply for two reasons: *firstly*, because it says that the promisee may accept instead of the original promise any satisfaction which he thinks fit; it does not say that the promisee may accept any promise of satisfaction by the debtor. Under that section the debtor is discharged only where there is both accord and satisfaction. Illustrations (*b*), (*c*) and (*d*) to s. 63 point to that conclusion. According to English law executory accord is insufficient. Illustration (*b*) to s. 63 no doubt expresses the doctrine contrary to that laid down in *Foakes* v. *Beer* (1), but there is nothing either in the section itself or in the illustrations to indicate that a mere naked promise of satisfaction would supersede the original debt. [Norris, J.—But *Hall* v. *Flockton* (5) lays down that where *promise* and not *performance* is intended to be received in satisfaction it is a good satisfaction.] There the promise [**324**] was founded upon a new consideration. If it be said that under s. 63 a mere promise, if accepted in satisfaction, is a good discharge, then, so far, s. 63 overlaps s. 62, and therefore such a promise is not valid without a new consideration. *Secondly*: Assuming that under s. 63 a naked promise of satisfaction, if accepted, supersedes the original debt, the Judge below finds that it was the intention of the parties when the new agreement was made that the sum of Rs. 400 should be paid down in cash and an instalment bond executed in favour of the plaintiff for Rs. 701. As the defendant failed to fulfil his part of the contract by not paying down the sum of Rs. 400 the parties must be relegated to their former rights, and the plaintiff has therefore the right to recover his original debt.

Baboo *Nil Madhub Bose*, for the respondent.

The law on the subject is laid down in ss. 62 and 63 of the Indian Contract Act. Section 62 enacts in a compendious form what the

(1) L. R. 9 App. Cas. 605. (2) 5 Rep. 117.
(3) 1 Strange 426=1 Smith Leading Cases, 8th ed. 357.
(4) 2 H. Black 317. (5) 16 Q. B. 1039.

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Legislature intended should be the law as to novation of contracts in this country. The section is advisedly worded in such a manner as to make a mere agreement between the parties to a subsisting contract to substitute another for it, and not the new contract itself, sufficient to effect a novation and the extinction of the old contract. Whether there was such an agreement in any case is always a question of fact—*Rajah Kallipersahd Singh* v. *Grant* (1).

The provisions of s. 63 are contrary to the well-known rule of English law, and seem to have been introduced to prevent the application of the English law to any of the cases that are expressly provided for by the section.

The question therefore of want of consideration is entirely out of place.

What is "satisfaction" in any case coming under the section is a question of fact. It always depends on the nature of the arrangement. A mere undertaking to perform an act may be accepted as "satisfaction," just as well as an executed promise.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The facts of this case appear to be these: The suit was brought [325] by the plaintiff to recover a sum of Rs. 1,473. How that sum is arrived at is stated at the top of page 3 of the paper-book.

It appears that in Falgoon 1288 the defendant executed a bond for Rs. 801 in favour of the plaintiff. The money was to be repaid in Magh 1289. From the date of the bond up to the date fixed for repayment of the money interest was to be paid at eighteen per cent. per annum. If the money was not paid on the date it was covenanted to repay it, namely, Magh 1289, then interest upon the original sum and upon the interest up to Magh 1289 was to run at the rate of twenty-four per cent. per annum. The money was not repaid on the date fixed for its repayment, namely, Magh 1289. The defendant not being able to pay went to the plaintiff, and said in effect this to him: "I am not able to pay you what is due to you under the bond; but I will pay you in cash Rs. 400, and I will execute a fresh *kistibundi* bond in your favour for Rs. 701." The plaintiff accepted these terms, but the defendant failed to carry them out. He did not pay the plaintiff the Rs. 400, nor did he, as he ought to have done, tender the kistibundi bond for Rs. 701 to the plaintiff. The plaintiff therefore has brought this action upon the basis of the old bond, and seeks to recover the amount which I have already mentioned, namely, Rs. 1,473.

The Subordinate Judge gave the plaintiff a decree for the whole amount claimed by him.

The Additional District Judge on appeal has modified that decree, and has allowed the plaintiff's claim only to the extent of Rs. 400. The ground upon which the Additional District Judge has proceeded is this: He says in effect, "I find that the provisions of s. 62 of the Contract Act apply. I find that the parties to the first contract agreed to substitute a new contract for it, and therefore the original contract need not be performed; and though the defendant has not carried out his part of the new contract, the plaintiff is not relegated to his rights under the old contract."

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(1) 2 Hay 329.

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We are of opinion that the Judge has erred in applying the provisions of s. 62 of the Contract Act to this case at all. S. 62 is but a legislative expression of the common law; and its [326] provisions do not apply after there has been a breach of the original contract. The parties may make a new contract in substitution of the old one, or may rescind or alter the old contract, and if they do so while the original contract is subsisting and unbroken, the original contract need not be performed. As I pointed out in the course of the argument, the law on this matter is laid down in the well-known and universally accepted text-book, Bullen and Leake's Pleadings, 3rd edition, page 673. It is said there: "It is competent to the parties to a contract at any time before breach of it by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it. The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction which is required to constitute a good plea after breach.". Then the form of the plea is given at page 675—"that after the alleged contract and before any breach thereof it was agreed by and between the plaintiff and the defendant that the said contract should be rescinded, and they then rescinded the same accordingly;" and there is a similar form in the case of a substituted agreement setting out the substituted agreement. Now is the case within s. 63? It is quite clear that s. 63 not only modifies, but is in direct antagonism to the law in England. It was laid down, as pointed out, in the case of *Foakes* v. *Beer* (1) that for the last pretty nearly three hundred years it has been the law in England that if *A* owes *B* five thousand rupees, and *B* consents to take two thousand rupees in payment of the debt, that is what is called in law *nudum pactum*, and that *B* after taking the two thousand rupees can subsequently bring his action for the unpaid three thousand rupees. The law in this country by virtue of s. 63 of the Contract Act is different; and it says: "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit." We think that the finding of the lower appellate Court in this case is that the plaintiff accepted in satisfaction of what was due to him at [327] the time the agreement was made Rs. 400 in cash and a fresh bond for Rs. 701. We think that is the finding. We do not think that the plaintiff ever intended to accept the naked promise to pay Rs. 400 and to give a bond for Rs. 701. The defendant has not given the satisfaction. He has not paid the money. He has not tendered the bond. The question is, what were the rights of the parties under these circumstances? It seems to us perfectly clear that the parties were relegated to their rights and liabilities under the original contract, and that the plaintiff, upon breach by the defendant of the terms which he had made, and upon the non-performance by him of the satisfaction which he had promised to give, was relegated to his rights under the old contract, and was entitled to bring the suit on the basis of the old bond, and to recover the money which he claimed.

The appeal must therefore be allowed, the decision of the Additional Judge set aside, and that of the Second Subordinate Judge restored, with costs in all the Courts.

H. T. H. *Appeal allowed.*

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(1) L. R. 9 App. Cas. 605.

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CIVIL REFERENCE.

15 C. 327.

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CIVIL REFERENCE.*

Before Mr. Justice Norris and Mr. Justice Beverley.

SANKARMANI DEBYA AND OTHERS (*Petitioners*) *v.* MATHURA DHUPINI (*Opposite-party.*)* [20th January, 1888.]

Bengal Tenancy Act (VII of 1885), *s.* 153—*Revisional power of District Judge in rent suits.*

The words "Judicial Officer as aforesaid" as used in the proviso to s. 153 of the Bengal Tenancy Act have reference to the "Judicial Officer" spoken of in cl. (*b*) of that section and to such officer only, and a District Judge has no power to revise decrees or orders passed by a District Judge, Additional Judge or Subordinate Judge referred to in cl. (a) of the section.

THIS was a reference by the District Judge of Fureedpore under the provisions of ss. 617 and 647 of the Civil Procedure Code, and the question referred was whether a District Judge has power to revise decrees passed by a Subordinate Judge, from which under s. 153 of the Bengal Tenancy Act (Act VIII of 1885) no appeal [**328**] lies, or in other words, whether the proviso contained in the last paragraph of that section has reference to the class of cases specified in cl. (*a*) of the section. The application which gave rise to the reference was for the revision of a rent decree passed by the Subordinate Judge of Fureedpore, and the District Judge dismissed the application, contingent on the opinion of the High Court by an order in the following terms:—

"This is an application invoking the revisional powers of the Court under s. 153 of the Tenancy Act of 1885 with reference to a decree of the Subordinate Judge in a rent suit of the description specified in the aforesaid section. The question is whether the proviso to that section vesting the District Court with revisional powers has reference to both cls. (*a*) and (*b*) of the section or to cl. (*b*) alone.

"The expression 'a Judical Officer as aforesaid' does not appear to be happy or explicit. I have compared this section with s. 102 of Bengal Act VIII of 1869, and also referred to the proceedings in the Legislative Council, and the conclusion I arrive at is that the proviso has reference to cl. (*b*) only, and that the words 'a Judicial Officer as aforesaid' denotes a Judicial Officer specially empowered by the local Government to exercise final jurisdiction in rent suits of the value of Rs. 50 and under. My reason is two-fold:—

"(1) If the proviso be held applicable to cl. (*a*) as well as to cl. (*b*), we are landed at the absurdity of finding the District Judge vested with power of revision over his own decisions and over those of an Additional Judge who may be of equal rank and standing with him.

"(2) It appears from paragraphs 114 and 115 of the Statement of Objects and Reasons (published in part V of the *India Gazette* of the 17th March 1883), which deal with s. 198 of the original Bill, corresponding to s. 153 of the Act, that the proviso was introduced only as a safeguard against the extension of final jurisdiction to the class of cases marked (*b*),

"I cannot find any reference to this section in the Report of the Select Committee published in Part V of the *India Gazette* of the 5th

* Civil Reference No. 18A of 1887, made by B. L. Gupta, Esq., Officiating District Judge of Furreedpore, dated the 18th of November 1887.

April 1884, in which year the section in question bore the number 168 in Chapter XIV. 1888 Jan. 20.

[329] "I am therefore disposed to dismiss this application. Entertaining however a reasonable doubt in the matter, I shall, as desired by the applicant's pleader, make a reference to the High Court under ss. 617 and 647 of the Code of Civil Procedure read with s. 143 of the Tenancy Act. Civil Reference.

"Contingent on the opinion of the High Court on the reference I dismiss the application, but make no order as to costs." 15 C. 327.

No one appeared on the reference.

The opinion of the High Court (Norris and Beverley, JJ.) was as follows:—

OPINION.

We are of opinion that the "Judicial Offcer as aforesaid" mentioned in the proviso to s. 153 of the Bengal Tenancy Act has reference to the "Judicial Officer" spoken of in cl. (*b*) of the section and to such an offcer only It follows that the District Judge possesses no revisional jurisdiction by virtue of that proviso in respect of the decrees and orders of a District Judge, Additional Judge or Subordinate Judge referred to in clause (*a*) of the section.

H. T. H.

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PRIVY COUNCIL.

Present:

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

Bishen Chand Basawat (*Defendant*) v. Nadir Hossein (*Plaintiff*). [23rd, 24th and 25th November, 1887.]

Attachment—Civil Procedure Code, s. 266— Property held by judgment-debtor in trust for a specific purpose—attempt to attach surplus after fulfilment of trust.

Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment debtor is rendered liable to attachment in execution of the decree against him, because a surplus of income is in his hands for his own benefit after due performance of the trusts; nor does such corpus, or any part of it, come, for that reason, within the meaning of s. 266 of the Code of Civil Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power, or exerciseable for his own benefit.

Where a trust had been created for specific purposes, *viz.*, the performance of religious and other duties, and the trustee had duly appointed [330] another trustee in his place, the latter being entitled to hold the trust estate: *Held*, that a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that in a suit in which all the parties interested were not before the Court, there could be no decision as to the extent of the trusts nor as to whether any surplus profits of the trust estates would, or would not, after the performance of the trusts, belong to the trustee personally.

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[F., 6 M.L.T. 193=19 M.L.J. 772 (776)=3 Ind. Cas. 255; **Rel. on,** 26 M. 450 (452); **Cons.,** 16 O.C. 109 (116)=18 Ind. Cas. 319 (322); **R.,** 6 C.W.N. 663 (665); 20 A. 46 (49)=17 A.W.N. 210; 35 B. 156=13 Bom. L.R. 101=9 Ind. Cas. 768; 8 M.L.T. 224 (225)=7 Ind. Cas. 79; 10 Ind. Cas. 399.]

APPEAL from a decree (28th May 1883) of a Divisional Bench of the High Court, reversing a decree (19th February 1881) of the Subordinate Judge of Moorshedabad.

The suit out of which this appeal arose was brought by one Saiyad Nadir Hossein, the present respondent, in accordance with s. 283 of the Civil Procedure, to establish his right as trustee to certain zemindaries in pergunnahs Bansdowl and Paltapur, in the Moorshedabad district, and to have set aside execution proceedings taken by Bishen Chand Basawat, the present appellant, against that property, including an order, made by a Court in execution, disallowing his claim to have it released from attachment.

The decree, in execution whereof the disputed attachment had been placed on the property, was against the estate of Mahomed Ali, deceased in 1868, who had been the predecessor of Saiyad Nadir Hossein, as trustee in possession of the property.

The plaintiff's case was that the property was held by himself and had been before held by Mahomed Ali, in trust for religious purposes; and therefore, was not liable to be attached in satisfaction of a decree, against the last trustee personally. The defence was that the trusts, even if validly created, which was denied, only extended to part of the proceeds of the estate held by Mahomed Ali; and that there was a residue of the property in the hands of the trustee which, after the trusts had been satisfied out of the other part, was liable to be attached in execution proceedings taken against the estate of Mahomed Ali.

The Subordinate Judge was of opinion that the property was held by Mahomed Ali for his own benefit, subject to certain [**331**] trusts of a religious nature; and that this beneficial ownership was liable to be attached in his hadns, and in the hands of his successors, for his personal debts. This decision was reversed by the High Court, which held that, although there was a margin of profit, after satisfying the trusts, which might be properly applicable to the claims of the execution creditor, still the property itself could not be attached to satisfy the debts of a former trustee.

No facts were in dispute, and the questions for decision in this appeal were of law.

At the hearing before the Subordinate Judge it appeared that the proprietary right was, in the year 1859, in Khairunnissa Khanum, a Mahomedan lady, who died in that year, having executed on 13th April 1859 a wasiatnamah. By this document, after reciting that she had been accustomed to defray the taziadari, mujlis (meetings) and abdarkhana (water supply) expenses from the proceeds of the zemindaries in pergunnah Bansdowl, that she was anxious that these should be kept up in perpetuity, and that she had no confidence in her son Enayet Ali, and that it was necessary she should appoint a wasi (administrator) for the purpose of carrying out the important works of the taziadari, &c., she proceeded as follows:—

"I therefore appoint in respect of the whole and entire of these zemindaries, gardens, buildings, and my whole property, my grandson, Mirza

Mahomed Ali Beg who is intelligent, fit, faithful, honest, a shrewd man of business, to be trustee, and deliver and entrust to him my property on the following terms: "That the said trustee shall, after my death, in accordance with the customs prevailing among those professing the Mahomedan faith and religion, cause the performance of, and provide for, all rites for the invocation of blessings, interments, and sepulture, hajj (pilgrimages), tazaidari, muzlis, sepulchral expenses, &c., from the property above described, after paying the Government revenue to the Collectorate from the proceeds of the above pergunnah as per schedule below; and from whatever surplus shall remain he will draw as trustee's due a monthly sum of Rs. 40, and he will pay a monthly sum of Rs. 100, new coinage, to Mirza Enayet Ali Beg, my son, and of Rs. 60 to Mobaruckunnissa Khanum, my daughter, and pay for repairs of the buildings aforesaid. The rent of the gardens, &c., and the wages of servants and employees, gardener, &c., will be paid by the said trustee, and the said trustee will pay, and the zemindaries and property of me, declarant, will never be divided or partitioned by butwara between my heirs, and they will always remain in the hands and [332] under the control of the aforesaid trustee, and the management thereof will remain with the said trustee; none of the heirs have or shall have, contrary to the terms of the trust, any power to cause a partition of my property; and the management and provision for all things above specified will be done by the said trustee, and the taking of accounts and entering into investigations and superintending all matters connected with the pergunnah aforesaid will be the work of the aforesaid trustee. In all these transactions none of my heirs shall exercise the least power, and they shall have no power to call any one to account; none of my heirs shall have any power to call for or take accounts from the trustee aforesaid. The whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence of (God), discharge and perform all the duties entrusted to him; and the dishonesty of the said trustee, when complained of by any of my heirs before any authority for the time being, will be disallowed and there will be no sort of dishonesty on the part of the said trustee."

Mahomed Ali, on 20th May 1868, also executed a wasiatnamah, appointing Saiyad Nadir Hossein to be wasi. The translation of it was as follows:—

"And for the purpose of keeping up and perpetuating all these things and the estate, that is to say, the taziadari, &c., of the said emambara and burial-grounds, and all other necessary and proper affairs according to the provisions and conditions of the aforesaid wasiatnamah, I appoint my sister's son, Nadir Hossein, for the purpose of carrying on the duties specified in the former wasiatnamah, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the wasiatnamah of the late Khairunnissa Khanum Saheba and of this wasiatnamah, take care of, maintain and keep the whole of the property, necessaries for lighting, silver and gold articles of all sorts belonging to the emambara; and exercising all the powers which I had, he will collect the rents and proceeds from the gardens, and, levying month by month his rightful allowance as trustee, carry on all the duties; and for the conduct of all law suits which are now pending or may occur afterwards, he will appoint vakils and mukhtears and properly conduct them;

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and he will conduct all duties connected with the emambara and burial-grounds, which are necessary and customary, month by month and year by year; and, except the power to improve, he will have no power to diminish the charge, and he will always make all proper arrangements with all servants belonging to the zemindaries, &c., appointed from before and now, and for the 5½ annas share of pergunnah Paltarore in Zillah Maldah, acquired by purchase, and which is also belonging to the emambara, and make intelligently all accounts, settlements of accounts, inquiries and investigations, and settlements of jummas; and the said trustee will have all the powers which I had except that of granting putnis and ijaras for the appointment and dismissal of servants, and the conduct of all business, and he will act as he thinks best for the good and welfare of the emambara. [333] And he is my relative, friend and well-wisher, and besides the above Mussummat Bibi Pirun, Mussummat Bubri Khanum, Mussummat Bibi Supun Jan and Mussummat Imami Bibi and others are my *motha* wives (*i.e.*, wives by a second grade marriage); and as long as they behave properly and remain under his protection and guidance, he, the said trustee, will provide for them. And after my death, he will cause my body to be clothed and buried; and will always cause the performance (reading) of the *fatehas* for the invocation of blessings, pilgrimages, readings of the Koran and the mujlis for the salvation of myself and of the late Khairunnissa Khanum; and if necessity should, in his opinion, arise, he is empowered to appoint another trustee. No one has the power to interfere. Should in future anybody prefer any sort of claim, it will be held false, and will be condemned as such before the hakims for the time being. For which reason I execute this wasiatnamah while of sound mind and in my full senses, in the present assembly, that it may come of use in proper time, and that it may remain as a document to future times."

Mahomed Ali having died on the 21st May 1868, those who had claims against his estate took proceedings against Nadir Hossein, disputing the effect of the second wasiatnamah. Again, in 1877, the present appellant attempted to enforce a decree against the estate of Mahomed Ali in the hands of Nadir Hossein. This failed, because the Court held that Nadir Hossein was not the legal representative of the judgment-debtor, and that assets of the latter could only be reached through legal process against his proper representatives. The present appellant having renewed his attempt in 1879 to attach the property left by Mahomed Ali, as being in the hands of the respondent partly for the benefit of Mahomed Ali's estate, the present suit resulted. The abovementioned judgment of the Subordinate Judge, stated more in detail, found that the first wasiatnamah was, in fact, executed by Khairunnissa, but not with knowledge of its nature. He held that it was not a deed converting the property into a religious endowment, but a will burthening the property, in the hands of the heirs, with certain charges for religious objects. As a will, he found that it was only valid to the extent of one-third of the property, being made without the consent of the heirs. He was of opinion that the second wasiat merely continued the trusts created by the former instrument, [334] and that as regards any beneficiary interest then possessed by Mahomed Ali, it was void as against his creditors, he being then insolvent. The result of these findings was that the large part of the estate was the private property of Mahomed Ali, during his life, and after his death was assets in the hands of his heir for the payment of his debts.

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This judgment was not maintained by the High Court (CUNNINGHAM and MACLEAN, JJ.). The Judges were of opinion that it was not essential to decide whether the property became waqf or not, and whether Mahomed Ali had become mutawali or not, inasmuch as the trust implied that the trustee, for the time being, was entitled to hold the property subject to the performance of the duties charged upon it. There might have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee. But that was not the question in hand, which was, whether Mahomed Ali's creditor was entitled to attach the property itself in the hands of the plaintiff. In regard to the appointment of the succeeding trustee by the document of 20th May 1868, the Judges held it fairly within the power conferred by Khairunnissa's wasiatnamah. Their judgment concluded thus: "We find, therefore, that Mahomed Ali was competent to execute the deed of 20th May 1868, that that deed vested the trust property in the plaintiff subject to the declared trusts. This finding disposes of the first defendant's case. If the trust deed be good, the plaintiff is entitled to hold the property subject to the charges of the trust, and to the claims of his creditors to any margin of profit, if there be one which can be shown to be his personal property. But the creditor of Mahomed Ali has, it appears to us, no right to attach the property in the hands of the present trustee in order to enforce a money decree aganist a former trustee which could never have been enforced, except against the margin of profit, which, after performance of the trusts, remained in his hands."

On this appeal.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the legal effect of the first wasiatnamah was to confer, so far as Khairunnissa was entitled to confer it, the [335] whole property upon Mahomed Ali as his own estate, subject to the performance of the trusts for religious objects. The second wasiatnamah, on the other hand, did not vest any interest in the respondent, but merely gave him the right of managing the estate for the purpose of paying out of the income sums required in respect of the religious duties imposed; and this caused the residue of the estate, beyond what was required for religious purposes, to pass to the heirs of Mahomed Ali on his death. Moreover, the second wasiatnamah, even if a transfer was attempted by it, could not pass any beneficial interest in the property, inasmuch as Mahomed Ali was insolvent at the date of it; and it was, therefore, void as against his creditors.

For another reason there was a personal interest in that part of the property which was not required for the expenditure on the objects of the trusts. This was that there was no complete appropriation of the property to religious objects by either the wasiatnamah of 1859 or that of 1868, neither of them having constituted the property to be waqf or strictly endowed for religious objects. Property might be either absolutely devoted to religious purposes, which was one mode of endowment, or it might be burdened in the hands of an owner with a trust for religious objects, which was another mode of providing for their performance, and this latter plan had been adopted here. The appropriation in order to constitute waqf must divest the private owner of all property in it. A mutawali was generally appointed. Here a wasi, or administrator, only was appointed. Waqf property might not be alienated; but where the whole of the profits of lands were not devoted to religious purposes, and were only heritable property burdened with a trust for such purposes, the profits might be alienated. In reference to this distinction were cited

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Moohummud Sadik v. *Moohummud Ali* (1), *Jewun Doss Sahoo* v. *Kubeerooddeen* (2), *Kumeez Fatima* v. *Suheba Jan* (3), *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (4), *Basoo Dhul* v. *Kishenchunder Geer* (5), *Dalrymple* v. *Khoondkar Azeezul Islam* (6), *Khaja Surwar Hossein* v. *Khaja Syed Hossein* (7), *Mahomed* [**336**] *Munnoo Chowdhree* v. *Hajra Bibee* (8). Also reference was made to Baillie's Mahomedan Law, Part II, Imameea, p. 211; the Tagore Law Lectures for 1874, pp. 463, 472 (mentioned by Mr. J. H. A. Branson); Macnaghten's Mahomedan Law, p. 62; Precedents, p. 327, case 8, p. 340.

In regard to the nature of the proof required, when a pardanashin is said to have alienated her property, was cited *Delroos Banoo Begum* v. *Ashgar Ally Khan* (9), afterwards affirmed on appeal (10).

In connection with the general proposition that under any system of law relating to religious trusts a surplus in the hands of the trustee, intended for his benefit, was available to satisfy decrees against him for his personal debts, was cited *Aushotosh Dutt* v. *Doorgachurn Chatterjee* (11) where a surplus belonged to a joint Hindu family, of the family property, charged with expenses of daily worship.

On a question whether the right, title, and interest of Nadir Hossein had been attached, or the estate itself, reference was made to ss. 274, 278 and 287 of Act X of 1877 and Act XIV of 1882. [Sir B. Peacock enquired what would have been the terms specifying the property to be sold if an application for sale had been filed]. The terms would have specified "all that remained after defraying the expenses of the trust." [Lord Hobhouse.—Would not that have involved proceedings in which all the parties interested must have been before the Court to ascertain the surplus and to have the trusts declared?] The argument was that, with, and subject to, certain definite trusts declared in the wasiatnamah, the property had vested in Mahomed Ali. The property, with these trusts annexed, could have been sold by him, and it therefore fell within s. 266.

Mr. *J. H. A. Branson*, for the respondent, was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

Sir B. Peacock.—In a suit filed in the Court of the Subordinate Judge the plaintiff prayed that an order passed in certain execution cases might be reversed and set aside.

[**337**] The defendant, as the purchaser of a decree which had been made against Mahomed Ali, obtained an order in execution against the heirs, or persons alleged to be the heirs, of Mahomed Ali for the attachment of certain property which he alleged to be the assets of Mahomed Ali. The plaintiff objected to the attachment of the property, and the present suit was brought to set aside the order.

The facts of the case are these: A Mahomedan lady named Khairunnissa, who had an absolute interest in the property, executed a document called a will, or a deed, which is set out in the record. By that document she devised the property to her grandson, Mahomed Ali, upon trust for the performance of certain religious duties and ceremonies in accordance with the Mahomedan religion. A question was raised whether the trust so created amounted to what in Mahomedan law is called a

(1) 1 Sel. Rep. 17=6 I.D.(O.S.) 17. (2) 2 M.I.A. 390. (3) 8 W.R. 313.
(4) 10 W.R. 299. (5) 13 W.R. 200. (6) S.D.A. (1858), 586.
(7) S.D.A. (1858) 1028. (8) S.D.A. (1858) 1218.
(9) 15 B. L. R. 167. (10) 3 C. 324. (11) 6 I. A. 182=5 C. 438.

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waqf, or whether it was merely a trust for the performance of religious duties. The High Court held that it was at any rate a trust for the performance of religious duties, and that a trustee had been appointed for the performance of them by Khairunnissa, and that a subsequent trustee had been appointed by that trustee. It is unnecessary to specify the various religious duties for the performance of which this trust was created. Many of them, such as the taziadari and others, were specified in a schedule to the deed, with the expenses set opposite, amounting altogether to Rs. 1,412. There was also a sum to be paid to her son Mirza Enayet Ali Beg, Rs. 100 per mensem, or yearly Rs. 1,200, and to her daughter Mobaruckunnissa Khanum, Rs. 60 per mensem, or yearly Rs. 720. Those two legacies have lapsed by death. Then there is "trustee's allowance of Mirza Mahomed Ali Beg at Rs. 40 per mensem, or yearly Rs. 480," and then there are other items for wages. At the end of the document, after specifying the trusts, it was declared that "the whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him."

Khairunnissa died in the year 1859, leaving her son, Enayet Ali, who lived until the 5th of February, 1860, and her daughter, [338] Mobaruckunnissa, who died on the 23rd of April 1869. It was contended that this document being the will of Khairunnissa, she could not dispose of more than one-third of her interest in the estate, and that the other two-thirds went to her heirs-at-law, her heirs-at-law, at the time of her death in 1859, being Enayet Ali, her son, and Mobaruckunnissa, her daughter. Their Lordships consider it unnecessary to decide whether the instrument was a will or a deed. Upon the death of Enayet Ali, Mahomed Ali, who had been appointed the trustee by Khairunnissa, was his heir-at-law. It appears that after the death of Khairunnissa, Enayet Ali made some claim, as heir, to his share of the property which he said his mother could not dispose of. Mahomed Ali, on the other hand, contended that the will of his grandmother was a valid one; that the whole of the property passed under that document to himself, and did not vest in his father; and that his grandmother had the right to dispose of the whole of the property. Mahomed Ali never claimed upon the death of Enayet to succeed to any portion of the property as having been undisposed of by his grandmother, but during the whole of his life treated the property of his grandmother as having been disposed of by her will for the purposes therein expressed. He could not therefore in his lifetime have claimed any portion of the estate as heir to his father Enayet. Mobaruckunnissa, as already observed, died on the 23rd of April 1869, and neither she nor any of her heirs have ever claimed to be entitled to any portion of the property as not having been disposed of by Khairunnissa.

The defendant in the suit claimed under a purchase in execution of a decree against Mahomed Ali, dated in 1863, to have the whole of the property sold in execution of that decree against the heirs-at-law of Mahomed Ali, the trustee. The case came on to be heard before the Subordinate Judge, who was the Judge sitting in the Court of Execution, and after various proceedings and objections it was ordered that the property should be attached. It was objected that the judgment-creditor could not attach the whole property, and that he had not specified any particular portion of it. The Judge, speaking of the residuary interest of the deceased [339] Mahomed Ali Beg as the property liable to be

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attached, said: "As there is yet time to ascertain the nature of interest under s. 287 of the Civil Procedure Code previous to the issue of the writ of proclamation, I think the claimant's objection on the score of the attachment being void for want of specification of the debtor's interest is untenable." He therefore disallowed the objection, and so in effect maintained the order which had been made for the attachment of the entire corpus of the estate.

One of the learned counsel for the appellant very properly admitted that no specific portion of the corpus could be sold, but that the whole corpus of the estate was liable to be sold. The High Court held that the corpus of the estate was not liable to be sold, and they say: "Nor is it essential to decide whether the property became what is known technically as waqf, and whether Mahomed Ali became mutawali, because the Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies that the trustee for the time being is entitled to hold the property subject to the performance of the duties charged upon it. There may have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee; but that is not the question now. The question is, whether Mahomed Ali's creditor is entitled to attach the property itself in the hands of the plaintiff."

If the whole property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, divised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him as trustee, the purchaser, of whatever religion he might be, would have to see to the [340] execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan Law? For example that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindus and Mahomedans at the time of the Mohurrum. The High Court says: "If there was a margin of profit, that margin of profit might possibly have been attached." Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts, would belong to Mahomed Ali or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties.

According to s. 266 of the Civil Procedure Code, Act X of 1877, which was the Code in force at the time when these execution proceedings were going on, the following property is liable to attachment and sale

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in execution of a decree, namely, lands, houses, or other buildings, goods, money, bank notes, and so on. Then "shares in the capital or joint stock of any railway company or other public company or corporation; and, except as hereinafter mentioned all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf." If there was any surplus in the hands of the trustee for the benefit of the judgment-debtor, it would not entitle the judgment-creditor to attach and sell the whole or any specific portion of the corpus of the estate. He could only attach the property over which the judgment-debtor [341] had a disposing power, which he might exercise for his own benefit, "whether the same was held in the name of the judgment-debtor, or by another person in trust for him." Mahomed Ali, just before his death, executed a deed, which is to be found on the record, and he says: "I appoint my sister's son, Nadir Hossein"—who is the present plaintiff—"for the purpose of carrying on the duties specified in the former wasiatnamah, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the wasiatnamah, of the late Khairunnissa Khanum Saheba, and of this wasiatnamah, take care of, maintain, and keep, the whole of the property, necessaries for lighting, silver and gold articles of all sorts belonging to the emambara"—and all the other religious duties. He is to be the trustee for carrying out the religious ceremonies which had been appointed by Khairunnissa under the wasiatnamah. It was contended that, if this was not a waqf, the trustee appointed by Khairunnissa had no power to appoint a new trustee. But even if Mahomed Ali could not appoint a trustee in his place, no one has ever objected to Syed Nadir Hossein as the trustee. If there had been any objection that he was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed, and a new trustee appointed by the Court under the Code of 1877. But Syed Nadir Hossein was in possession as trustee, and no person interested in the performance of the religious duties had ever objected. Even if there had been an objection, that would not have converted the corpus of the property held in trust into Mahomed Ali's own private property, liable to be attached for his private debts. By s. 280 of the Code of Civil Procedure, Act No. X of 1877, it is enacted that:—"If upon the investigation the Court is satisfied that for the reasons stated"—that is upon the investigation of the claim of an objector—"in the claim or objection such property was not when attached in the possession of the judgment-debtor, or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor [342] at such time, it was so in his possession not on his own account, or his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order releasing the property wholly or to such an extent as it thinks fit, from attachment." Section 281 enacts "that if the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property, and not on account of any other person, or was in the possession of some

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other person in trust for him, or in the occupation of a tenant, or other person paying rent to him, the Court shall disallow the claim."

Their Lordships are of opinion that the order for the attachment of the corpus of the estate was erroneous, and that a proclamation could not have been lawfully issued for the sale of any portion of the property attached.

Their Lordships are of opinion that the judgment of the High Court was right, and they will therefore humbly advise Her Majesty to dismiss this appeal and to affirm that judgment. The cost of the appeal must be paid by the appellant.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *Lambert, Peth & Shakespear.*

C. B.

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15 C. 342 (P.C.)=5 Sar. P.C.J. 128.

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PRESENT:

Lord Fitzgerald, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

PARMESWAR PERTAB SINGH AND OTHERS (*Defendants*) *v.* PADMANAND SINGH AND OTHERS (*Plaintiffs*). [2nd December, 1887.]

Lease, Construction of—Construction of pottah as to duration—Use of the word "mokurari."

A ghatwali estate having been sold for arrears of revenue, the purchaser brought suits to set aside under-tenures, and in so doing sued a tenant who alleged himself to be a ghatwal. The latter compromised the suit, receiving a mokurari pottah not containing any words importing a hereditary interest.

Held, that the above circumstances were no ground for declining to give effect to the pottah as it stood, the word "mokurari" not importing inheritance.

[343] APPEAL from a decree (19th May 1885) of a Divisional Bench of the High Court, affirming a decree (31st December 1883) of the Subordinate Judge of Bhagulpur.

The suit out of which this appeal arose was brought by the respondents, who were zemindars of Kharagpur in the Bhagalpur district, to recover possession of a mouzah of which a mokurari lease had been made in 1853 to one Teknarain Singh. He died in 1881, and this suit was brought against his sons, who were in possession, and who alleged that the tenancy was hereditary.

The second Subordinate Judge of Bhagulpur, holding that, upon the terms of the pottah of 1853, it was one only for the life of Teknarain Singh, decreed the claim in favour of the plaintiffs.

On appeal a Divisional Bench of the High Court (TOTTENHAM and AGNEW, JJ.) gave judgment as follows:—

"There are no words whatever in this pottah which would import any hereditary interest; and it has been held frequently that the word "mokurari" alone does not import any thing more than fixed rent.

"It has been urged upon us on behalf of the appellant that we must look to the circumstances of the case, and not only to the document. The circumstances set up for the defence were, that the mouzah in question

was foremerly a ghatwali tenure. Therefore by its nature it was in fact a hereditary tenure, and the ghatwals or their descendants could not be ejected.

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"The ghatwali estate was sold for arrears of Government revenue in 1838, and was purchased by the present plaintiffs' predecessor. The purchaser brought suits to set aside encumbrances, and amongst others, the ghatwals were sued. Teknarain appears to have been one of those tenants who were sued for the setting aside of his tenure. He pleaded that he was a ghatwal. The suit, however, was to set aside the sunnud on which his title was based, and there was no admission, nor was there any finding that Teknarain was a ghatwal at all. It appears that he compromised the suit, and permitted a decree against him on the condition of receiving the lease which is now in question.

"The learned Advocate-General has contended that if this compromise was brought about through ignorance, on the part of Teknarain, of his position under the law, it should not be [344] held to bind him; and it is argued that, at any rate, the tenure having been held by him and his predecessors for a long series of years, it is not likely that he would, without consideration, consent to give up his position altogether and take a lease for his own life.

"We cannot, however, say that Teknarain was ignorant of his position under the law. He well knew what his position was, for he set up a ghatwali title in the very suit in which he entered into this compromise. It is quite possible that he felt that his case was a precarious one, and that it would be better than having a decree ousting him from this tenure, to enter into a compromise by which he could secure his tenancy for his own life.

"We think, therefore, that we must hold that the lower Court put a right construction upon this pottah, and that there are no circumstances which would warrant the Court to decline to give effect to that document as it stands.

"This being so, the suit was rightly decreed."

For the appellants, Mr. *J. D. Mayne* submitted that there was nothing in the terms of the lease inconsistent with a permanent tenure, and that the lease and compromise must be construed with reference to the asserted ghatwali tenure.

Mr. *C. W. Arathoon*, for the respondents, was not called upon.

SIR B. PEACOCK delivered their Lordships' judgment to the effect that they concurred in the construction put upon the pottah by the High Court.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

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[345] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

JOYKRISHNA MUKHOPADHYA AND ANOTHER (*Defendants*) *v.* SARFANNESSA AND OTHERS (*Plaintiff's*).* [1st February, 1888.]

Sale for arrears of rent—Regulation VIII of 1819, *ss.* 3, 5, 6, 14—*Sale of putni tenure —Registered putnidars—Suit by unregistered putnidars.*

An unregistered proprietor of a putni tenure is entitled to sue to set aside a sale held under Regulation VIII of 1819.

Chunder Pershad Roy v. *Shuvadra Kumari Shaheba* (1) followed.

[R., 16 C.L.J. 501=17 Ind. Cas. 171 (172); 13 C.L.J. 102=15 C.W.N. 5=8 Ind. Cas. 766 (767).]

THIS was a suit brought to set aside the sale of a putni tenure held under Regulation VIII of 1819.

The plaintiffs stated lot Sachitarah was the zemindari of defendant No. 1, and that within that zemindari three mouzahs had been let out in putni, the putni being recorded in the names of the plaintiffs' predecessors in the sherista of the defendant No. 1. They further stated that a 9-anna share of the putni mehal belonged to them and a 7-anna share to defendants Nos. 2 and 4, and that in accordance with a private partition a 16-anna share in two of the said mouzahs had been allotted to them, corresponding to their 9-anna share in three mouzahs, and a 16-anna share of the third mouzah had been allotted to the defendants Nos. 2 and 4; that zemindar, defendant No. 1, had instituted proceedings under Regulation VIII of 1819 for the realization of the half-yearly rent for 1291 in respect of the putni mehal, but that no notification of sale had been served in accordance with law; and that the property had been sold at an inadequate price, that the sale was brought about fraudulently by the defendants Nos. 2 and 4 in collusion with the zemindar, and that the property had been purchased at the sale by defendant No. 2 in the name of his son, defendant No. 3. Under these circumstances the plaintiffs asked that the sale might be set aside.

The defendants contended amongst other matters that the [346] plaintiffs not being recorded as putnidars, the suit would not lie; and that the advertisement of sale had been duly published.

The Subordinate Judge held that there was no authority for the proposition that no one but a recorded putnidar could sue to set aside a sale under the Regulation, and on the authority of the case of *Chunder Pershad Roy* v. *Shuvadra Kumari Shaheba* (1) decided against the defendants on that point; and on the question of the service of notice held that the notice had not been served in accordance with the law, and therefore set aside the sale, declaring that the putnidars were entitled to revert to the position they held before the sale.

Defendants Nos. 1 and 3 appealed to the High Court.

Baboo *Hem Chunder Banerjee*, Baboo *Ashutosh Mukerji* and Baboo *Pran Nath Pundit*, for the appellants, contended amongst other matters

* Appeal from Original Decree, No. 319 of 1886, against the decree of Baboo Sharoda Prosad Chatterjee, Rai Bahadoor, Subordinate Judge of Hooghly, dated the 6th of September 1886.

(1) 12 C. 622.

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that the plaintiffs not being registered putnidars were not competent to sue, referring to ss. 5, 6 and 14 of Regulation VIII of 1819 and citing the case of *Gossain Mungul Doss* v. *Roy Dhunput Singh* (1); and after submitting that the notice of sale had been served in substantial conformity with the requirements of the Regulation, took objection to the form of the decree which placed an unregistered assignee in possession.

Baboo *Sri Nath Das*, Baboo *Gopal Chunder Ghosal* and Baboo *Boido Nath Dutt*, for the respondents relied on the case of *Chunder Pershad Roy* v. *Shuvadra Kumari Shaheba* (2).

JUDGMENT.

The judgment of the Court (PETHERAM C.J., and TOTTENHAM, J.) was delivered by.

PETHERAM, C.J.—This is a suit to set aside the sale of a putni tenure under Regulation VIII of 1819 on various grounds. The only grounds upon which the suit has been decreed are: that the proclamation of sale was not served according to law, and that the property has been sold for an inadequate price; and this appeal comes before us against that decision, and upon the appeal two points are argued. First, it is argued that even if the Subordinate Judge is right in the conclusion of fact at which he has arrived that the advertisement of sale was not served, still this [347] suit cannot be maintained, because the plaintiff, although he is interested in the putni, is not and never has been registered in the serishta of the zemindar as the owner of the putni, and that without such registration the suit cannot under the provisions of the said Regulation be maintained.

The sections of the Regulation which are relied upon by the defendant in support of this contention are ss. 5 and 6, but before considering the provisions of those sections it is necessary to consider the provisions of s. 3 as well. By s. 3 of that Regulation putni tenures are declared valid, transferable and answerable for debt. It is not necessary for me to read the particular words of the section; all that it is necessary to say is that by that section these tenures are made transferable in perpetuity and are transferable by sale, gift or in any way which the putnidar thinks fit, so that by virtue of that section these tenures are made actual property in the land which the holder of them may dispose of as he chooses, the relation of landlord and tenant between the putnidar or his assignee and the zemindar remaining during the whole continuance of the tenure. Then come ss. 5 and 6, and the effect of the provisions of those sections amounts to this, that upon an alienation or transfer by the putnidar the zemindar may exact a fee, which represents his profit, being the portion of his interest in the property whenever a transfer of the tenure is made, the amount of which is regulated by the Regulation itself; and further than that, until that fee has been paid, the zemindar shall not be bound to register the transfer and further than that, until the transfer has been registered, he shall not be bound to recognise the transfer in any way—that is to say, until his demand has been satisfied and registration has been effected, the old tenant remains his tenant, and the relation of landlord and tenant has not been created between him and the assignee of the putnidar, whatever the arrangement may be between the putnidar and his assignee. This is the effect, so far as I can see, of these sections, that until the terms of the Regulation have been complied with, and until the fee has been paid and

(1) 25 W.R. 152. (2) 12 C. 622.

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the registration effected, the relation of landlord and tenant continues to exist between the landlord and the old tenant, and no privity of contract and no relation [348] of landlord and tenant exits between the landlord and the assignee. But that is all; the Regulation does not say, and it would be very inequitable that it should say, that no interest whatever could be created in the tenure by the assignor, or that no person could obtain any interest whatever in the tenure, without the registration of the transfer. Any interest which could be created consistently with the remaining in existence of the original tenure can be created without the Regulation, and so far as I can see, is not prevented by the Regulation in any way; and therefore as it seems to me that if the assignee, the plaintiff in this case, can show that he has obtained an interest in the tenure, although it does not amount to an assignment so as to make him a tenant of the landlord and to release his assignor—that is to say, if there has been a sale or a professed sale which is regular and which destroys the tenure in which he is interested, but which fact could be contested by any one as no sale at all—it may be that it would be most inequitable to hold, unless we were driven to hold it by the words of the Regulation, that he is unable to say that this sale is no sale and that it is void as against everybody else.

In support of this view we are referred to the case of *Gossain Mungul Dass* v. *Roy Dhunput Singh* (1). This was a case which came before the late Chief Justice Sir Richard Garth and Mr. Justice Birch, and the decision is dated 25th February, 1876. The facts of that case do not appear from the report, and from the report it may well be that the Judges in that case supposed that the sale was being attacked, not because of any irregularity in the sale, but for some other reason. We are, however, referred to the record of the case which has been sought for in the office, and there it appears that, at all events, one of the points was that the sale in that case was irregular and could be attacked on that ground. How that may be I do not know, and whether the Judges had that fact before them, and whether the judgment proceeded on that fact, I cannot say; all that it is necessary for me to say is that, so far as anything appears on this judgment here, there is nothing to show upon what ground the sale was attacked, and therefore it seems to me that that case is distinguishable from the present.

[349] The next case which bears upon this point is the case of *Chunder Pershad Roy* v. *Shuvadra Kumari Shaheba* (2), which came before Mr. Justice Prinsep and Mr. Justice Trevelyan and which was decided on the 8th of February, 1886. That case is distinctly in point, and there the learned Judges distinguished the case of *Gossain Mungul Doss* v. *Roy Dhunput Singh* in the same way as that in which I have distinguished it, and they came to the conclusion that, notwithstanding the fact that the Regulation prevents the relation of landlord and tenant from coming into existence, there is nothing to prevent any person who has an interest in the putni, which interest has been injured by the irregularity in the sale, from showing that this is so and obtaining relief. In our opinion this view, which is the view which has been taken by the learned Judges in that case, is in accordance with the Regulation, and consequently, following that case, we are of opinion, and we hold, that this objection cannot be maintained.

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(1) 25 W.R. 152.

(2) 12 C. 622.

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The only other remark which it is necessary for me to make on this part of the case is upon s. 14 of the Regulation, and as to that I need only say that that section would seem to indicate that it was the intention of the Legislature that a suit of this kind might be maintained by a person other than the registered proprietor of the putni; so that, looking at the context as well, it also shows that the view which we have taken, and the view which has been taken by Mr. Justice Prinsep and Mr. Justice Trevelyan, is the view which the Legislature intended should be taken, and therefore, as I said before, this objection cannot, in our opinion, be maintained.

The next question is the question upon the merits, and is whether the advertisement was served according to law. This is a pure question of fact. [*As to this point the learned Chief Justice agreed with the finding of the Court below.*]

An objection is made as to the form of the decree, and that objection is that the decree, in effect, puts an unregistered assignee in possession. That may or may not be the case, but what the parties are entitled to, after this sale is set aside, is that they are entitled to be reinstated in the same position [**350**] as they were in before; and if, as a matter of fact, the assignee was in possession as before, it may be that, so far as the landlord is concerned, his possession was only the possession of the assignor; but if he was in possession by some arrangement with the putnidar, I think he is entitled to have the sale set aside, and that the effect of setting aside the sale will be that the parties must be reinstated in their original position. If he was in possession before, he will be in possession again; but, until he is registered, he cannot be in possession as a tenant to the zemindar. His possession will be that of a putnidar, whether jointly with him or under some arrangement with him; but his rights are to be reinstated in the position he was in before this sale, which is now declared void, took place. In the result this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

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15 C. 350.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

RASH BEHARI BOSE (*Plaintiff*) v. PURNA CHUNDER MOZUMDAR AND OTHERS (*Defendants*).* [13th January, 1888.]

Sale for arrears of Revenue—Ejectment, Right of—Benamee lease obtained by defaulting proprietor from purchaser ot revenue sale, Effect of an under-tenure—Act XI of 1859, *ss.* 37, 53.

A mehal belonging to defendants Nos. 1 and 2 was brought to sale for arrears of Government revenue and purchased by defendant No. 6, from whom the plaintiff obtained a talukdari pottah of a portion of the land comprised in the mehal. The plaintiff thereupon sued to eject defendant No. 4, who was in possession of the land under the lease which was found to have been granted previous to the revenue sale. In the suit it was found that the plaintiff obtained the talukdari pottah as mere benamidar for defendant No. I.

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* Appeal from Appellate Decree No. 949 of 1887 against the decree of Baboo Perbati Coomar Mitter, Subordinate Judge of Jessore, dated the 24th of January 1887, affirming the decree of Baboo Poorno Chunder Roy, Munsif of Khulna, dated the 29th of March 1886.

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APPELLATE CIVIL.

15 C. 350.

Held, that the provisions of s. 53 of Act XI of 1859 applied to the case and that the plaintiff was not entitled to interfere with the tenancy of defendant No. 4 or eject him, and that the suit had been rightly dismissed.

In this suit there were six defendants—No. 1, Grish Chunder Mitra; No. 2, Syama Sundari Dasi; No. 3, Purna Chundra [351] Mozumdar; No. 4, Uma Charan Mozumdar; No. 5, Poresh Nath Sing; and No. 6, Satoo Lall Dutt.

The plaintiff sued to establish his title to and for possession of some 18 cottahs of land. He alleged that the defendants Nos. 1 and 2 were proprietors and in *Khas* possession of the disputed land; that on the 23rd March 1874, the mehal in which the land was situate was sold for arrears of revenue and purchased by one Prosunno Kumar Dutt in the name of one Mothura Nath Ghose who sold it to the defendant No. 6, and that defendant No. 6 had given him a talukdari pottah of the land in suit; that defendants Nos. 1 and 2 sold the disputed land to defendant No. 5 on the allegation that it was their *lakhiraj*, and that the defendant No. 3 claimed the disputed land in *jummai* right under them, and that defendant No. 4 was in actual possession as purchaser of the rights of defendant No. 3.

Defendant No. 4 alone appeared and contested the suit. He alleged that the plaintiff was a mere benamidar for defendant No. 1, and contended that the suit could not therefore proceed. He further set up his purchase from defendant No. 3, who, he alleged, had been in possession for more than twelve years and long before the sale on the 23rd March 1874, and he stated that he did not know whether the disputed land belonged to the taluk as alleged by the plaintiff or was *lakhiraj*, and that he had tried to pay rent to the plaintiff.

Amongst the issues framed was one as to whether the plaintiff was or was not a mere benamidar for defendant No. 1, and if he was whether the suit could be maintained.

The first Court found that the plaintiff was a mere banamidar for the defendant No. 1, and that he could not therefore succeed, as the defendant No. 1 was not entitled to eject a purchaser from one who was his tenant. Finding the other issues raised in the case also against the plaintiff, that Court dismissed the suit with costs.

The plaintiff thereupon appealed, but the lower appellate Court finding that the tenancy held by defendant No. 4 had been created before the date of the revenue sale, and that the plaintiff was a mere benamidar of defendant No. 1, held that the latter was not entitled to oust the defendant No. 4. The appeal was accordingly dismissed with costs.

[352] The plaintiff now preferred this second appeal to the High Court.

Munshi *Shumsul Huda* (for Boboo *Dwarkanath Chuckerbutty*), for the appellant.

Baboo *Boidyo Nath Dutt*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

BEVERLEY, J.—The facts of this case are somewhat complex.

The plaintiff sues to eject the defendant No. 4 from a certain jumma within a certain mehal. The defendant No. 4 purchased this jumma from the defendant No. 3, who had been holding it for some time as a tenant under the defendants Nos. 1 and 2, the proprietors of the mehal. The

defendants Nos. 1 and 2 having defaulted, the mehal was brought to sale for arrears of revenue and purchased by one Prosunna Coomar Dutt, whose rights were transferred to the defendant No. 6, from whom the plaintiff has obtained a *talukdari* pottah; and it is on the strength of this pottah granted by the auction-purchaser that the plaintiff, under the provision of s. 37 of Act XI of 1859, sues to eject the defendant No. 4.

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It has been found as a fact by both the lower Courts that the plaintiff is merely a benamidar for the defendant No. 1; that is to say, that the talukdari pottah under which he claims was granted by the auction-purchaser to one of the defaulting proprietors; and they have accordingly held that the present suit cannot be maintained; that is to say, that the defaulting proprietor cannot be allowed in equity to turn out of this jumma a tenant whom he himself left in.

It is contended on second appeal that this decision is erroneous; that s. 53 of Act XI of 1859 will not apply to this case, inasmuch as the plaintiff—that is to say, the defendant No. 1—has not acquired the whole of the auction-purchaser's interest, but has only taken a lease of a portion of that interest.

It seems to us quite clear that the present case does fall within the principle of s. 53, which is that a defaulting proprietor shall not be allowed to take advantage of his own default in order to disturb subordinate interests in the land. The words of the section [353] material to this case are these: "Any recorded or unrecorded proprietor or co-partner who may purchase the estate of which he is proprietor or co-partner, or who by repurchase or otherwise may recover possession of the said estate, if it has been sold for arrears under this Act, shall by such purchase acquire the estate subject to all its incumbrances existing at the time of sale, and shall not acquire any rights in respect to under-tenants or royts which were not possessed by the previous proprietor at the time of the sale of the said estate." The words "or otherwise" are quite wide enough to include a case like the present, where the former proprietor has recovered possession of a portion of the property by virtue of a lease from the auction-purchaser.

For these reasons, therefore, without going into the other question raised in this appeal, we think it is quite clear that the plaintiff's suit was properly dismissed.

This appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 353.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

SYAM LAL SAHU (*Plaintiff*) v. LUCHMAN CHOWDHRY AND OTHERS (*Defendants*).* [1st February, 1888.]

Evidence—Survey Map—Suit for possession—Ejectment—Evidence of Possession and Title.

In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a revenue sale, the

* Appeal from Appellate Decree, No. 581 of 1887, against the decree of Baboo Sham Chunder Dhur, Subordinate Judge of Bhagulpore, dated the 27th of December 1886, modifying the decree of Baboo Bemola Churn Mozumdar, Munsif of Begooserai, dated the 25th of September 1885.

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only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47.

Held, that a survey map is evidence of possession at a particular time, *viz.,* the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case.

Held, further, that as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly twenty years [354] between them—they might be sufficient evidence of title and the decree of the lower Court was correct.

Mohesh Chundra Sen v. *Juggut Chundra Sen* (1) discussed.

[**Rel. on,** 17 C.W.N. 151 (152)=15 Ind. Cas. 341; **R.,** 22 C. 252 (258); 2 L.B.R. 56 (59).]

THIS was a suit to obtain possession of 10 bighas 1 cottah and 12 dhurs of land which the plaintiff alleged belonged to Mouzah Chandpur, which he had purchased at a sale for arrears of Government revenue in March 1882. The plaintiff also claimed damages and mesne profits. The suit was instituted on the 2nd September 1884. The defendants claimed the land as belonging to Mouzah Salimabad, and denied that it was ever comprised in Mouzah Chandpur. They also pleaded limitation.

The Munsif, finding that the plaintiff had not adduced any evidence to prove his possession within twelve years, held that the suit was barred by limitation, and dismissed it without going into the merits.

On appeal the Subordinate Judges set aside the decision of the Munsif, and on the merits delivered the following judgment:—

"On the question of title there is, it has been admitted, no evidence on either side excepting copies of two survey maps produced by the plaintiff, one being the survey map of 1846-47 and the other that of 1865-66. A local inquiry was held by the Civil Court Amin, and it was found that 2 bighas 1¾ dhurs according to the first map, and 14 bighas 17 cottahs and 4½ dhurs according to the second map, fell within Mouzah Chandpur. The survey map of 1846-47 was the general survey of all estates, while the survey of 1865-66 was the survey of those places only on which the river Ganges had made encroachments, and in this view the former is, for the purpose of ascertaining the limits of conterminous mehals, entitled to more weight and value. Taking the map of that survey as our guide, therefore, it appears that 2 bighas 1¾ dhurs of the disputed land, as shown in the Civil Court Amin's map, appertain to Mouzah Chandpur purchased by the plaintiff, and this has not been displaced by anything on the defendant's side. Regarding the rest of the claim there is nothing to establish it, and it should be dismissed."

He accordingly gave the plaintiff a decree for possession of the [355] 2 bighas 1¾ dhurs of land only, dismissing the remaining portion of his claim.

Against that decree the plaintiff now appealed to the High Court on the ground that the lower Court should have relied on the map of 1865-66 and given him a decree for the full amount of land claimed, and the defendants preferred a cross-appeal contending that the Court was wrong in treating the survey map of 1846-47 as evidence of title without proof of possession, and that the suit should have been dismissed altogether.

(1) 5 C. 212.

Baboo *Jodub Chunder Seal*, for the appellant. **1888 FEB. 1.**

Baboo *Rajendro Nath Bose* and Baboo *Nilkant Sahai*, for the respondents.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:— APPELLATE CIVIL.

JUDGMENT.

This was a suit by a purchaser at a revenue sale to recover certain lands on the allegation that they were the re-formed lands of the estate which he had purchased. This allegation was denied by the defendants, and the parties went to trial on this issue. **15 C. 353.**

The first Court erroneously threw out the suit on the ground of limitation without going into the merits. The lower appellate Court has overruled the plea of limitation, and on the merits has given the plaintiff a decree for so much of the land in dispute as is found to have been included within his estate at the time of the survey of 1846-1847. The Subordinate Judge says: "On the question of title there is, it has been admitted, no evidence on either side, excepting copies of two survey maps produced by the plaintiff, one being the survey map of 1846-47 and the other that of 1865-66. A local enquiry was held by the Civil Court Amin, and it was found that 2 bighas 1¾ dhurs according to the first map, and 14 bighas 17 cottahs 4½ dhurs according to the second map, fell within Mouzah Chandpur. The survey map of 1846-47 was the general survey of all estates, while the survey of 1865-66 was the survey of those places only on which the river Ganges had made encroachments, and in this view the former is, for the purpose of ascertaining the limits of conterminous mehals, entitled to more weight and value."

[356] Both parties have appealed to this Court. The plaintiff has appealed on the ground that the lower appellate Court should have based its decree upon the later Dearah survey map; but in our opinion this is no ground for second appeal, and the plaintiff's appeal must, therefore, be dismissed. The defendants respondents object to the decree on the ground that the lower appellate Court was wrong in law in relying upon the survey map as conclusive evidence of title. In support of this contention we have been referred to the case of *Mohesh Chundar Sen* v. *Juggut Chunder Sen* (1), in which case it was, no doubt, found that the thakbust map relied on was not in itself sufficient evidence of title. Upon a consideration of that case, however, and of the other cases cited there—*The Collector of Rajshahye* v. *Doorga Soonduree Debia* (2), *Shusee Mookhee Dossee* v. *Bissessuree Debee* (3), *Oomut Fatima* v. *Bhujo Gopal Dass Mohunt* (4), *Ram Narain Doss* v. *Mohesh Chunder Banerjee* (5)—we are not prepared to say that in no case can the evidence of survey maps be sufficient evidence of title. As is stated in those decisions, each case must be decided upon its own merits. A survey map is evidence of possession at a particular time, the time at which the survey was made; and although, as in the case cited, evidence of possession at one particular time might not be sufficient in itself to raise a presumption that the land belonged to the estate at the time of the permanent settlement, yet, coupled with other evidence of possession, it might suffice to raise that presumption. Now in the present case we gather that the land which has been decreed to the plaintiff is included within his estate both in the survey map of 1846-47 and in the Dearah survey map of 1865-66—that is to say,

(1) 5 C. 212. (2) 2 W.R. 210. (3) 10 W. R. 343. (4) 13 W. R. 50.
(5) 19 W. R. 202.

1888 Feb. 1. — Appellate Civil. — 15 C. 353.

it has been found to have been in his predecessor's possession as appertaining to the estate he has purchased at two periods separated by an interval of twenty years. We are not prepared to say that this was not sufficient evidence from which the Subordinate Judge might fairly draw the inference that the title lay with the plaintiff.

[357] The cross-objection must, therefore, be dismissed.

Each party will pay his own costs.

H. T. H. *Appeal and cross-objection dismissed.*

15 C. 357.

APPELLATE CIVIL

Before Mr. Justice Mitter and Mr. Justice Beverley.

UMESH CHUNDER DAS (*Plaintiff*) *v.* CHUNCHUN OJHA, HEIR AND REPRESENTATIVE OF THE LATE JUGODUMBA DEBIA OJAIN (*Defendant No.* 1).* [17th November, 1887.]

Mortgage—Suit for foreclosure—Conditional Sale—Regulation XVII of 1806*—Transfer of Property Act* (*IV of* 1882), *s.* 2*—General Clauses Consolidation Act* (*I of* 1868), *s.* 6*—" Proceedings."*

In a suit for foreclosure under a deed of conditional sale, where the due date of the deed expired and notice of foreclosure was served while Regulation XVII of 1806 was in force, but before the expiration of the year of grace that Regulation had been repealed by the Transfer of Property Act, *Held,* following *Mohabir Pershad Narain Singh* v. *Gungadhur Pershad Narain Singh* (1), that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the General Clauses Consolidation Act I of 1868.

The "proceedings" referred to in that section are not necessarily judicial proceedings only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure.

THE suit out of which this appeal arose was a suit in respect of a kut-kobala or deed of conditional sale executed in favour of the plaintiff on the 6th November 1876. The deed recited that if the money were not repaid within two years from that date the plaintiff would be at liberty to foreclose the mortgage.

Accordingly on the 22nd February 1882 the plaintiff served the mortgagor with notice of foreclosure under Regulation XVII of 1806, and the mortgage money not having been repaid within one year from that date, he brought this suit for a declaration of foreclosure and for possession of the property and mesne profits. As an alternative prayer the plaintiff asked that, if the Court were of opinion that the mortgage had not already been [358] foreclosed, it might order foreclosure in the manner prescribed by the Transfer of Property Act.

The defendant *inter alia* objected that the mortgage could not be foreclosed under the provisions of Regulation XVII of 1806, that Regulation having been repealed by the Transfer of Property Act. This objection was disallowed by the Court of first instance, but allowed by the lower appellate Court, and from the latter decision the plaintiff appealed to the High Court.

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* Appeal from Appellate Decree, No. 2184 of 1886, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 26th of July 1886, modifying the decree of Baboo Krishna Chunder Chatterji, Subordinate Judge of 24-Pergunnahs, dated the 1st of December 1885.

(1) 14 C. 599.

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The Advocate-General (Mr. *Paul*) and Baboo *Karuna Sindhoo Mookerjee*, for the appellant.

Mr. *Woodroffe*, Baboo *Rash Behary Ghose*, Baboo *Troylokhya Nath Mitter*, Baboo *Akhil Chunder Sen* and Baboo *Golab Chunder Sircar*, for the respondent.

The Court (MITTER and BEVERLEY, JJ.) delivered the following judgments, in which the arguments sufficiently appear:—

JUDGMENTS.

BEVERLEY, J., after shortly stating the facts as above, continued: The only question before us in second appeal is whether the lower appellate Court was right in holding that the Regulation did not apply in this case, but that the mortgage must be foreclosed under the provisions of the Transfer of Property Act, which came into force on 1st July 1882.

The material facts as regard this question are these: The deed of conditional sale was executed and the due date expired while the Regulation was still in force. Notice of foreclosure, it is alleged, was also served while the Regulation was in force, but when the year of grace expired the Regulation had been repealed.

The Advocate-General for the appellant contends generally that the mortgagor s right to foreclosure under the provisions of the Regulation having accrued while the Regulation was still in force, that right is saved by s. 2, cl (*c*) of the Transfer of Property Act; and in this particular case he relies on a decision of this Court in *Mohabir Pershad Narain Singh* v. *Gungadhar Pershad Narain Singh* (1). Mr. Woodroffe, on the other hand, supports the decision of the lower appellate Court on the authority of the decision of the Full Bench of the [**359**] Allahabad Court in *Gunga Sahai* v. *Kishen Sahai* (2), and of the Full Bench of this Court in *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (3), and of a Division Bench of this Court in *Baijnath Pershad Narain Singh* v. *Moheswari Pershad Narain Singh* (4); and the attempts to distinguish this case from that relied on by the Advocate-General on the ground that in the present case notice of foreclosure was served after the Transfer of Property Act had been passed, though before it came into force.

As regards the general question raised by the Advocate-General, it seems to me that, as a Division Bench of this Court, we are precluded from considering it by the decision of the Full Bench above referred to, in which it was held by a majority of the Judges (in conformity with the decision of the Allahabad Court) that where the mortgage was executed and the due date expired while the Regulation was in force, but no proceedings for foreclosure had been instituted under the Regulation at the time of its repeal, foreclosure could only be sued for under the provisions of the Transfer of Property Act. The Full Bench, however, did not decide as to the procedure which should be followed in cases where proceedings had been instituted under the Regulation prior to its repeal. In the case of *Baijnath Pershad Narain Singh* (4) notice of foreclosure had been served and the year of grace had expired before the Regulation was repealed, and relying upon those facts the Court held that the mortgagee had thereby acquired an immediate right to have a decree declaring the property to be his absolutely. In *Mohabir Pershad Narain Singh* (1), as in the present case, the notice of foreclosure was served while the Regulation was still in force, but the Regulation had been repealed before the year of grace expired. Mr. Woodroffe accordingly argues

(1) 14 C. 599. (2) 6 A. 262. (3) 12 C. 583. (4) 14 C. 451.

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that the full and complete right of the mortgagee to a decree for foreclosure and possession had not accrued, and that the *ratio decidendi* relied on in the case of *Baijnath Pershad Narain Singh* is wanting in the present case. But the Judges who decided the case of *Mohabir Pershad Narain Singh* were of opinion that the mortgagee had acquired a right to bring a suit [**360**] under the Regulation at the expiration of the year of grace, and they held that that right was saved by cl. (*c*) of s. 2 of the Transfer of Property Act. Without going so far as this (which perhaps may seem to militate somewhat against the principle laid down by the Full Bench) it appears to me that it may fairly be said that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the General Clauses Act. Mr. Woodroffe argues that the proceedings referred to in that section are judicial proceedings only, and that, the service of notice of foreclosure being merely a ministerial proceeding, that section cannot apply. But I see no sufficient reason for narrowing the plain meaning of the term in this manner. If the Regulation merely provides a mode of procedure for foreclosure, it seems to me to be only consonant with reason that when that procedure has been put in force it should be continued, and that what has been done should not be set aside in order that a new procedure under a totally different law should be substituted. For this reason, though not prepared to agree in its entirety with the reasoning of the Judges who decided the case of *Mohabir Pershad Narain Singh*, I am prepared to follow the decision in that case, and to hold that in the present case the mortgagee was entitled to foreclosure under the provisions of the Regulation.

I am of opinion therefore that the decree of the lower appellate Court must be reversed, and the case remanded to that Court for determination of the question whether the notice was duly served.

MITTER, J.—I concur. The Full Bench decisions in *Gunga Sahai* v. *Kishen Sahai* (1) and in *Bhobo Sundari Debi* v. *Rekhal Chunder Bose* (2) do not, as pointed out by my learned colleague, support the view of the law taken by the District Judge in this case. In those cases the mortgagee had not taken any steps to foreclose the mortgage under Regulation XVII of 1806 when the Transfer of Property Act came into operation, and it was held that the mortgagee after the repeal of the aforesaid Regulation could not adopt the procedure laid down in it to effect a valid foreclosure. But here all the steps that are necessary to [**361**] be taken under the Regulation had been taken when it was in force. All that remained was to bring a suit for foreclosure which is not provided in the Regulation. That suit has now been brought, and the (plaintiff) appellant does not ask us to apply to it the procedure laid down in any repealed Regulation, but the procedure which is now in force. The Full Bench decisions therefore will not help us in deciding the question raised in this appeal. The case of *Baijnath Pershad Narain Singh* v. *Moheswari Pershad Narain Singh* (3) is also inapplicable, because the plaintiff in that case had acquired the right of an absolute owner, and the relation between him and the defendant as mortgagee and mortgagor had ceased to exist when the Transfer of Property Act came into operation. In this case that relation still subsisted when that Act came into operation.

But the case of *Mohabir Pershad Narain Singh* v. *Gungadhur Persad Narain Singh* (4) is exactly in point. There, as in this case, the steps for the purpose of effecting foreclosure had all been taken under

(1) 6 A. 262. (2) 12 C. 583. (3) 14 C. 451. (4) 14 C. 599.

Regulation XVII of 1806 when it was in force, and the relation of mortgagee and mortgagor had not ceased to exist when the Transfer of Property Act came into operation.

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15 C. 357.

It has been contended before us on behalf of the respondent that that case has not laid down the law correctly, but I am unable to accept this contention as valid, because it is (*a*) contrary to a well-settled principle of construction that in matters of substantive right a statute is not to be so read as to affect it unless it does so in express language or by necessary implication; it is (*b*) contrary to the provisions of s. 2, cl. (*c*) of the Transfer of Property Act itself; and it is (*c*) also contrary to s. 6 of the General Clauses Act No. I of 1868.

Under the law in force, before the Transfer of Property Act came into operation, the appellant mortgagee had the right of foreclosing the mortgage by causing a notice to be served through the principal Civil Court of the district upon the mortgagor, informing him that his right of redemption would be gone if the mortgage money be not paid in full within one year from the date of the service of the notice. This is a substantive right, and not an inchoate right *i.e.*, a mere chance of being developed **[362]** into a substantive right as contended for on behalf of respondent. This right was vested in the plaintiff in the capacity of a mortgagee, and on the expiration of the year of grace he acquired a new right, *i.e.*, that of an absolute owner. But the one right is as much a vested right as the other. There is nothing in the Transfer of Property Act which in express words or by necessary implication takes away this right.

The right accruing to a mortgagee under Regulation XVII of 1806 when the notice prescribed in it has been served on the mortgagor will not be affected by the Transfer of Property Act, as provided in cl. (*c*) of s. 2. It is a right conferred by the Regulation, but *arises out of the relation of mortgagee and mortgagor constituted in this case before the Act came into operation.* It is therefore expressly saved by the clause in question. Then, again, on the service of the notice of foreclosure in this case a certain liability on the part of the mortgagor arose out of that relation, *viz.*, the liability of losing the right of redemption if the mortgage money in full be not paid within one year. That liability also remained unaffected by this clause.

The contention on behalf of the respondent, as already stated is also contrary to the provisions of s. 6 of the General Clauses Act. The service of notice upon the mortgagor in this case was an *act* done. It was a valid and effectual act at the time when it was done, because at that time the Regulation which prescribed its doing was in force. We are asked to undo the effect of that Act, and to hold that notwithstanding it was valid and effectual at the time when it was done, it should be treated as if it had not been done after the Transfer of Property Act came into operation, because the Regulation under which it was done has been repealed by that Act. That is precisely what s. 6 of the General Clauses Act says *inter alia* that we must not hold. It says that "the repeal of any Statute, Act or Regulation shall not affect anything done * * * * * * * * before the repealing Act shall have come into operation." The case of *Mohabir Pershad Narain Singh* v. *Gunga Pershad Narain Singh* (1) must therefore, in my opinion, be followed.

J. V. W. *Appeal allowed.*

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(1) 14 C. 599.

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APPELLATE CIVIL.

15 C. 363.

15 C. 363.

[363] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

LALRADDI MULLICK (*Decree-Holder*) *v.* KALA CHAND BERA (*Judgment-Debtor*)* [16th January, 1888.]

Limitation (Act XV of 1877), sch. II art. 179—Execution of decree—Step-in-aid of execution—Application to sell attached property subject to a mortgage.

A judgment-creditor applied on the 22nd May 1882, for execution of a decree, dated 7th November 1881, and certain property of the judgment-debtors was attached. Thereupon a claim was preferred by a mortgagee, and on the 10th August 1882, the judgment-creditor admitted the claim and applied that the property might be sold subject to the claimant's mortgage, and the proceeds, if any, paid over to him in part satisfaction of his decree. On the 29th June 1885, another application was made for execution, and on the 20th November 1886, a third application was made. To the latter application objection was taken, and it was contended that the decree was barred by reason of more than three years having elapsed between the application of the 22nd May 1882, and that of the 20th June 1885.

Held, that the application of the 10th August 1882, by the judgment-creditor to allow the sale of attached property subject to the mortgage of the claimant was "a step-in-aid of execution of the deree" within the meaning of art. 179, sch. II, Act XV of 1877, and the execution of the decree was therefore not barred.

THIS appeal arose out of an application made on the 29th November 1886, to execute a decree dated the 7th November 1881. The judgment-debtor objected that the right to execute the decree was barred by limitation.

The grounds upon which the objection was made and the various proceedings had in execution of the decree before the 29th November 1886, appear sufficiently from the judgment of the High Court.

The Munsif overruled the objection and allowed the execution to proceed, but on appeal by the judgment-debtor the Munsif's order was set aside.

The judgment-creditor now appealed to the High Court.

Baboo *Jadub Chundra Seal,* for the appellant.

[364] No one appeared for the respondent.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

It is a matter of regret that in this case no one appears for the respondent. The point to be decided is of some little importance, and perhaps of some little difficulty. The facts are these: The decree-holder, the appellant before us, obtained a decree on the 7th of November, 1881. On the 22nd May 1882, he applied to execute that decree. A certain property of the judgment-debtor's was attached and put up for sale. While the property was under attachment a claim was laid to it by a third party. That claim in due course came on for investigation before the Court, and on the 10th of August 1882, it was allowed. At the time the claim was allowed the judgment-creditor through his pleader admitted the validity

* Appeal from Order No. 272 of 1897 against the order of C. B. Garrett, Esq., Judge of 24 Pergunnahs, dated the 28th of April 1887, reversing the order of Baboo Janokee Nath Mookerjee, Munsif of Diamond Harbour, dated the 18th of February 1887.

of the claim, and applied that the property under attachment might be sold subject to the mortgage, and that the proceeds realized, if any, *ultra* the mortgage debt, might be paid over to him in part satisfaction of his decree. That was on the 10th of August 1882. A small sum of money was reailzed from that sale, namely, Rs. 16. On the 20th June 1885, another application for execution was made. What was done on that application does not appear. Subsequently another application for execution was made on the 29th November 1886. Then it was urged on behalf of the judgment-debtor that the application was barred by reason of more than three years having elapsed between the application of the 22nd May 1882 and the application of the 20th June 1885.

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15 C. 363.

The Munsif decided in favour of the judgment-creditor. The District Judge has reversed that decision, and has upheld the objection of the judgment-debtor. The judgment of the lower appellate Court is a very short one, and is as follows: "I think this appeal must be allowed. The decision in the Calcutta Law Reports, Volume XII, page 85, is directly against the decree-holder's contention. The execution is barred. I reverse the Munsif's decision with costs." It is to be noted that the name of the case mentioned by the Judge is not stated; and on looking at XII, Calcutta Law Reports, page 85, we [**365**] find there the end of a judgment of Her Majesty's Privy Council which has absolutely nothing whatever to do with the point now in dispute, What the case referred to by the District Judge is we are unable to say, (1).

We are of opinion that the application of the 10th August 1882, by the judgment-creditor to allow the sale of the mortgaged and attached property, subject to the mortgage of the third party, who was claimant, is, within the meaning of art. 179, sch. II of the Limitation Act, a "step in aid of execution of the decree," and therefore we think that the judgment of the lower appellate Court is erroneous. We accordingly set it aside, and restore the decision of the Munsif. The execution will be allowed to proceed.

The appellant, the judgment-creditor, must have his costs in this and the lower appellate Court.

H. T. H. *Appeal allowed.*

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15 C. 365=12 Ind. Jur. 385.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

KASHI MOHUN BORUA (*Decree-holder*) *v.* BISHNOO PRIA (*Judgment-debtor*).* [12th January, 1888.]

Execution of Decree—Scheduled Districts—Execution of Decree passed by Court of Scheduled District in Court of a Regulation District—Civil Procedure Code (Act VIII of 1859), *s.* 284—*Civil Procedure Code (Act XIV of* 1882), *ss.* 223, 229—*Scheduled Districts Act (XIV of* 1874), *s.* 5.

On the 15th May 1876, a judgment-crediter obtained a decree in the Civil Court of the Chittagong Hill Tracts, which are included amongst the Scheduled

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* Appeal from Order No. 248 of 1887 against the order of F. H. Harding, Esq., Judge of Chittagong, dated the 29th of April, 1887, affirming the order of Baboo Nittyo Gopal Sirkar, Munsif of North Pattia, dated the 27th of December 1886.

(1) The case might perhaps have been *Joobras Singh* v. *Bubooria Alumbasee Kocr,* 7 C.L.R. 424, in which it was held that an application to sell attached property was not an application within art. 179, sch. II of the Limitation Act, 1877.—*Rep.*

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Districts, and on or about the 15th May 1876, at his instance, it was sent with a certificate of non-satisfaction to the Court of a Munsif in the Regulation District of Chittagong for execution. After sundry unsuccessful attempts to execute the decree an application was made on the 17th September 1886, for its execution. The judgment-debtor objected that under s. 229 of the Code of Civil Procedure (Act XIV of 1882) the Munsif's **[366]** Court had no jurisdiction to execute the decree, as it could only act under that section, and the Code had never been extended to the Chittagong Hill Tracts.

Held, that, as at the time the decree was passed and sent to the Munsif for execution, Act VIII of 1859 was in force, and by s. 284 of that Act the judgment-creditor had a right to have his decree sent to any Civil Court for execution, he was entitled now to have it executed, as neither Acts X of 1877 or XIV of 1882 by express words or implication deprived him of that right.

Held, further, that the intention of the Legislature was, with regard to decrees obtained in Scheduled Districts after the Code of 1887 came into force, that such decrees should not be executed by Courts in British India unless and until, under the provisions of s. 5 of the Scheduled Districts Act (XIV of 1874), the Government had issued the notification therein referred to applying to the Scheduled Districts such portion of the Code of Civil Procedure as they thought proper to apply.

Quære.—Whether a decree passed by a Court in a Scheduled District and sent for execution to a Court in a Regulation District after Act X of 1877 came into force can be executed by the latter Court in the absence of such a notification. extending the provisions of the Code of Civil Procedure to the Scheduled Districts.

[F., 34 C. 576=11 C.W.N. 622=6 C.L.J. 30.]

THIS appeal arose out of an application made to the Munsif of North Pattia in the district of Chittagong for execution of a decree passed on the 12th June 1874, by the Civil Court of the Chittagong Hill Tracts. On the 15th May 1876, an application was made to the latter Court for execution of the decree for sending the same with a certificate of non-satisfaction to the Court of the Munsif of North Pattia, and although it did not appear clearly on the record of the present appeal as to whether that certificate was in existence, as it was not now forthcoming, it was assumed for the purpose of the appeal that the certificate asked for had been duly transmitted. After the 15th May 1876, various applications were made for execution of the decree by the Court of the Munsif of North Pattia but nothing was realized. The present application was made on the 17th September 1886, and the judgment-debtor filed objections to its execution, and amongst them contended that the Munsif's Court had no jurisdiction under s. 229 of the Civil Procedure Code of 1882 to execute the decree, inasmuch as it was passed by the Court of the Chittagong Hill Tracts, to which the Civil Procedure Code had no application, as that district [**367**] was one of the Scheduled Districts to which the provisions of the Civil Procedure Code had never been extended; and as the Court of the Munsif could only execute decrees sent to it under the provisions of s. 229, this decree could not be executed in that Court. The Munsif allowed this objection, and stayed the proceedings in execution. The judgment-creditor, therefore, appealed to the Judge, and that officer confirmed the decision of the Munsif in a judgment of which the following is the material portion:—

"After careful consideration of this matter I think that the Munsif is right in the view which he has taken. The Code of Civil Procedure, with the exception of ss. 1 and 3, does not extend to the Scheduled Districts as defined in Act XIV of 1874, of which the Hill Tracts of Chittagong are one. There is, therefore, no provision which authorizes a Civil Court in the Hill Tracts of Chittagong to send a decree which it has passed to a Court of this or any other Regulation District for execution.

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The question is whether, when, in accordance with what hitherto appears to have been the practice, that Court sends such decree for execution to such Courts, the latter are precluded from executing the decree. I think they are so precluded, for s. 223 of the Civil Procedure Code says clearly that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution 'under the provisions hereinafter contained.' The use of the words 'under the provisions hereinafter contained' seems to me to make it necessary that the decree should have been sent for execution in accordance with the provisions of the Code, and not otherwise. Section 284 of the old Act VIII of 1859 was as follows: 'A decree of any Civil Court within any part of the British territories in India, or established by the authority of the Governor-General in Council in the territories of any foreign Province or State, which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other such Court in the manner following.' The words 'within any part of the British territories in India' have been omitted in s. 229 of the present Code, and I think that this omission must have been intentional on the part of the Legislature. It may [**368**] be said that the view which I am inclined to take places the Civil Courts of the Scheduled Districts which are in British India in a worse position than the foreign Courts mentioned in s. 229 of the Civil Procedure Code. But it must be remembered that s. 5 of the Scheduled Districts Act authorizes the Local Government, with the previous sanction of the Governor-General in Council, from time to time by notification in the *Gazette of India*, and also in the *Local Gazette* (if any), to extend to any of the Scheduled Districts, or to any part of any such districts, any enactment which is in force in any part of British India at the date of such extension. It is in the power, therefore, of the Local Government to provide a remedy for any inconvenience which may result from the inability of the Courts of this or any other district to execute the decree of the Civil Court of the Hill Tracts by extending the necessary sections to that district. I hold that under the present law the Courts of this district have no jurisdiction to execute decrees passed by the Civil Courts of the Hill Tracts of Chittagong, and dismiss this appeal with costs."

Against that order the judgment-creditor now appealed to the High Court.

Baboo *Akhil Chunder Sen*, for the appellant.

Mr. *R. E. Twidale*, for the respondent.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This is an appeal from the decision of the Officiating Judge of Chittagong. That decision affirms the decision of the Munsif of North Pattia.

The facts of the case are these: The judgment-creditor, appellant, obtained a decree in the Court of the Chittagong Hill Tracts on the 12th of June 1874. On the 15th of May 1876, he made an application for execution of the decree, and asked for a certificate of non-satisfaction to be sent to the Court of the Munsif of North Pattia; and we take it that as a matter of fact on or about the 15th of May 1876, a certificate was in due course sent, and in due course reached the Court to which it was sent. After the receipt of the certificate in that Court

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[369] various applications for executoin have, from time to time, been made by the decree-holder, but nothing has been realized under the decree. The last application was made on the 17th of September 1886; and on that occasion, and, as far as we know, for the first time, the objection was taken by the judgment-debtor that under the provisions of s. 229 of the Code of Civil Procedure the decree was not capable of execution by the Court of the Munsif of North Pattia. The Munsif accepted the argument of the judgment-debtor's vakil; and the Officiating District Judge has upheld the decision of the Munsif.

We think that the conclusion at which the District Judge has arrived is erroneous, and must be set aside. At the time the judgment-creditor obtained this decree, the Civil Procedure Code, Act VIII of 1859, was in force; and s. 284 of that Act is as follows: "A decree of any Civil Court within any part of the British territories in India, or established by the authority of the Governor-General of India in Council in the territories of any foreign Prince or State which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other such Court in the manner following;" and in the subsequent sections the sending of the decree to another Court and the proceedings thereupon to be taken are described. Those proceedings are to all intents and purposes similar to those under the Code of 1877, reproduced in the Code of 1882. The words "any Civil Court within any part of the British territories in India," occurring in s. 284 of Act VIII of 1859, are omitted from s. 229 of the present Code. It was argued in the lower Court, and it is also argued here, that the omission of these words in s. 229 operates to deprive the judgment-creditor of his right to have his decree which he had obtained when the Code of 1859 was in force executed in the Munsif's Court. It is to be noted that the Code of 1877 is, as the previous Code of 1859 was, a Code to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. It deals with procedure, and almost entirely with procedure. The appellant in this case had a decree in 1874, and up to the 1st of October 1877, the day when the Civil Procedure Code of 1877 came into force, he had by virtue [370] of the provisions of the Code of 1859, a right to have his decree sent to any Civil Court under the provisions of s. 284 and have it executed. Now the question is, are there any distinct words in the Code of 1877 taking away from him the right which he already possessed? It is admitted that there are no such express words. Ought we then to hold that the right is taken away by implication? We do not think we ought. We think that the intention of the Legislature was, with regard to decrees obtained in Scheduled Districts after the Code of 1877 came into force, that those decrees should not be executed by Courts in British India unless and until, under the provisions of s. 5 of the Schedule Districts Act of 1874, the Government had issued the notification therein referred to applying to the Scheduled Districts such portion of the Code of Civil Procedure, that is, the Code of 1877, as they thought proper to apply. It appears that no such notification has been made; and what might have been the result of those proceedings if the application to send the decree for execution to the Munsif's Court had been made after the Code of 1887 came into force it is not necessary to determine, or to express any or the slightest opinion about. All that we need say is that we do not think that the right which the judgment-creditor had acquired at the time he applied for the certificate of non-satisfaction has been taken away, either by express

words or by implication, by the Code of 1877. This appeal must, therefore, be allowed with costs; and the Munsif must be directed to proceed with the execution case on the merits. He will take up the case *de novo*, and adjudicate upon all the other objections which were raised by the judgment-debtor.

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H. T. H. *Appeal allowed.*

15 C. 371.

[371] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

PEARY MOHUN CHOWDHRY (*Judgment-debtor*) v. ROMESH CHUNDER NUNDY (*Decree-holder*).* [2nd February, 1888.]

Execution of decree—Representative of decree-holder—Attachment of decree—Civil Procedure Code (Act XIV of 1882), *ss.* 232, 244, 273.

A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in s. 244, cl. (*c*) of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached.

When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor.

[**F.**, 6 C.L.J. 141 (142); **Appr.**, 17 A. 425 (426); **R.**, 16 M. 20 (22); 17 M. 58 (61)=3 M.L.J. 211; 6 C.L.J. 437=11 C.W.N. 433 (437); 24 C. 778 (783); 24 T.L.R. 12; 8 Ind. Cas. 675.]

THIS was an appeal against an order passed by the District Judge of Chittagong, reversing an order passed by the Subordinate Judge of that district in certain execution proceedings arising out of applications to execute certain decrees. One Uma Churn Chowdhry had obtained a decree for Rs. 2,868-13 against Peary Mohun Chowdhry, the appellant in this appeal. Peary Mohun Chowdhry, on the other hand, held a decree for the sum of Rs. 6,000, against Uma Churn, and in addition to that decree Romesh Chunder Nundy, the respondent, held another decree against Uma Churn. The facts of the case and the various orders passed in the execution proceedings culminating in the order of the Subordinate Judge passed on the 11th December 1886, which gave rise to this appeal will appear from the judgment of the District Judge, which was as follows:—

"This is an appeal against the orders of the lower Court cancelling a previous order for the attachment of a decree for Rs. 2,868-13 obtained by one Uma Churn Chowdhry against the respondent (Peary Mohun Chowdhry) in this case in execution of a decree obtained by the appellant (Romesh Chunder Nundy) against Uma Churn Chowdhry. It appears that Uma Churn Chowdrhy obtained a decree against Peary Mohun Chowdhry for Rs. 2,868-13, and that Peary Mohun Chowdhry obtained a [372] decree against Uma Churn Chowdhry for Rs. 6,000 odd. The Subordinate Judge in his judgment says as follows:—

"On the 13th September 1886, Peary Mohun Chowdhry, after deducting the smaller amount due by him on the aforesaid first decree,

* Appeal from Order No. 280 of 1887 against the order of F.H. Harding Esq. Judge of Chittagong, dated the 27th of May 1887, reversing the order of Baboo Rakul Chunder Bose, Subordinate Judge of that district, dated the 11th of December 1886.

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applied for execution of the second decree for the balance under s. 246 of the Civil Procedure Code, and on that very day the Court admitted that application and ordered execution for the larger sum. The effect of that order, it appears to me, is that the smaller decree was fully satisfied. Before these proceedings Uma Churn Chowdhry's property had been sold in execution of another decree, and payment order for the balance of the sale proceeds was given to Peary Mohun. One Romesh Chunder Nundy had a decree against the said Uma Churn Chowdhry. Romesh Chunder applied on the 13th September 1886, to attach the aforesaid smaller decree in which Uma Churn was the decree-holder. No order was passed on that application on that day, when Romesh's execution case was struck off. A fresh application was made for execution on the next day, and on the 18th idem an order was passed for attaching the smaller decree. The question is whether the smaller decree could be attached under the above circumstances. I think not, because when the Court on the 13th September 1886, ordered the execution of the larger decree for the balance after deducting the sum due under the smaller decree, it must be considered that the smaller decree was fully satisfied, and therefore it cannot be attached. I therefore cancel the former order of attachment, which was passed *ex parte*, and direct the money to be paid to Peary Mohun Chowdhry. Each party to pay his own costs of this application.' The Subordinate Judge then cancelled the order of attachment. This order for cancelling the order of attachment was passed upon an application by Romesh Chunder Nundy, the appellant in the present case, for execution of the decree held by Uma Churn Chowdhry against Peary Mohun Chowdhry, and attached by himself in execution of his decree against Uma Churn Chowdhry. The Subordinate Judge appears to be mistaken in the view which he has taken. Section 246 of the Civil Procedure Code lays down: "If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall [373] be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered in the decree for the larger sum, as well as satisfaction on the decree for the smaller sum. Now there is nothing to show that on the 13th September 1886, when Peary Mohun Chowdhry made his application for execution of his decree after deducting the smaller sum due from himself, the two decrees were before the Court. It is doubtful therefore whether the Court under these circumstances had the power to enter satisfaction as directed in s. 246 of the Civil Procedure Code.

"But, apart from this, the Subordinate Judge appears to have misread the order of the 13th September most strangely. That order set forth that, the decree-holder Peary Mohun Chowdhry having applied for execution of his decree after deducting the amount of the decree obtained against himself by his judgment-debtor, proper orders would be passed on the 18th September. On the 18th September the application for set-off was rejected on the ground that the smaller decree had been attached in execution of a decree in another case. The Subordinate Judge was wrong therefore in his opinion that the Court had on the 13th September 1886, ordered the execution of the larger decree for the balance after deducting the sum due under the smaller decree, and that consequently it must be considered that the latter decree was fully satisfied, and could not therefore be attached.

I have felt doubtful during the hearing of this case whether the

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appellant had a right to apply execution of the decree obtained by Uma Churn Chowdhry against Peary Mohun Chowdhry on the ground that it had been attached in execution of a decree obtained by himself against Uma Churn Chowdhry. For s. 273 of the Civil Procedure Code does not provide for the holder of the decree sought to be executed applying to a Court for execution of an attached decree except when the Court passing the decree sought to be executed is not the same as the Court passing the attached decree. The section is silent with reference to the right of the holder of the decree sought [374] to be executed to apply for execution of an attached decree passed by the same Court which passed the decree sought to be executed. It merely provides that in such a case attachment is to be made by an order of the Court directing the proceeds of the attached decree to be applied in execution of the decree sought to be executed. It does not say how the proceeds are to be realized, whether the holder of the decree sought to be excuted has the same right to apply for execution of the attached decree as is given in the second part of the section which refers to decrees passed by different Courts, in the event of the decree-holder not taking out execution, or whether he should cause the attached decree to be sold. Under the circumstances I am doubtful whether the question between Ramesh Chunder Nundy, the present applicant, and Peary Mohun Chowdhry, with regard to the liability of Uma Churn's decree obtained against the latter to attachment in execution of a decree obtained by Romesh Chunder Nundy against Uma Churn Chowdhry, falls properly under s. 244 of the Civil Procedure Code. If it does not, there is no appeal in the present case. As, however, this was not contended before me during the argument of the appeal, I am unable to decide this point against the appellant.

"As the Subordinate Judge was clearly wrong in the view which he took about the smaller decree having been satisfied, I decree this appeal with costs."

Against that judgment and the order passed therein Peary Mohun Chowdhry now appealed to the High Court.

Mr. *R. E. Twidale*, for the appellant.

Baboo *Aukhil Chunder Sen*, for the respondent.

The judgment of the High Court (Norris and Beverley, JJ.) was as follows:—

JUDGMENT.

It is admitted that the sole question for our decision in this case is whether or not an appeal lay to the District Judge from the order of the first Subordinate Judge, dated 11th December, 1886. If there was no appeal from that order, the order of the District Judge, dated 27th May, 1887, was passed without jurisdiction, and although there would be no appeal against it to this Court, we have intimated that in this case we are prepared [375] to consider this appeal as an application under s. 622 of the Code to have that order set aside on the ground that it was made without jurisdiction.

The facts as found by the District Judge are these: U. and P. had cross-decrees, P's decree being for the larger amount. R. had also a decree against U., in execution of which he applied to attach U.'s decree against P. There is some question as to the date on which this application was granted, but the Judge finds it was prior to the 18th September, on which date an application by P. to execute his decree for the balance

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after setting off the smaller decree (under s. 246 of the Code of Civil Procedure) was rejected. On the matter coming again before the Court—in what manner it came before the Court does not clearly appear upon the proceedings—the Subordinate Judge cancelled his former order attaching U.'s decree in execution of R's decree, and directed that P.'s decree should be executed. R. thereupon appealed to the Ditstrict Judge, and the question is whether an appeal lay against the Subordinate Judge's order. It is clear that no appeal would lie unless the order complained of can be regarded as an order made under s. 244 of the Code, that is, an order determining a "question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharged or satisfaction of the decree." Now the question related to the execution, discharge or satisfaction of U's decree against P., and the point for our consideration is whether R having been allowed to attach that decree can be treated as the representative of U, in the determination of that question—that is to say, whether a person who attaches a decree is a representative of the decree-holder. Reading s. 232 of the Code with s. 273, we are of opinion that he must be so regarded. Section 273 distinctly provides that in certain cases the attaching creditor may himself apply to execute the decree. The District Judge appears to think that this can only be done in cases which come within that distinct provision—that is, in cases where the decree which has been attached and the decree which is sougt to be executed are the decrees of different Courts. But there would seem to be no sufficient reason for this restriction. The section rather seems [**376**] to contemplate the right of the attaching creditor in every case to enforce execution of the decree which he has attached. Where both decrees are decrees of the same Court, the section assumes that that Court has jurisdiction to execute the attached decree—that is, its own decree—on the application of the attaching creditor. It is only where the decree attached is the decree of another Court that a special provision is necessary, and accordingly the section specially provides that in such a case the attaching creditor must make a formal application to the Court which made the decree to execute its own decree which he has attached. It would seem then that a creditor who attaches a decree is in much the same position as the transferee of a decree under s. 232, and we think that he must be regarded as a representative of the decree-holder under s. 244 (*c*). For these reasons we are of opinion that an appeal did lie to the District Judge, and that this appeal must be dismissed with costs.

H. T. H. *Appeal dismissed.*

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FULL BENCH.

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FULL BENCH.

Before Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Ghose.

TUPSEE SINGH AND OTHERS (*Plaintiffs*) v. RAM SARUN KOERI (*Defendant*).* [28th February, 1888.]

Bengal Tenancy Act (VIII of 1885), ss. 20, 21—General Clauses Act (I of 1868), s. 6—Retrospective enactment when applicable to pending suit—Pending suit—Landlord and tenant—Right of occupancy.

Section 21, sub-s. 2 of Act VIII of 1885 is expressly retrospective, and applies to suits pending at the date of the commencement of that Act. *Jogessur Das* v. *Aisani Koyburto* (1) followed.

[F., 21 C. 940 (945) (F.B.); R., 16 C. 267 (272).]

THIS reference arose out of a suit brought on the 1st June, 1885, to eject the defendant from 10 cottahs of land situated in Kisanpali. The defendant put in his written statement on the [377] 13th July 1885, and the case came on for hearing on the 23rd January, 1886. The defence raised by the written statement was that no notice of ejectment had been served, and that the plaintiff had agreed to allow him (the defendant) to hold the land in suit as a portion of his hereditary tenure. It was admitted that the defendant held 4 bighas 10 cottahs of land situate in the same village as his hereditary tenure, and that he had held the 10 cottahs in dispute for ten years. The Munsif on the 23rd January, 1886, found that notice had been served and that the agreement had not been proved; but further found that the defendant under s. 20 of the Bengal Tenancy Act was a "settled ryot" in 4 bighas 10 cottahs of the village, and held that under s. 21 of that Act he had therefore acquired a right of occupancy in the land in suit; he therefore dismissed the suit. On appeal the Subordinate Judge affirmed the decision of the Munsif. On appeal by the plaintiffs to the High Court, the learned Judges (TOTTENHAM and NORRIS, JJ.) referred to a Full Bench the question whether s. 21 of the Bengal Tenancy Act was applicable to any suit instituted before that Act came into force.

The following was the order of reference:—

This was a suit brought by the plaintiffs to eject a tenant after notice to quit.

The question on which the appeal turns is whether or not the Court below was right in applying s. 21 of the Bengal Tenancy Act of 1885 to the case which was instituted several months before that Act came into operation. The plaint was filed in June, 1885, and the defence was put in July. The new Act came into operation on the 1st of November following.

The Courts below gave the defendant the benefit of sub-s. 2, s. 21 of the Bengal Tenancy Act, and held that he had right of occupancy in the disputed land, because he had been in possession of it from before the 2nd March, 1883, and was a settled ryot of the village within the meaning of s. 20.

* Full Bench on Special Appeal 2290 of 1886 against the decree of Baboo S. C. Dhur, Officiating Second Subordinate Judge of Sarun, dated 30th August, 1886, affirming the decree of Baboo Nepal Chunder Bose, Munsif of Sarun, dated 23rd January, 1886.

(1) 14 C. 553.

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Having regard to the provisions of s. 6 of the General Clauses Act. to the Full Bench decision recently passed in the case of *Lall Mohun Mukerjee* v. *Jogendra Chunder Roy* (1), in which it was held that s. 174 of the new Act was not applicable [378] to decrees passed under the old rent law, and to the apparent unreasonableness of deciding a case upon the basis of an enactment not yet come into force when the pleadings were filed, we should have had no hesitation in at once holding that the lower Court was in error in giving effect in this case to the new Act.

But the respondent's pleader Baboo *Nobin Chunder Ghosal*, called our attention to a case decided by MITTER and BEVERLEY, JJ.—*Jogessur Das* v. *Aisani Koyburto* (2), in which the very same question was decided in favour of the tenant. In that case all proceedings in the suit, except the filing of the plaint, seem to have taken place after the new Act came into force; but the decision was not based at all upon that consideration. The learned Judges held upon the construction of the section itself that it was applicable to all suits in which no decree had been passed at the time the new Act came into operation.

And a later case, Second Appeal No. 2440 of 1886, decided on the 23rd of May by PRINSEP and BEVERLEY, JJ., has since been brought to our notice, in which the same point appears to have been similarly decided by the dismissal of the plaintiff's appeal with costs, though the *ratio decidendi* is not specified.

In the face of these authorities we hesitate to give effect to our own opinion, which is not in accordance with that affirmed in those cases and entertained by the lower Courts in the present case.

If that opinion be correct, it follows that in a suit such as this tried on the 31st October 1885, without reference to the provisions of the Bengal Tenancy Act, and in which the plaintiff was on that date entitled to succeed, if for any reason the delivery of judgment had to be postponed till next day, the decree would have to be in favour of the defendant on a ground which he had not and could not have pleaded at the trial.

With great respect to the opinion of the learned Judges, with whom we have the misfortune to differ, we must confess that we do not see in the retrospective operations of s. 21 anything that compels us to give it effect in a suit instituted and heard partly or wholly before the Act came into operation. In [379] any suit instituted under that Act the tenant would of course be entitled to the benefit in question, unless he was deprived by some previous decree in another suit. But we do not see how he can take advantage of any section creating a right in an Act not yet in force when the suit was brought and his defence was made.

We therefore have determined to refer the case to a Full Bench for the decision of this question, *viz.*:—

Is s. 21 of the Bengal Tenancy Act (VIII of 1885) applicable to any suit which was instituted before that Act came into force?

Mr. *Casperss* and Baboo *Dwarkanath Mukerji*, for the appellants.

Mr. *Casperss*.—The general rules on this subject are to be found in Maxwell on Statutes (pp. 257-273) and Dwarris on Statutes (pp. 680-687). Before an Act can be read retrospectively so as to apply to pending suits it must be stated in express terms that the Act is to be so read. The case of *Jogessur Das* v. *Aisani Koyburto* (2) is distinguishable, as there the plaint was filed before the 1st November, but the defendant had no notice of suit till after that date. In this case

(1) 14 C. 636. (2) 14 C. 553.

issues were framed before the Act came into force, and no issue as to the applicability of the new Act was framed; it was not thought of until raised by the lower Court. There are many cases where a right of action grounded upon a previous contract has been entertained and enforced after the new Act has come into operation—*Gilmore* v. *Shuter* (1). Where such a right of action has been asserted and the Courts have become seised thereof, and issue has been joined between the parties before the Act came into force, then, *a fortiori*, it would require words of special force in the statute to defeat such a vested right. It could not have been the intention of the Legislature by *general* words or even necessary implication to take away a vested right from a person who has been put to expense and costs in instituting his suit, and visit the innocent pursuer of that right with costs—see *Couch* v. *Jefferies* (2). It is a general [**380**] rule that when the Legislature alters the rights of parties by taking away a right of action, its enactments, unless in express terms they apply to pending actions, do not affect them—*In re Joseph Suche & Co.* (3), per Jessel, M.R. The decision in that case was expressly rested upon general principles. I submit that the Legislature must here make use of special words. A statute should be so read that, if possible, no sentence, clause, or word shall be superfluous, void or insignificant.—*The Queen* v. *The Bishop of Oxford* (4). But the Court can know nothing of the intention of an Act, except from the words in which it is expressed applied to the facts as existing at the time—see *Logan* v. *Courtown* (5); also *Fordyce* v. *Bridges* (6). I say that the section was intended to apply to the case of a landlord shifting his ryot from a holding in which he had acquired settled rights in order to prevent his acquiring rights of occupancy in any other land which he might happen to hold in the same village. The landlord being aware that the new law when passed would give the tenant an advantage, the Legislature wished to prevent the tenant from contracting himself out of any such advantage which is to be acquired under the new law. That is the reasonable meaning of the section. There is nothing in s. 21 which puts it beyond doubt that the Legislature meant it to be retrospective so as to deprive a person of a right of action vested in him at the time of the passing of the Act, and unless obliged by express terms the Courts will not construe it so as to effect past transactions, retrospective laws being of questionable policy—see *Philips* v. *Eyre* (7), *Jackson* v. *Wooley* (8), *The Midland Ry Co.* v. *Pye* (9), *Thistleton* v. *Frewer* (10). The words " decree or order " were introduced as a saving clause, otherwise every kind of suit decided between landlord and tenant during the period in question might have been reopened. The matter does not, however, rest upon this section, because there is also a substantive law with reference to pending suits contained in s. 6 of Act I of 1868; and in order to abrogate this law some special [**381**] words would be necessary in the retrospective Act. The case of *Lall Mohun Mukerjee* v. *Jogendra Chunder Roy* (11) is decided on a different point, but the general principles there lad down apply here.

Baboo *Nobin Chunder Ghosal* for the respondent.—The question depends on the construction of the section. The words of sub-s. 2 clearly show that the Act applies to pending suits; the general principles

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(1) 2 Lev. 227. (2) 4 Burr. 2462. (3) L.R. 1 Ch. D. 50.
(4) L.R. 4 Q.B.D. 261. (5) 13 Beav. 22, 29. (6) 1 H.L. Ca. 4.
(7) L. R. 6 Q. B. 23. (8) 8 El. & Bl. 784. (9) 10 C.B. N.S. 191.
(10) 31 L. J. Ex. 230. (11) 14 C. 636.

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contended for by the other side do not therefore apply—see *In re Ratansi Kalianji* (1).

In this case of *Thakooranee Dossee* v. *Bisheshur Mookerjee* (2), s. 6 of Act X of 1859 was held to be retrospecttive. I rely on *Jogessur Das* v. *Aisani Koyburto* (3).

The following opinions were delivered by the Full Bench:—

OPINIONS.

WILSON, J. (PIGOT, O'KINEALY, and GHOSE, JJ., concurring).—This is a suit brought by a landlord against his tenant to eject him from certain lands, in respect of which he alleged that he had given a notice to quit. The service of the notice has been found as a fact. But the defendant resists his landlord's claim to eject him on the ground that he is entitled to a right of occupancy in the land in dispute. Under the law in force prior to the Bengal Tenancy Act, 1885, the defendant would not have had a right of occupancy.

The facts of the case are these: The defendant is a settled ryot, within the meaning of s. 20 of the Bengal Tenancy Act, 1885, of the village within which the lands in dispute are situated. The suit was filed in June, and the written statement in July, 1885. The Bengal Tenancy Act came into operation on the 1st November 1885. The case was decided by the Munsif in January, 1886. The defendant has been a tenant of the land in dispute from before the 2nd of March, 1883, down to the bringing of the suit. The question that arises is whether, by reason of s. 21 of the Bengal Tenancy Act, the defendant is to be held to have a right of occupancy in the lands in dispute. The same question arose in *Jogessur Das* v. *Aisini Koyburto* (3), [382] and MITTER and BEVERLEY, JJ., answered it in the affirmative. The learned Judges before whom this case came on second appeal were disposed to dissent from that view, and they accordingly referred the case to a Full Bench.

The words that we have to construe are those of s. 21, sub-s. 2, The sub-section is this: "Every person who, being a settled ryot of a village within the meaning of the last foregoing section, held land as a ryot in that village at any time between the 2nd day of March, 1883, and the commencement of this Act, shall be deemed to have acquired a right of occupancy in that land under the law then in force; but nothing in this sub-section shall affect any decree or order passed by a Court before the commencement of this Act." I accept the proposition contended for by the learned Counsel for the appellant in his able argument, that an enactment affecting rights of property is not to be so construed as to give it retrospective effect, unless the intention that it shall have such effect clearly appears. But I think in the section under consideration such an intention is plainly expressed. The first part of the section deals with the case of lands held by a settled ryot at or after the date from which the Act speaks, that is to say, the date at which it came into operation, and it declares that such holding shall give a right of occupaancy. Sub-s. 2 deals with the case of lands held by a settled ryot at an earlier period, namely, between the 2nd of March 1883, and the commencement of the Act and it says that such holding shall be deemed to have given a right of occupancy. The sub-section is therefore in express terms retrospective.

(1) 2 B. 148 (199). (2) 3 W.R. (Act X) 29 (87)=B.L.R. Sup. Vol. 202. (3) 14 C. 553.

It was further contended that, admitting this to be so, effect should not be given to the sub-section in a case pending before the commencement of the Act, and the learned Judges who referred the case to us were disposed to adopt this view. I am quite alive to the inconveniences that arise when a suit has to be decided according to a law not in force when the suit was brought. But I think the language of the section is too clear to enable us to avoid the construction which entails those inconveniences. The retrospective enactment [**383**] is quite general in its terms. And the exception from its operation, expressly made by the last words of the section, in the case of decrees or orders passed before the commencement of the Act, seems to be to show that pending suits were not to be excepted.

I should answer the question referred to us in the affirmative, and dismiss the appeal with costs.

Tottenham, J.—As I understand the rest of the Bench to be unanimous in the opinion expressed by Mr. Justice Wilson, I too assent to it.

T. A. P. *Appeal dismissed.*

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FULL BENCH.

Before Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Ghose.

Uzir Ali (*Auction-Purchaser*) v. Ram Komal Shaha and others (*Decree-holder and Judgment-Debtors*).* [28th February, 1888.]

Bengal Tenancy Act (VIII of 1885), s. 174—Execution applied for after passing of Act VIII of 1885, decree being previous to the Act—Bengal Act. VIII of 1869—Construction of statutes.

A sale in execution of a decree passed under Ben. Act VIII of 1869, execution having been applied for after Act VIII of 1885 had come into force, cannot be set aside under s. 174 of the latter Act.

Principle of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1) applied.

[**Overruled,** 22 C. 767 **(F.B.)**; 17 C.W.N. 619 (620)=15 Ind. Cas. 479 (480); **Rel. on.** 18 C.W.N. 103 (105); **R.,** 16 C. 267 (272) **(F.B.)**; 21 C. 940 **(F.B.)**; 23 B. 450 (452)]

On the 30th September, 1885, one Ram Komal Shaha obtained a rent decree against Abdul Ali and Tufuzzul Ali, and on the 15th June, 1886, applied for execution of this decree. On the 7th September, 1886, the under-tenure was put up for sale, and was purchased by one Uzir Ali.

On the 8th September, 1886, the judgment-debtors applied under s. 174 of the Bengal Tenancy Act to have the sale set aside: and on the 6th December, 1886, the Munsif passed an order setting aside the sale under s. 174, directing a refund of the purchase money.

The auction-purchaser thereupon applied to the High Court under s. 622 of the Civil Procedure Code, and obtained a rule [**384**] calling upon the decree-holder and the judgment-debtors to show

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* Full Bench on Rule No. 172 of 1887 against an order of Baboo Uma Churn Kur, Munsif of Anwarah, dated the 6th December, 1886.

(1) 14 C. 636.

1888 FEB. 28. — FULL BENCH. — 15 C. 383 (F.B.).

cause why the order of the 6th December 1886 should not be set aside on the ground that the Munsif had no jurisdiction to make that order, inasmuch as s. 174 of the Bengal Tenancy Act was not applicable to the case.

On the hearing of the rule the Court (MITTER, A. C. J. and GHOSE, J.) passed an order referring to a Full Bench the question whether a sale in execution of a decree passed under Ben. Act VIII of 1869 could be set aside under s. 174 of the Bengal Tenancy Act when execution of the decree was applied for after the last-mentioned Act came into operation?

The following was the order of reference:—

"The question raised on this rule is whether the lower Court had any power under s. 174 of the Bengal Tenancy Act to set aside the auction sale at which the petitioner was the purchaser.

"The rent-decree in execution of which the sale in question took place, was passed before the Bengal Tenancy Act came into operation. But the application for execution of the decree was made after the said Act came into operation. The lower Court upon the application of the judgment-debtor set aside the sale under the provisions of s. 174 of the Bengal Tenancy Act. The contention in this rule on behalf of the auction-purchaser is that, as the decree was made under Bengal Act VIII of 1869, the provisions of the present Tenancy Act will not govern the execution proceedings, although they were commenced after the new Act came into operation. Precisely the same question was referred to the Full Bench in Rule No. 1401 of 1886. But as it was compromised, the question was not decided by the Full Bench. This question is of great importance, and is likely to arise in numerous cases hereafter; and as its decision is not free from difficulty, we refer it again to the Full Bench. The question referred is—whether a sale in execution of a decree passed under Bengal Act VIII of 1869 can be set aside under s. 174 of the Bengal Tenancy Act when execution of the decree was applied for after the last-mentioned Act came into operation?"

Munshi *Serajul Islam*, to show cause contended that s. 174 of Act VIII of 1885 applied; but an application in execution should be governed, unless the Legislature has excepted it, by the [385] law in force when it was made—*Delhi Bank* v. *Orchard* (1), *Papa Sastrial* v. *Anuntarama Sastrial* (2), and referred to *Shivram Udaram* v. *Kondiba Muktaji* (3) and *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (4):

Baboo *Aukhil Chunder Sen*, in support of the rule contended that the Munsif had no jurisdiction to entertain the application under s. 174, and that the decree being made under Ben. Act VIII of 1869 the provisions of s. 174 of the Bengal Tenancy Act of 1885 would not govern the execution proceedings, even though they were commenced after the new Act was in force; that *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (5) showed that an application in execution of a decree is an application in the suit in which the decree was made; that s. 174 was not a matter of procedure, and the presumption would be against giving to it retroactive force—*In re Ratanji Kalianji* (6).

OPINION.

The opinion of the Full Bench (WILSON, TOTTENHAM, PIGOT, O'KINEALY and GHOSE, JJ.) was delivered by WILSON, J., and concurred in by the other learned Judges.

(1) 3 C. 47. (2) 3 M. 98. (3) 8 B. 340. (4) 7 B. 462.
(5) 8 C. 51. (6) 2 B. 148.

WILSON, J.—I cannot distinguish this case in principle from the former Full Bench decision of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1). Section 174 was there held to be not a matter of mere procedure, but to confer a substantive right. In the absence of any indication of intention that the provision is to operate retrospectively, it does not, I think, by the ordinary rules of construction, apply to the proceedings under a decree passed before the commencement of the Act. I should answer the question referred to us in the negative and set aside the order complained of.

1888 FEB. 28. — FULL BENCH. — 15 C. 383 (F.B.).

T. A. P. *Rule absolute.*

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15 C. 386.

[**386**] CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF PANATULLA. PANATULLA *v.* QUEEN-EMPRESS.* [21st December, 1887.]

Penal Code, s. 177—Furnishing false information for the purpose of preventing the commission of an offence, Meaning of.

The information which, under the second branch of s. 177 of the Penal Code, a person is legally bound to give "for the purpose of preventing the commission of the offence" relates not to the commission of offences generally but to the commission of some particular offence.

[**Appl.**, 1 N.L.R. 133; **R**, 31 M. 548=19 M.L.J. 274=4 M.L.T. 325=8 Cr. L.J. 425; 7 N.L.R. 101=11 Ind. Cas. 785=12 Cr. L.J. 441 (443).]

PANATULLA, a constable, was employed to make his rounds by night and call at the house of the notorious bad characters on his beat who were under police supervision, and to ascertain whether they were indoors or not. On one occasion, having made his rounds, he falsely stated to his superior officer as to some of these people that they had been inside their houses when as a matter of fact they had not. Upon these facts the Deputy Magistrate was of opinion that "the information which the accused was required to give and which he falsely furnished was information required for the purpose of preventing the commission of an offence, and therefore the offence made out fell under the second part of s. 177 of the Penal Code." He accordingly sentenced the accused to be rigorously imprisoned for six months.

On appeal the Sessions Judge declined to interfere. An application was therefore made to the High Court on behalf of the accused and a rule obtained.

Baboo *Josoda Nundan Paramanick*, for the petitioner.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows:—

JUDGMENT.

WILSON, J.—The accused in this case was charged and convicted under s. 177 of the Penal Code. This section contains two branches.

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*Criminal Motion No. 356 of 1887 against the order passed by C. A. Kelly, Sessions Judge of Dinagepore, dated 4th of October 1887, affirming the order passed by H. Thompson, Deputy Magistrate of Dinagepore, dated the 9th September 1887.

(1) 14 C. 636.

1887 Dec. 21. — Criminal Motion — 15 C. 386.

The first branch of it runs thus: "Whoever, being [387] legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both." This deals with the simple case of a person who, being bound to furnish true information to a public servant, furnishes false information to him, and, under this part of the section, the maximum punishment is six months' simple imprisonment with or without fine.

The second branch of the section is expressed thus: "Or if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The facts found against the accused were these: He was a constable, and was employed on what is described as round duties—that is to say, it was his duty to make his rounds by night and to call at the houses of the notorious bad characters on his beat who were under police supervision, and to ascertain whether they were indoors or not. And on one occasion, having made his rounds, he falsely stated as to some of these people that they had been inside their houses when as a matter of fact they had not. Now that was information which he was bound to furnish to a public servant, that is to say, to his superiors, and it is found that he wilfully made a false statement; therefore his offence comes under the first part of the section. But he has been convicted under the second part of it on the ground that the information was required for the purpose of preventing the commission of an offence. I think that must mean not for the purpose of preventing the commission of offences generally, or rendering the commission of them more difficult, but for the purpose of preventing the commission of some particular offence. That being so, the case does not come within the second part of that section. It follows therefore that the sentence which was passed was one which ought not to have been passed. The prisoner was sentenced to six month's rigorous imprisonment, [388] whereas the maximum punishment to which he could have been sentenced was six months' simple imprisonment. It appears that he has already undergone three months' rigorous imprisonment, which he ought not to have been subjected to, and therefore the justice of the case requires that the three months' rigorous imprisonment which he has undergone should be taken as equivalent to the term of simple imprisonment to which alone he could have been legally sentenced. He will, therefore, now be released from imprisonment, the sentence of six months' rigorous imprisonment which was passed upon him being reduced to one of simple imprisonment from the date of the conviction to the present date.

K. M. C. *Sentence reduced.*

15 C. 388. 1888 JAN. 24.

CRIMINAL REFERENCE.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Ghose.

BHAGIRAM DOME (*Complainant*) v. ABAR DOME AND ANOTHER (*Accused*).* [24th January, 1888.]

15 C. 388.

Fishery—Infringement of exclusive right of fishery in public river—Theft—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly—Penal Code, ss. 343, 178, 403, 426 *and* 447.

Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and infringement of that right is not *theft* under s. 378 of the Indian Penal Code.

The accused were charged with unlawfully taking fish along with some eleven others in a public river, the right of fishing in which had been let out by the Government to the complainant, and the lower Court, amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly.

Held that the conviction was wrong and that no offence had been committed.

[**F.**, 5 S.L.R. 122=13 Ind. Cas. 214=13 Cr. L.J. 22 (23); **R.**, 15 C. 402 (409); 24 M. 81; **D.**, U.B.R. (1892-1896) 234 Cr.; 27 M. 551 (560)=1 Weir 386 (393); 28 A. 204=A.W.N. (1905) 255=2 A.L.J. 826.]

THIS was a reference under s. 438 of the Code of Criminal Procedure by the Deputy Commissioner of Sibsagur, who considered that the accused had been wrongly convicted by the [**389**] Assistant Commissioner of offences under ss. 143, 447, 379, 426 and 506 of the Indian Penal Code for unlawfully taking fish from a public river, the right to the fishery of which had been leased by Government to the complainant.

Each of the accused was fined Rs. 10, or in default sentenced to two months' rigorous imprisonment, and in referring the case the Deputy Commissioner stated that he considered the conviction was based on an erroneous view of the law and that it should be set aside.

The facts of the case and the reasons given by the Assistant Commissioner for arriving at the conclusions he did are sufficiently stated in his judgment, which was as follows:—

"The question of fact in this case is extremely simple. Accused and eleven others, thirteen in all, are said to have caught fish in complainant's julkar in the Bhagdai (Desoi) river. Accused in admitting the fact of fishing state that they were fishing in the Romari Pathar, two or three miles off, and not in the bed of the river. Complainant does not claim the julkar of the Romari Pathar. Complainant would have no motive to complain against persons who fished it the pathar, and the evidence leaves no room to doubt the truth of the complaint.

I find that accused and eleven others were fishing together without complainant's consent in the bed of the Bhagdai or Desoi river, Block I (from Naga Hills to Malo Pathar), the exclusive fishery right of which has been settled with complainant by Government for 1887-88; that each of the accused and the others of the thirteen men are proved to have actually caught fish and moved them from their nets into their boats, though there is no evidence that the fish so caught were actually removed from the

* Criminal Reference No. 279 of 1887 made by J. Knox-Wight, Esq., Deputy Commissioner of Sibsagar, Assam, dated the 5th of October, 1887, against the order passed by P. G. Melitus, Esq., Assistant Commissioner of Jorehat, dated the 12th of September, 1887.

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river; that on complainant objecting and attempting to stop their fishing he was threatened by accused.

As to the question of law, it is urged that on the finding no offence has been committed. The pleaders urge—(*a*) that the fish are not complainant's property within the meaning of the Penal Code; (*b*) that they were not in complainant's possession within the meaning of s. 378 of the Penal Code; (*c*) that trespass on a fishery in a public river is not criminal trespass within the meaning of s. 441. They quote the following rulings:

[390] (A) *The Queen* v. *Revu Pothadu* (1), following a previous ruling —In these rulings it was held that fish in a creek or in an open irrigation tank are not in such "possession" as is contemplated in s. 378 of the Penal Code; consequently the taking of such fish does not constitute theft under s. 379.

(B) *Empress* v. *Charu Nayiah* (2). Held that the unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of a criminal trespass, though under this ruling unlawful fishing in a tank or private river apparently would amount to criminal trespass.

(C) *The Meherpore case*, 1887 (3). This case refers to the [391] Chucka Khola Bheel, a large natural bheel which draws its fish supply from

(1) 5 M. 390. (2) 2 C. 354.

(3) **15 C. 390 N.**

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF MADHAB HARI AND OTHERS.*
[6th June, 1887.]

Baboo Doorga Das Dutt, for petitioners.
Mr. *Kilby,* for the Crown.

The facts of this case appear sufficiently from the judgment of the High Court which was delivered by—

JUDGMENT.

PETHERAM, C.J. (and of which the material portion was as follows):—In this case some sixty-eight persons have been convicted of stealing under these circumstances. It appears that in the neighbourhood where this transaction took place there is a large bheel. The land surrounding this bheel belongs to one person, and he has let the right of fishing in it to the complainant in this case for the sum of Rs. 500 a year, There is nothing to show that this bheel is anything in the nature of a tank in which fish are caught and stored in any sense, but it is a natural reservoir of water which has come there without human agency, and in which fish would naturally be.

That being the state of things, it appears that, on a particular day in the year, it is the practice of the inhabitants of the neighbouring towns and villages to go to this bheel and catch what fish they can, and for doing that these sixty eight persons have been convicted of stealing fish and punished in an extraordinary manner. A large number of them were whipped there and then, or at any rate a few hours after, and a large number of them have been sentenced to two months' rigorous imprisonment.

Under these circumstances no crime has, in our opinion, been committed. It is perfectly clear that the offence of theft could not have been committed because the fish, said to have been stolen were not the subject of any one's property; they were wild fish in a natural lake, and until they were reduced to [391] possession by being caught no property could be acquired in them by any one so that there could be an offence of theft committed by another person; and it seems to us therefore that these persons did not commit any theft, and that, so far as the offence of which they have been convicted is concerned, it is quite clear that on that ground alone the conviction cannot be sustained.

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* Criminal Motion No. 133 of 1887 against the order passed by Howling Luson, Assistant Magistrate of Meherpore, dated the 15th April, 1887.

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the Jellinghee and Bhysakh rivers through khals and natural hollows. It was ruled—(*a*) that the fish in this bheel [392] being *feræ naturæ* are not "property;" (*b*) that they were not in the "possession" (as required by s. 378 of the Penal Code) of the holders of the julkar. This ruling is counteracted by the ruling in the Meherpore case, 1886 (1), referring to the same bheel [393] in which the Court held—(*a*) that

In addition to that, as Mr. Justice Ghose reminds me, it is clear that there was no dishonest intention to take the fish, because, whether such a custom could be legally established or not, on the Magistrate's own view of the case, these people went there relying on their supposed right to go there and catch fish. For both reasons, therefore, we are of opinion that the offence of theft was not committed by these men.

Then Mr. Kilby argues that, though the offence of theft may not have been committed, the offence of criminal trespass has, because he says that if these people had gone to the land of some one who had ordered them not to go there, they would have been guilty of criminal trespass.

The first remark that I have to make with reference to this argument of Mr. Kilby is that it is not clear that they were directed not to go on the land by any one entitled to prevent them from going there, for the person who directed them not to go on the land was not the zemindar nor the person who had a right to forbid them, but the person who had taken a lease to catch the fish. But for the purpose of what I am going to say I will assume that these people were rightly forbidden to go on the land, but a trespass under such circumstances is not a criminal offence for which the persons committing it could be criminally prosecuted and a criminal punishment imposed. Unless they went on the land for some of the purposes mentioned in s. 441 of the Indian Penal Code, their going there would not amount to criminal trespass, and the purpose mentioned in that section are "to intimidate, insult or annoy any person in possession of the property." As I said just now, what these people went there for was to fish in this natural lake; they did not go there to intimidate any one, certainly not to intimidate the person who was in possession, the zemindar, because he had no interest in it, and takes no interest in these proceedings now, but they went to catch fish, and their intention must be limited to that, and therefore, in our opinion, the offence of criminal trespass was not committed, and thus it remains that the only offence of which they have been guilty is an offence against the civil law by walking on a man's land when he has forbidden them to do so. That is not a criminal offence by the English law, nor, so far as I know, is it a criminal offence in this country, and therefore, there being no criminal offence, whatever, the conviction must be set aside.

Conviction quashed.

[This case is referred to in 15 C. 402 (407).]

(1) 15 C. 392 N.

Before Mr. Justice Mitter and Mr. Justice Grant.

MADHOO MUNDLE AND OTHERS (*Petitioners*) *v.* UMESH PARNI (*Opposite Party*).*
[9th July, 1886.]

In this case the accused were charged under ss. 143 and 379 with being concerned together and with others in stealing fish from the complainant, one Umesh Parni. The offence was alleged to have been committed on the 1st Bysack and on a large bheel called the Chucka Khola Bheel, of which the complainant was the ijardar. It was alleged that it was a custom in that part of the country for the villagers to assemble together and fish in different bheels on the 1st Bysack without the owner's consent, and on this occasion the complainant a few days before the 1st Bysack put in a petition before the Assistant Magistrate asking for protection of his bheel and stating that he expected a great number of persons would collect there and steal his fish on the day in question. In answer to that petition the Assistant Magistrate deputed a police constable to watch the bheel.

On the day in question a number of persons did collect at the bheel to fish, and in consequence thereof the present case was instituted.

The Assistant Magistrate in his judgment stated that there had been a number of similar cases in some of which the defence had been set up that it was the custom

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* Criminal Revision No. 263 of 1886 against the order passed by Howling Luson, Esq., Assistant Magistrate of Meherpore, dated the 2nd June 1886.

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the fish were "property;" (b) that they were in "possession;" (c) that the offence of theft would have been committed if they had actually been moved.

Some other rulings are cited as to fisheries in the sea or in tidal rivers which do not bear upon the case. The Bhagdai or Desoi is a river navigable for small boats for a part of the year.

The sum total of these rulings is: (a) [except the Meherpore case (1887)] it appears to be admitted that fish in a river or in an open tank or bheel are the property of the holder of the fishery; (b) but they are not in such "possession" that their taking constitutes theft (s. 379); (c) that trespass on a fishery in a public river is not criminal trespass, the river not being in the exclusive possession of the fishery-holder and the public having the right of entry on it.

These rulings are rulings of Divisional Benches. So far as I know the matter has never been fully argued or referred to a Full Bench.

It is contended for the prosecution that the facts constitute offences under the following sections of the Penal Code:—

[394] *Section 379 of the Penal Code—Theft*—It is said that all the essentials of theft exist. I examine each essential in detail:—

(a) "*Moving in order to take.*"—This appears on the finding: each accused moved a fish from their net to their boat. From the newspaper reports of the Meherpore case of 1886 it appears that the High Court held

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for the villagers to fish in the various bheels on the 1st Bysack, but he found that, though such had been the case, it had not been done with the consent of the zemindars, and in some instances compensation had afterwards been paid to the owners of the bheels, and there could, therefore, be no doubt that private rights had been invaded. In the present cases the Assistant Magistrate found that there was no question as to a number of persons having assembled and fished, and that the accused did not claim any right so to fish, but on the contrary that one of them pleaded guilty and that the others merely pleaded *alibis*. As regards the latter, he disbelieved the evidence adduced on their behalf, and, without considering the legal question subsequently raised in the High Court, convicted all the accused and sentenced them, some to fines, others to imprisonment, and the remainder to a whipping, and awarded Rs. 15 to the complainant as compensation under s. 545 of the Criminal Procedure Code.

Against these sentences the accused applied to the High Court to set aside the convictions under its revisional power on the ground that no offence had been committed. That application was granted and the record sent for. Upon the case coming on to be heard Baboo *Doorga Dass Dutt* [393] appeared for the petitioners and Baboo *Sharoda Prosunno Roy* for the opposite party, who was the complainant before the Assistant Magistrate.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows:—

JUDGMENT.

We think that there is no evidence in support of the conviction in this case under either of the sections under which the petitioners have been convicted, *viz.*, ss. 143 and 379. There is no evidence to establish that the petitioners acted in concert so as to have one object. No doubt the act complained of was that they were fishing, but there is nothing on the record from which it could be inferred that they were acting in concert with that one common object. Unless that is proved the conviction under s. 143 of the Indian Penal Code would be illegal. On the other hand the circumstances of the case would tend to show that they were acting quite independently. Similarly under s. 379 there is no evidence to show the removal of any fish by the petitioners from the bheel.

We therefore set aside the convictions under both these sections and direct that the fines, if realized, be refunded, and if any one of these petitioners be still in jail under these sentences we direct their immediate release. The order regarding compensation will also be set aside, and such compensation money if paid must be refunded.

Conviction quashed.

[This case is also explained in 15 C. 402 (407).]

that the offence of theft would only be completed if the fish were actually removed from the bheel, but probably the newspaper reporter was mistaken. Under s. 378 of the Penal Code the offence of theft is completed when the property is moved. 1888 JAN. 24. CRIMINAL REFERENCE. 15 C. 388.

(b) " *Dishonestly.*"—Accused had no title to this fish; they knew the fishery to be leased to complainant. These were wrongful gain to themselves, loss to the lessee and loss to Government from tendency to diminish revenue.

(c) " *Moveable property.*"—It seems admitted in the rulings above mentioned (except, so far as I can judge from newspapers, in the Meherpore case) that fish in a fishery is the property of the fishery-holder. The fishery-holder can recover in the Civil Court the value of the fish taken without his consent. By the customary law of the country property in river fisheries (other than tidal rivers) vests in Government and can be leased by Government to private persons, and, if so, the fish in the fishery are the property of the lessee. Theft of fish from a fishery in England would not be a larceny at common law, but neither would theft of trees, crops, fruit, &c., be larceny, though it is undoubtedly theft under the Penal Code. The Penal Code is based on English criminal law; but the laws relating to real property in this country follow the old land laws of the country which recognise fish in a fishery to be the property of the owner of the fishery. Hence the *feræ naturæ* theory does not apply to fish in this country, though it does apply to wild birds and animals. Fishings of large and small rivers, bheels, &c., have been settled on this understanding from 1793 downwards.

(d) " *Out of possession.*"—It is urged (*a*) that the fish in the fishery was in the possession of complainant, the lessee in possession of the fishery. This is negatived by the two Madras rulings and the Meherpore ruling of 1887, in which it was held that this kind of constructive possession is not possession within the [**395**] meaning of s. 378 of the Penal Code; (*b*) that complainant might at any time he thought proper have confined the fish within a limited sheet of water. It is the custom as the floods subside to put bamboo fencing across the bed of the river and other outlets so as to shut in the fish. When this is done the fish are in possession; but the question is whether complainant, having the right and the power to put up the fencing whenever he thinks proper, is not to be considered in possession of the fish, whether he actually fences them in or not. I doubt if this has ever been brought before the High Court. It is the general custom with small rivers and bheels. I am inclined to think that complainant, having the power to shut in the fish whenever he pleased in as small a space as he pleased, must be held to be in possession of the fish whether he actually shuts them in or not. In the present case the fencing had not been put up on the date of occurrence, as it does not pay to put it up till towards the end of the rains.

(e) "*Without consent.*"—Consent was wanting on the finding. Moreover complainant objected at the time with the result of being threatened.

Section 403 *of the Penal Code.*—The only point that may be considered wanting to constitute theft is the possession. The fish being complainant's property, even assuming they are not in his possession, an offence under s. 403 of the Penal Code has been committed. Accused dishonestly misappropriated the fish, knowing their action to be an infringement of the property rights of the holder of the fishery. If evidence of actual removal is wanting, the facts on the finding show an attempt;

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ss. 403 and 511 of the Penal Code. At any rate they entered upon the fishery with the intention of criminally misappropriating the fish. The applicability of s. 403 of the Penal Code has apparently never been considered by the High Court.

Section 426 *of the Penal Code*.—Accused committed mischief by removing the fish supply of the fishery and thus diminishing the value of the fishery. The mere fact of accused taking a fish each would not affect the fishery much; but if every one acted on the same principle, the fishery would be injuriously affected and its value materially diminished. It may be a matter of [**396**] doubt whether a fishery is "property" under s. 425 of the Penal Code. In *Empress* v. *Charu Nayaih* (1), it is laid down that the fishery of a public river is property within the meaning of s. 411 (but that the river being a public one was not in any one's exclusive possession, and a man's entry on a public river to infringe a fishery right is not criminal trespass, because he does not enter upon property in the possession of another). If a fishery is property under s. 441, I presume it is also property under s. 425.

Section 447 *of the Penal Code*.—The question is whether in the face of the above ruling a finding of criminal trespass can hold. In an exactly similar case—*Proceedings*, 15*th Feb.* 1870 (2)—it was held that the offence of criminal trespass had been committed. "Where in a ryotwari district the accused cultivated waste land which they had been ordered by the Collector not to cultivate, it was held that they were properly convicted of criminal trespass when they entered on it to commit an offence under s. 188." Waste land in a ryotwari tract is in no one's exclusive possession. It is in the possession of Government just as a river is in the possession of Government. The public have the right of entry on and right of way over waste land as long as it continues waste land just as they have the right of entry on a river for travelling or recreation, or bathing or drawing water. If it is criminal trespass to enter upon waste land to commit an offence, it seems to be equally criminal trespass to enter on a river to commit an offence. In the present case the entry is criminal trespass as it was made with intent to—(*a*) commit mischief, s. 426; (*b*) criminal misappropriation, s. 403; (*c*) theft, s. 379.

Section 143 *of the Penal Code*.—There is no evidence that accused and others had actually conspired to fish there, but when a number of persons do the same wrongful act in the same time, place and manner, a common intent must be presumed. In this case twelve persons were fishing near each other at the same time near complainant's julkar, to which they had no right without his consent, and on being told to stop refused to do so; some of them threatened complainant. It is a fair and reasonable presumption that they had a common intent, at least after they were told by complainant [**397**] to stop. The presumption is strengthened by the fact that Domes generally fish in numbers and not singly. Their common intent was to commit—(*a*) criminal trespass, s. 447 of the Penal Code; (*b*) mischief, s. 426; (*c*) theft, s. 379; (*d*) criminal misappropriation, s. 403.

Section 504, 506 *of the Penal Code*.—On being told by complainant to stop fishing accused threatened him "*Marien Gosari halai tau baba*," as much as to say: "We will beat you within an inch of your life"—an expression of intention which might be either insulting under s. 504, or criminally intimidating under s. 506 of the Penal Code, according to the

(1) 2 C. 354. (2) 5 M.H.C. Ap. XVII.

character of the person addressed. In the present case it appears to have caused an alarm.

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I think therefore accused are guilty of offences under ss. 143, 379, 426, 403, 447, 504 or 506 of the Penal Code. Section 403 of the Penal Code is not summarily triable, but the offences under ss. 143, 447 of the Penal Code, where the intent is to commit an offence under s. 403, are triable summarily."

No one appeared on the reference.

The judgment of the High Court (NORRIS and GHOSE, JJ.) was as follows:—

JUDGMENT.

This is a reference by the Deputy Commissioner of Sibsagur under s. 438 of the Criminal Procedure Code, questioning the legality of the conviction of Abar Dome and Bhagiram Dome by Mr. Melitus, Assistant Commissioner of Sibsagur, under ss. 143, 379, 426, 447 and 506 of the Indian Penal Code.

The two accused were charged before the Assistant Commissioner under ss. 143, 379 and 447; and apparently they were called upon to make their defence in respect only to offences said to have been committed under those sections. It appears, however, that the Assistant Commissioner, in the course of his judgment, finds them guilty not only of the offences of which they were charged, but of others as well.

The main charge was one of theft, said to have been committed in respect of fish in a public river, the *julkar* right in which had been leased to the complainant by Government; but there were, as mentioned above, charges in respect of other offences, *viz.*, for being members of an unlawful assembly and for criminal trespass.

The Assistant Commissioner tried the case summarily, and after giving in his proceeding a short epitome of the evidence **[398]** taken by him, proceeded to give his judgment. In the first place, he notices the grounds upon which it was contended before him that no offence had been committed; and he then summarises the decisions of this Court and of the Madras High Court that were quoted before him as follows:—

"The sum total of these rulings is—(*a*) (except the Meherpore case, 1887) it appears to be admitted that fish in a river or in an open tank or bheel are the property of the holder of the fishery; (*b*) but they are not in such possession that their taking constitutes theft (s. 379); (*c*) that trespass, on a fishery in a public river is not criminal trespass, the river not being in the exclusive possession of the fishery-holder and the public having the right of entry on it." He adds: "These rulings are rulings of Divisional Benches. So far as I know, the matter has never been fully argued or referred to a Full Bench."

Then the Assistant Commissioner says that it is contended before him for the prosecution that the facts proved in the case constitute offences under various sections of the Penal Code, and he gives those sections one after another and his argument for holding that the accused are guilty under those sections. The sections are 379 (theft), 403 (criminal misappropriation), 426, (mischief), 447 (criminal trespass), 504 or 506 (insult or criminal intimidation).

Now, the first observation which he has to make upon this judgment of the Assistant Commissioner is that, if the rulings referred to by him lay down the propositions indicated by him, it was his bounden duty

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to follow them so far as they were applicable to this case, and not to disregard them, as he evidently does, on the ground that they are rulings of Divisional Benches, and also on the ground that, so far as he knows, "the matter has never been fully argued." Where the Assistant Commissioner derives this knowledge from we are at a loss to conceive. But whether the matter was fully argued or not, the Assistant Commissioner was bound to follow those rulings as rulings of the highest Court in this Presidency until they were overruled by decisions of the Full Bench.

In the present case, the river from which the fish were taken is a public river. Whether or no it is navigable throughout [**399**] the year, we do not know. The Assistant Commissioner however says (for which there is no evidence on this record) that it is a "river navigable for small boats for a part of the year." Assuming that it is, as the Assistant Commissioner represents, we take it is a flowing river, and that fish enter it, and leave it, at their pleasure; and that the lessee of the fishery has no control whatever over them. The fish are not stored or bred there; they are not confined within an enclosed space, and are therefore free to go wherever they please. They are *feræ naturæ*, and as such nobody can be said to be in "possession" of them, and therefore no theft can be committed in respect to such fish. This is not only the common law in England, but it is a law which has been accepted both in Bengal and Madras for many years. (See *Kashi Chunder Dass* v. *Hurkishore Dass* (1), *Bhusun Parui* v. *Denonath Banerjee* (2), *Khetter Nath Dutt* v. *Indro Jalia* (3), *Empress* v. *Charu Nayiah* (4), *The Queen* v. *Ravu Pothadu* (5), Russell on Crimes and Misdemeanours, Vol. II, p. 376).

The Assistant Commissioner, however, while discussing s. 379, says, broadly, but apparently without any authority, that the "*feræ naturæ* theory, does not apply to fish in this country, though it applies to wild birds and animals;" and that "fishings of large and small rivers, bheels, &c., have been settled on this understanding from 1793 downwards." No doubt fishery is a right which is recognized as *property* in this country; but the question is whether fish in a *river* can be said to be property in the "possession" of the person who may have the fishery right, and whether their infringement of that right is a criminal offence as defined in s. 378 of the Indian Penal Code. We are decidedly of opinion that it is not.

We observe that the Assistant Commissioner, while he felt himself pressed by the authority of the Meherpore case of 1887 and two Madras cases quoted before him, sought to get over them by saying that it is the custom as the floods subside to put bamboo fencing across the bed of the river and other outlets so as to shut in the fish, and that "in the present case the fencing had [**400**] not been put upon the date of occurrence, as it does not pay to put it up till towards the end of the rains." We do not know in what sense the word *custom* is used; but taking it in the sense that it is in some cases the practice to put up fencing when the floods subside for the purpose of shutting up the fish, and supposing that while the fish are thus shut up they are in the "possession" of the owner of the *julkar*, that argument cannot possibly avail in this particular case, for the offence is said to have been committed in the month of September while the floods must have been high and when, as the Assistant Commissioner himself says, no fencing had been put up.

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(1) 19 W.R. Cr. 47. (2) 20 W.R. Cr. 15.
(3) 16 W.R. Cr. 78. (4) 2 C. 354.
(5) 5 M. 390.

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The next offence which the Assistant Commissioner holds that the accused are guilty of is one under s. 403 (criminal misappropriation). There was no charge under this section, and indeed there could not be any, because the accused were tried summarily. The Assistant Commissioner, however, proceeds to hold that an offence under that section has been committed, though he does not convict the accused under that section by reason of its being a summary trial; and he observes that " the applicability of s. 403 of the Penal Code has apparently never been considered by the High Court." The Assistant Commissioner may or may not be right in this; but if the point has never been considered, it is because no body ever thought of raising it before. Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent (see Mayne, p. 335). In this particular case there cannot be any pretence for saying that subsequent to the act of taking the fish anything happened which constituted the retaining of the fish wrongful and fraudulent. The intention was one and the same throughout; and no new facts occurred which could possibly change the character of the seizure and retention of the fish.

The next section that the Assistant Commissioner discusses is s. 426 (mischief), and he holds that the act complained of diminished the " value of the fishery," and that fishery is property within the meaning of s. 425, and that therefore the accused are guilty under s. 426. The accused had not been charged with [**401**] an offence under s. 426, and we think that in respect also of this section the Assistant Commissioner is completely in error. If it was a flowing river, and on the date of occurrence the flood was high, as it must have been in September, and if no fencing had been put up to shut up the fish in any manner, and they were free to escape in any direction they pleased, we fail to see how the act of the accused could possibly diminish the value of the fishery, or cause any change in the property, supposing that fishery is property within the meaning of s. 425, as the Assistant Commissioner holds it to be.

The Assistant Commissioner then takes up s. 447 (criminal trespass), and holds in the face of the rulings of this Court that an offence under that section has been committed; and the only pretence for his doing so is a decision of the Madras High Court [*Proceedings* 15*th February*, 1870 (1)], which refers to the case of waste land belonging to Government, and devoted to the use of the village community, and where the accused cultivated the land, although he had been ordered by the Sub-Collector to refrain from cultivating it; and it was held that the Sub-Collector had legally the power to make the order, and therefore when the accused went upon the land he did so with the intent of committing an offence under s. 188 of the Penal Code. In the first place that case has no application to this case; and in the second place, supposing it has any application, the Assistant Commissioner was bound to have guided himself by the rulings of this Court, and not by any rulings by the Madras High Court. We may here observe that throughout his judgment in this case, the Assistant Commissioner has displayed a clear and deliberate intention to ignore the decisions of this Court—a spirit which cannot but be deprecated in a Judicial Officer who is bound to follow the decisions of the superior Court.

(1) 5 M.H.C. Ap. XVII.

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We are of opinion that, the river being a public one, it was not in the exclusive possession of the complainant, and that the entry of the accused upon that river was not with the intent of committing any of the offences mentioned by the Assistant Commissioner, *viz.*, criminal mischief, criminal misappropriation or theft.

[402] The next section that the Assistant Commissioner takes up is s. 143 (unlawful assembly). It is sufficient to say that there is no evidence upon the record of this case to indicate that the men who went to fish in the river were bound by any common object within the meaning of that section; and for aught that appears, although more than five persons were engaged in fishing at the same time, place and manner, they were engaged for their own respective purposes, and no common object can legitimately be presumed from their acts.

The last sections that the Assistant Commissioner takes up are 504 and 506 (insult and criminal intimidation). The accused were not charged with any offence under either of these sections, and so far as s. 504 was concerned, there is no evidence that the insult, if there was any, was offered with the intention or knowing it to be likely that the provocation given would cause the person insulted to break the peace; nor do we think there is sufficient evidence in this case as would bring the case within the offence of criminal intimidation as is defined in s. 503.

Having now discussed the various sections of the Indian Penal Code under which the Assistant Commissioner held the accused were guilty, we have merely to say that the conviction must be set aside, and the fine, if paid, must be refunded.

We cannot, however, close this judgment without once more saying that throughout this case the Assistant Commissioner has displayed a wanton disregard of the authority of the rulings of this Court, which cannot but be gravely censured.

H. T. H. *Conviction quashed.*

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15 C. 402.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Ghose.

MAYA RAM SURMA (*Complainant*) *v.* NICHALA KATANI AND OTHERS (*Accused*).* [24th January, 1888.]

Fishery—Fishing in tank connected with a running stream—Theft—Criminal trespass —Penal Code, ss. 379, 447.

Accused were charged with having taken fish from a tank belonging to the complainant and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not [403] enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish, that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high, and the tank was connected with the streams, so that the fish could leave it at pleasure.

Held, that the fish were *feræ* and not in "the possession of" the complainant, and consequently no offence had been committed.

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* Criminal Reference No. 280 of 1887 made by J. Knox-Wight, Esq., Deputy Commissioner of Sibsagur, dated 5th October, 1887, against the order passed by P. G. Melitus, Esq., Assistant Commissioner of Jorehat, dated 12th September 1887.

Held, further, that had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the owner of the tank, the conviction would have been upheld.

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The Meherpore case of 1887 (1) distinguished.

[R., 22 M.L.J. 184=11 M.L.T. 23=13 Cr. L.J. 38=1912 M.W.N. 42=13 Ind. Cas. 278.]

IN this case the accused were tried before the Assistant Commissioner of Sibsagur for an offence under s. 379 of the Penal Code in respect of fish which they were charged with having taken from a tank belonging to the complainant, and they were further charged under s. 447 with criminal trespass in respect of the tank. The Assistant Commissioner convictd the accused and sentenced them each to pay a fine of Rs. 5, or in default one month's rigorous imprisonment, but the Deputy Commissioner, considering that the evidence, even if believed, did not establish the offence of theft or criminal trespass having regard to the decision in the case of *In the matter of the petition of Madhab Hari* (1), and that the lower Court had based its decision on an erroneous view of the law, referred the case to the High Court.

The facts of the case and the grounds upon which the Assistant Commissioner based his judgment are sufficiently stated in the judgment of the High Court.

No one appeared on the reference.

The judgment of the High Court (NORRIS and GHOSE, JJ.) was as follows: —

JUDGMENT.

This is a reference by the Deputy Commissioner of Sibsagur under s. 438 of the Criminal Procedure Code, questioning the legality of the conviction of one Nichala Katani and three others by Mr. Melitus, Assistant Commissioner of Sibsagur, under ss. 379 and 447 of the Indian Penal Code.

The accused in this case were charged with the offence of theft said to have been committed in respect of fish in a tank belonging to the complainant, and also with the offence of criminal trespass.

[**404**] The Assistant Commissioner in the first instance, *i.e.*, on the 1st August last, dismissed the complaint under s. 203 of the Procedure Code with the following observations: —

Complainant did not cultivate the fish; they entered the tank in flood time. Therefore according to a High Court ruling (in the *Meherpore case* (1)), they are *feræ naturæ* and no man's property, and no offence (such as theft or trespass) has been committed. The circumstances of the tank and of the Chucka Khola Bheel (which I know) are identical, except that the Chucka Bheel is of larger area. This tank is a tank in the *pather* connected with the river by *jans* and hollows; so is the Chucka Khola Bheel. Complaint dismissed under s. 203 of the Criminal Procedure Code. If complainant wishes, I will refer this case to High Court for orders."

On the 12th of August the Assistant Commissioner took up the matter again, although the complainant did not apparently move him to refer the matter to higher Court; and in a proceeding which he recorded on that day, he repeated that the "circumstances of the Bheel in the Meherpore case and the tank of the complainant were identical so far as the dominion and control of the owner of the tank or bheel over the fish is

(1) 15 C. 390.

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concerned," the only differences being, as he said, that the Meherpore Bheel is of larger area, and is a natural bheel, whereas the tank in this case is "partially at least excavated;" and then he observed that "whatever law applies to the Chucka Khola Bheel applies also to this tank and to other private tanks and bheels, and to the numerous public bheels and rivers which are held under temporary fishery leases from Government." Having made this observation, the Assistant Commissioner said as follows: "The Meherpore case has not been, so far as I know, authoritatively reported, and I doubt if I was right in accepting mere newspaper reports and the statement of the law, which conflicts with previous rulings and practice, especially as it appears from the newspapers that the High Court held in 1886 (1) in the matter of the same Chucka Khola Bheel that the offence of theft under s. 379 would have been committed if the fish had actually been removed from the bheel. In the present complaint of Maya Ram Surma, it appears [**405**] that the fish had not merely been moved in order to the taking, but actually removed and taken away from the tank. The matter is one of such importance to Government and the public that I do not feel justified in allowing this complaint to remain struck off on my own authority. I request the favour of the definite instructions for future guidance. To D. C. for orders."

The above proceeding being laid before the Deputy Commissioner, Mr. Wight—the same officer who has made the present reference—he recorded the following order on the 22nd August:—

"In the present state of the record I am unable to refer the matter to the High Court. The High Court are not the legal advisers of Government, and they have invariably refused to act as such. They only deal with cases and pronounce judgment upon them when they are brought judicially under their notice. You have dismissed the case under s. 203; I think you are wrong. The ruling you refer to is that of a Division Bench, and there are rulings in the opposite sense. Please take up the case and enquire into it. If you acquit on the evidence, or if you *convict*, the matter would be dealt with and referred to higher authority if necessary. Having power to deal with cases dismissed under s. 203 myself, I am not justified in referring them."

Upon the matter going back to the Assistant Commissioner, that officer recorded certain evidence, and on the 8th September last found that the accused entered upon complainant's tank and unlawfully took therefrom some fish, and accordingly held them guilty under ss. 379 and 447 of the Penal Code.

In dealing with the case, the Assistant Commissioner makes the following observations: "The tank was excavated by complainant in the *pathar* (fields) on his own decennially-settled *patta* land. It gets its fish supply from the overflow of the *pathar;* it is connected with the Rararian stream, which is itself connected with the Dhale stream. Both these streams flow from the Naga Hills towards the Brahmaputra. When the inundation is high on the *pathar* the fish are at liberty to leave the tank unless complainant fences in the tanks or outlets; but when the floods subside the fish are shut in, and unable to leave the tank. On the date of this occurrence the inundation appears to have been high. Such cases have been always [**406**] dealt with under ss. 447, 379 of the Penal Code. The recent ruling in the *Meherpore case,* 1887 (2), has

(1) 15 C. 392. (2) 15 C. 390.

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thrown some doubt on the applicability of these sections. In this ruling it appears to have been held—(*a*) that fish entering a bheel or tank in this manner are *feræ naturæ*, and not the property of the owner of the bheel, tank, &c.; (*b*) that they are not in the possession of such owner."

Having made the above observations, the Assistant Commissioner again points out, as he had done on the 1st of August, that the circumstances of the Meher Bheel and of this tank are identical except in this, that the area of the latter is much smaller, and it is an "excavated tank" and not a natural hollow, and adds "that if the complainant pleased he could at any time *confine the fish in a very small space.*"

The Assistant Commissioner then observes that the "customary law of the country recognizes that the property in fish vests in the owner of a bheel or tank. If the fish are held to be in the possession of the owner, the offence of taking them amounts to theft under s. 379; if they are held not to be in possession within the meaning of s. 378, their taking amounts to an offence under s. 403 of the Penal Code (criminal misappropriation). The High Court have apparently never considered the applicability of this section. The entry upon the tank to commit either of these offences amounts to criminal trespass under s. 447."

He then says that the High Court in the *Meherpore case* of 1886 (1) held "that the offence of theft would have been committed in the Chuka Khola Bheel if the fish had actually been moved," and that moreover it appears to him upon the principles laid down in the case of *The Empress* v. *Charu Nayiah* (2) that it would be "criminal trespass to enter upon a private tank or river to unlawfully take fish," and he concludes by saying as follows: "Following these two rulings in preference to the Meherpore ruling, 1887 (3), I convict accused under ss. 447, 379 of the Penal Code."

Subsequently on the 12th September the accused persons presented a petition to the Assistant Commissioner, asking him to refer [**407**] the case to the High Court, and Mr. Melitus forwarded the application to the Deputy Commissioner.

The Deputy Commissioner, Mr. Wight, who had on the 22nd August held that the Assistant Commissioner was wrong to dismiss the complaint under s. 203, and had observed that the ruling in the *Meherpore case* was that of "a Division Bench, and that there were rulings in the opposite sense," now observes that "the evidence, even if believed, does not establish the offence of theft or criminal trespass if the recent ruling in the *Meherpore case* be correctly reported;" and "as the lower Court has based its decision on a wrong view of the law, the order should be reversed," and he concludes by saying that the point referred is "of the greatest importance to the public and to Government, and it is very necessary to have the correctness of the present order either affirmed or denied."

No doubt the question raised is of very great importance; but looking at the course this case has taken as noticed above, one cannot help observing that both the Assistant Commissioner and the Deputy Commissioner assumed almost from the very beginning an attitude towards the decision of this Court in the *Meherpore case* of 1887 (3), which cannot but be disapproved.

If properly examined, it will be seen that the ruling in that case does not conflict with the decision of this Court in 1886, nor with that in the

(1) 15 C. 392. (2) 2 C. 354. (3) 15 C. 390.

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case of *The Empress* v. *Charu Nayiah* (1). The Assistant Commissioner has evidently not taken pains to examine the cases, and yet he says he follows these two latter rulings "in preference to the Meherpore ruling in 1887 (2)."

In the *Meherpore case* of 1886 (3) the questions that were raised and discussed before this Court in 1887 were not raised, and indeed it was wholly unnecessary to consider them. What this Court in 1886 held was simply this, that the conviction for theft could not be sustained, because the fish had not been moved away. It did not hold, as the Assistant Commissioner supposes, "that the offence of theft would have been committed if the fish had actually been moved." In the other case referred to, *viz.*, *The Empress* v. *Charu Nayiah* (1), the only question before this Court [**408**] was whether the charge of criminal trespass could be maintained against a person who had entered upon a public river and fished in it, and the Court held that it could not be maintained, because the owner of the fishery was not in execlusive possession of the river, it being a public one. No question was then raised or discussed as to the circumstances under which a person would be guilty of criminal trespass if he entered upon a private tank or river.

Turning now to the case before us, it appears upon the facts found by the Assistant Commissioner that the tank is an artificial piece of water, and of comparatively small dimensions; it is not a natural reservoir of water, and there is no assertion of any customary right to fish in this tank, as was found to exist in the *Meherpore case* of 1887 by the Magistrate, and upon which finding this Court held that there could be no dishonest taking of the fish when the accused went to fish relying upon that custom; and in this view of the matter the facts of this case are clearly distinguishable from those in the *Meherpore case*, and we should have been quite prepared to affirm the conviction in this case had it appeared that the fish had been at the time of occurrence in the "possession" of the owner of the tank—that is to say, if they had been restrained of their natural liberty, and liable to be taken, according to the pleasure of the owner, or, in other words, if they had been practically in the power and dominion of the owner of the tank. (*See* Russel on Crimes and Misdemeanours, Vol. II, p. 376). But upon the facts as found by the Assistant Magistrate, and which have been quoted above, it seems to be clear that they were not so. The tank was evidently not enclosed and shut up on all sides; the fish were not reared and preserved therein, but found their way there through the overflow of the neighbouring channel, which was connected with other flowing streams; and on the date of the occurrence the inundation was high, and the fish were at perfect liberty to leave the tank. This being the state of things, the fish were *feræ naturæ*, and were not in the power and dominion of the owner of the tank; and the case would therefore fall within the priciple laid down in *The Queen* v. *Revu Pothadu* (4) and *Rex* v. *Carradice* (5) [**409**] For these reasons we are of opinion that the conviction for the offence of theft cannot stand.

Nor can it stand for the other offence of which the Assistant Commissioner has found the accused guilty, *viz.*, the offence of criminal trespass. If the fish were *feræ naturæ*, and not in the power and dominion of the owner of the tank, there is nothing to show in this case that the accused entered upon the tank with the intent of commiting any offence under the

(1) 2 C. 354. (2) 15 C. 390. (3) 15 C. 392. (4) 5 M. 390. (5) R. & R. C. C. 205.

Penal Code or for the purpose of intimidating, annoying or insulting the owner of the tank. It was indeed an act of trespass on the part of the accused to enter upon the private property of the complainant, but it was not "criminal trespass" within the meaning of s. 447. The Assistant Commissioner has however specially referred to s. 403, and he maintains that the accused entered upon the tank for the purpose of committing the offence of criminal misappropriation, and that the applicability of this section was never considered by the High Court. It is not necessary here to state the reasons why we do not consider that there could be no offence under s. 403, for we have done so in our decision in another case—*Bhagiram Dome* v. *Abar Dome* (1)—tried by Mr. Melitus and referred to us by Mr. Wight.

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15 C. 402.

We are therefore of opinion that the conviction in this case is bad in law and must be set aside. The fine if paid to be refunded.

H. T. H. *Conviction quashed.*

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15 C. 409 (P.C.)=15 I. A. 37=12 Ind. Jur. 175=5 Sar. P.C.J. 100.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

RAIKISHORI DASI AND ANOTHER (*Defendants*) v. DEBENDRANATH SIRCAR AND OTHERS (*Plaintiffs*). [8th and 9th November and 22nd December, 1887.]

Hindu law, Will—Will, Construction of—Restrictions upon estate bequeathed, Effect of, if contrary to Hindu law—Restrictions separable from valid dispositions.

In the will of a Hindu, restrictions contrary to law made by the will upon vaild dispositions, if they are separable from the latter, need not be held to invalidate them.

[410] Three documents, of which the second and third were executed by a testator after intervals of some years, together formed his will, containing a bequest of estate to his sons.

This was valid by the High Court, although the testator in the later documents had endeavoured to impose restrictions upon the estate contrary to law, and therefore inoperative; the principal of them being, (*a*), prohibition of actual possession or alienation, by any son, of his share in the estate; and (*b*), direction that the whole estate should be managed in a common cutcherry, with religious trusts, the sons to get only the remaining amount of profit according to their respective shares in perpetuity.

At the same time the Court held good a provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority none of the sons should have a right to partition; any son who should separate from the others, getting, up to the time of his attaining majority merely maintenance, and not the profits accruing upon his share.

A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share: the first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would not take effect.

The judgment of the High Court to the above effect was upheld by the Judicial Committee.

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(1) 15 C. 388.

1887 Dec. 22.

Privy Council.

15 C. 409 (P.C.)=15 I.A. 37=12 Ind. Jur. 175=5 Sar. P.C. J. 100.

[F., 31 C. 111 (127)=7 C.W.N. 688; R., 20 C. 906; 26 B. 449=3 Bom. L.R. 857 (865); 32 C. 992=1 C.L.J. 482 (497)=9 C.W.N. 949; 12 C.W.N. 793; 13 Bom. L.R. 141=9 Ind. Cas. 951 (954).]

Appeal from a decree (9th September 1884) of the High Court, reversing a decree (30th September 1882) of the Subordinate Judge of the Pabna district.

The appellant, Raiksihori Dasi, one of the defendants in the suit, the other being a purchaser of part of the estate to which she alleged title, was the widow of Gobindnath Sircar, who died on the 8th May 1875, having been, in his childhood, adopted by Bishwanath Sircar, the testator, whose will was the subject of construction.

After the adoption Bishwanath Sircar, having re-married, had a family of five sons, of whom three, along with the son of a fourth, were the respondents in this appeal. Bishwanath died on 10th December 1871, having during his life *viz.*, on 21st January 1856, on 15th May 1862, and on 24th July 1870, executed the testamentary papers in question. The first, after naming the three sons, then the only sons born to the tstator, and naming the adopted son, contained the following clause:—

[411] "On my death my adopted son Gobindnath Sircar shall get a share of three annas, Brojendranath Sircar a share of five annas, Krishnendranath Sircar a share of four annas, and Jagadindranath Sircar a share of four annas, of all these properties, and of the properties which I may acquire in future. Again, if I get a son then Gobindnath Sircar shall get a share of two annas ten gundas, Brojendranath Sircar a share of three annas fifteen gundas, Krishnendranath Sircar a share of three annas five gundas, Jagadindranath Sircar a share of three annas five gundas, and that son shall get a share of three annas five gundas. If besides one son I get more sons hereafter, then, with the exception of the *dalan* which I have demarcated and given in the share of Brojendranath, minor, as stated below, the adopted son, and son born *i.e.*, all my sons shall be entitled in equal shares to all my properties, moveable and immoveable, and no one will be able to raise any objection thereto. If there be no sons born then the division will be according to the above shares."

A second clause provided for the payment of the debts to be paid by the sons in proportion to the share taken by each. A third clause named executors and managers of the family estate during the minority of the sons. Fourth and fifth clauses contained directions as to the apportionment of the family dwelling house. A sixth clause dealt with the expenses of religious ceremonies, and a seventh reserved rights of alteration.

On the 15th May 1862, Bishwanath Sircar executed another document which referred to the above, stating "all affairs are to be managed according to that will and this," and providing that until the youngest son should attain majority the names of those who were of full age should not be registered, nor should they be able to interfere with the property. His adopted son, his naib Krishna Krishore Doss, and his companion Iswar Chunder Chaki, were appointed executors. In the second clause he added:

"I have fixed a common cutcherry for the management of all family affairs. All affairs shall be managed by the joint amlas and managers, *i.e.*, of the sixteen annas, but the sons even on attaining majority and getting their names registered shall not be able to break down the common cutcherry; all the expenses for the performance of daily and periodical rites will be defrayed under the management of the amlas, and the sons shall

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get the remaining amount of profits in accordance with their respective shares from generation to generation. Besides this, they shall not be able to break down the common cutcherry and bring the same into their own possession. If any of the amlas of the sixteen annas be guilty in any way then the sons who may have attained majority and the managers shall [**412**] dismiss that amlas...............But they shall never be able to destroy the ijmali character of the thing."

On the 24th July 1870 Bishwanath executed a third document, mentioning the two previous documents, as to which it observed that it was necessary to alter and amend their contents. It stated the birth of two other sons, the respondents Jogendranath and Digindranath, and said that there were at that time six sons living, " and according to the arrangements made in the former wills the shares of all will be equal. I accordingly provide by this will that each son shall take a two annas thirteen gundas one kauri and one krant share in the estate."

A second clause included in such distribution properties purchased since the date of the last will. A third imposed restrictions on alienation, and directed that all sons should get the profits, " which will be left over and above that, according to the shares mentioned above, and they will not be able to be presonally in possession." A fourth clause dealt with the expenditure for the daughters, and appointed their guardians.

An important part of the fifth clause was as follows.—

" My heirs shall enjoy the profits of my zemindari and other immoveable properties according to the prescribed rules. If, God forbid, any of those sons, die without sons, then none of his heirs shall get his share, but my heirs, my remaining sons, or if they have sons, then those sons shall get it according to those shares. If any of these sons of mine becomes indebted, then that debt shall be realized from him, and these zemindaris, etc., of mine shall not either be sold by auction or be liable for his debt, because it is only for the purpose of carrying on their maintenance that I haxe fixed the share of the right of each of my sons, and besides this, they shall have no proprietary right or ownership whatever in those shares. As regards the rules which have been laid down for the sons who are to enjoy the profits of my properties, moveable and immoveable, if any son do not get sons but only daughters, then the sons born of the wombs of those daughters shall not be able to be heirs to and claimants of my moveable and immoveable properties on the ground of the same being the properties of their maternal grandfather."

In the sixth clause the testator enjoined that if any of his sons should not have any sons or daughters—

" Then his widow shall get for her life only a fair amount for her maintenance and the expenses for pious acts from the profits of her husband's share, but she shall not be entitled to the profits of the entire estate, or be competent to make sale or gift of anything on the ground that it was the property left by her husband."

[**413**] Jagadindranath died in 1874, and his widow in 1875. The adopted son, Gobindnath, died in 1875, leaving a widow Raikishori Dasi. the present appellant. While he lived he managed the family estate, and for three years after his death the family remained together.

The sons had their names registered as proprietors of the whole estate under Act VII of 1876 (Bengal Land Registration Act). In 1876 Raikishori Dasi left the family dwelling; and in what she was entitled to under the will she transferred a four-anna share to Syed Abdul Subhan Chowdhry.

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The present suit was instituted by the four surviving sons of Bishwanath for a declaration that under the will, or wills, they were the owners of the property, and that Raikishori Dasi had no right to any of it, or to any possession, and also that her conveyance of 1878 was void.

In defence, she alleged that the terms of the will were contrary to Hindu law, and that it was therefore inoperative and invalid; that this suit for a declaratory decree was not maintainable, plaintiff having no possession; that she had inherited her husband's share, and had made the transfer to the said Abdul Subhan, who was co-defendant, and supported her statement.

Upon issues framed accordingly, the Subordinate Judge was of opinion that the will had not been acted upon, and that its provisions were contrary to Hindu law, the corpus of the property not having been given by the testator to his sons, and the female heirs having been excluded. Also, that the present suit for a declaratory decree was not maintainable. He, therefore, dismissed the suit.

Pending an appeal to the High Court, Brojendranath died, and his son was substituted in his place.

A Divisional Bench (TOTTENHAM and FIELD, JJ.) held, on the construction of the three testamentary instruments, that there was a good gift to the six sons of the testator's property in equal shares, and that in the second and third the testator had endeavoured to impose restrictions upon the proprietary interest conferred by the first, which restrictions were opposed to law, and must be regarded as invalid and inoperative.

In regard to the first document they said:—

[414] "Now, there can be no doubt that if the devolution of the testator's property depended upon this instrument alone, it would be necessary to decide that all the sons took equal shares of the whole of the property, moveable and immoveable. We have, then, to consider how far these testamentary provisions have been altered, or modified, by the two subsequent wills."

The judgment then sets forth the principal directions in the second document, and adds:—

"The second paragraph sets forth that a common cutcherry has been established for the management of all the affairs connected with the property, which are to be managed by the joint amlas and managers; but that the sons, even on attaining majority and getting their names registered, shall not be able to break down the common cutcherry." It is then directed that the expenses for the performance of the daily and periodical rites are to be defrayed under the management of the amla of the sixteen-anna or whole of the estate, and that the sons shall get the remaining amount of profit 'according to their respective shares from generation to generation.' The will then declares that, besides this, they shall not be able to break down the common cutcherry and bring the same into their own possession. In our opinion this is a restriction upon partition, the right to which according to the law administered in these provinces, must be regarded as an essential element of ownership. We think, therefore, that the restriction is void, and that the gift of the property in the shares specified in the first will cannot be affected thereby. The third clause provides for the defrayal of the expenses of the marriages of members of the family from joint funds, and directs that until the youngest son attains majority, none of the sons shall be able to separate, and if they do so, then any son who separates is to get merely maintenance and is not to be entitled to the

profits accruing upon his share up to the time when he attains majority. This is, we think, a valid clause and can be enforced if occasion should arise. The remaining provisions of this will do not require notice."

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Coming to the third document, the judgment gives the principal clauses, which are not repeated here, as they have been stated in the preceding part of this report, and considers especially the fifth clause, which is above set forth, beginning with the words "My heirs shall enjoy the profits." The judgment proceeds thus:—

"Now what we have to consider is whether the above provisions, *viz.*, that the sons shall get the shares of the profits, and shall not be able to be personally in possession, and shall not be able to make any gift or sale or any other kind of alienation, and the further declaration in the fifth paragraph, that it was only for the purpose of carrying on their maintenance [**415**] that the testator had fixed the share of each of his sons, and besides this that they had no right or ownership whatever in those shares, so far altered or modified the disposition of the property contained in the first document of 21st January 1856 as to amount to a revocation of the absolute bequest contained in it. Upon the best consideration that we have been able to give to the arguments that have been addressed to us, we are of opinion that they do not. We think that the first provision as to the sons receiving the profits and not being able to get possession of their shares embodies a restriction which must be held to be invalid and inoperative. The true meaning of the original passage in the will is, that the sons shall not get possession of designated or specified shares, in other words, that there shall be no partition, and this is merely a repetition of the previous condition in the second will. Then the restriction upon alienation is also invalid, being opposed to the policy of the law. The passage in paragraph 5 taken with the context clearly has for its object the prevention of the property from being made liable for debts incurred by the sons, and this object is one which cannot be effectuated.

"The conclusion then at which we arrive upon the construction of these three testamentary instruments is, that there was a good gift to the six sons of the testator's property in equal shares; and that in the second and third wills, the testator has endeavoured to impose restrictions upon the proprietary interest conferred by the first will, which restrictions are opposed to law and must therefore be regarded as invalid and inoperative.

"The next question with which we have to deal arises upon the construction of the fifth paragraph of the third will which provides as follows:—

"If any of those sons die without sons, then none of his heirs shall get his share, but the rest of *my sons and heirs*, or if they have sons, then those sons shall get it according to those shares.' We may observe that here also there is an error in the translation. 'The rest of *my sons and heirs*' is an erroneous rendering of the original. 'The rest of my sons *being heirs* or *who are heirs*' is the proper meaning. It has been contended by the learned counsel Mr. *Evans* that the gift over created by these words is bad, inasmuch as it is a gift to an indefinite class. In support of this contention we have been referred to the case of *Soudamini Dasi* v. *Jogesh Chunder Dutt* (1), and we have been asked to apply the principle laid down in that case to the case which is now before us. We may observe that in the case of *Rai Bishen Chand* v. *Asmaida Koer* (2) decided by the

(1) 2 C. 262. (2) 6 A. 560=11 I.A. 164.

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Privy Council in March 1884, the principle of English law which was adopted and made applicable to Hindus in the case of *Soudamini Dasi* was considered and observed upon by their Lordships of the Privy Council. The case of *Rai Bishen Chand* was no doubt a case not of a will but of [416] a deed *inter vivos*, intended to have immediate operation; and as regards the applicability of the principle to Hindu wills, their Lordships decided nothing definitely. They did, however, refer to illustration (*b*) to s. 102 of the Succession Act (X) of 1865 as importing into India an English rule of construction which usually defeats the intention of the testator; and it would appear that the adoption of the English rule of construction did not recommend itself to their Lordships on that occasion as a sound principle applicable to the wills of Hindus. If we had to decide whether this principle ought to be adopted in this country, we should perhaps think it necessary to refer the question to a Full Bench, having regard to the recent observations of the Privy Council in the case just referred to, and because we ourselves entertain some doubt as to whether this principle ought to be followed in construing the wills of Hindus. We think, however, that it is not necessary to decide this question on the present occasion. We have not here to deal with an intention to which in its entirety it is impossible to give effect, and in consequence of its being impossible to effectuate the whole intention, any attempt to give effect to a portion of it would practically amount to making a new will for the testator by substituting another and a different intention, the existence of which is not to be gathered from the will. We think that in the present case there are two intentions wholly separable, the second not depending upon the first, and that it is possible to give effect to the first intention without entering into the question whether the second intention is one to which the law can or cannot allow effect. The will provides that if one of the sons die without sons, none of his heirs shall get his share; but, *first*, that the rest of the testator's sons shall get that share, and, *second*, that if any of those other sons have died leaving sons, the sons so left shall receive the share, that is, their proportion of the share, or in other words, as we understand it, that the sons of the deceased sons shall for the purposes of the inheritance stand in the place of their fathers. Now assuming for argument's sake that the sons of the deceased son constitutes a class, some of whom may have been in existence at the time of the testator's death, while others may have been born subsequently, that this class therefore consists of some who may take and others who cannot take, and that the gift over to these sons of a son is in consequence invalid, we have to observe that this second case has not yet arisen. The case with which we have to deal is the case of one of the testator's sons dying and other sons surviving him. We may observe that as Jagadindranath died before Gobind's death and without male offspring, it is unnecessary to consider him in dealing with the question before us. Now it appears to us that the first intention, that is, the intention that if one of the testator's sons shall die, the other surviving sons shall receive his share, is an intention complete in itself, and one to which we can give effect, and that the validity of the gift over in this case is not affected by the further provision as to what is to be done if one of the sons predecease the son in respect of whose share the question arises, such son so predeceasing having left sons in respect of whose right the question of the validity of the second intention would have to be considered. This case has not arisen, and, it is therefore unnecessary for us to decide whether the gift would, in this case be void as a gift to an

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indefinite class. We are, therefore, of opinion that we ought to give effect to the clear intention of the testator as to the share of a son dying [417] going over to the other sons who survive him. We think, then, that according to the true construction of the will, upon the death of Gobindanath Sircar, the one-sixth share which he originally received under the provisions of the will, together with the share which he obtained upon the death of Jagadindranath Sircar, went over, under the provisions of paragraph 5 of the third will, to the four sons who are plaintiffs in this case, and that Raikishori Dasi, the widow, was not entitled to take anything by inheritance from her deceased husband Gobindnath Sircar.

"It has further been contended by the learned Counsel for the respondent that the provisions contained in paragraph 11 of the third will are wholly void, and that in respect of the moveable and other properties specified in this paragraph there is an intestacy, and that, in consequence, Raikishori Dasi is entitled to the share in such property which her husband would have received according to Hindu law. We are of opinion that there has been in this paragraph of the will an attempt to tie up the property in perpetuity, that this attempt must fail, and that no effect can be given to these provisions of the will. But we do not think that the result will be that there is an intestacy in respect of these portions of the property. We think, as we have already said, that there has been a good gift of the whole of the property in paragraph 1 of the first will, and that the attempt to tie up the property failing, the original gift must prevail.

"The suit has been brought for confirmation of possession, and an attempt was made to show that Raikishori was in possession of a portion of the property, and it was therefore said that as regards this portion the plaintiffs' suit could not succeed, because, being out of possession, they ought to have sued for possession and not merely for a declaratory decree. We have heard the evidence of this point, and we entertain no doubt that although Raikishori made certain attemps to obtain possession of a portion of the property, those attemps were not successful, and the real possession remained in the hands of the plaintiffs.

"The result will be that the decree of the Subordinate Judge must be set aside and the plaintiffs will have a decree construing the will in accordance with this judgment. The defendant Raikishori Dasi will be declared to have no interest in the property left by the testator Bishwanath Sircar, and the conveyance of the 9th Falgoon 1285 will be declared void and must be cancelled. And it may be well to observe that this conveyance being so cancelled must not be returned to the party by whom it was [418] filed. The plaintiffs will have their costs in this Court and in the Court below.

Mr. *J. D. Mayne*, for the appellants, argued that the decree of the High Court must be reversed as erroneous. Upon the construction of the three documents he argued that the provisions of the second and third, directing what estates should be held by the sons, were inconsistent with, and in effect were a revocation of, the bequest conferring estates upon them in the first document. All the instruments must be read together, and the testator's whole intention regarded. This was expressed in the last which, as a will, was substituted for the first and second. If then this third will was, as he submitted it was, invalid on account of the attempt to create a perpetuity, and by reason of other provisions contrary to law, there was no operative bequest, and the result was an intestacy. The only estates bequeathed by the testator to his sons in the third will were

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invalidly bequeathed, for he coupled with the bequest invalid restrictions. The testator did not intend his sons to have the property without the restrictions imposed; and if the restrictions were removed, the testator's intention could not be carried out. It was, therefore, necessary to hold the whole bequest invalid.

The provisions inserted by the testator in case any son should die without a son also were contrary to law. The whole scheme failing, intestacy resulted; it not being permitted or possible, to spell out a meaning that was legal, by disregarding the provisions that were illegal—see remarks as to this in the judgment in the *Tagore case* (1). Reference was made to *Sookmoy Chunder Dass* v. *Monohurri Dasi* (2); *Leake* v. *Robinson* (3); *Pearkes* v. *Moseley* (4); *Bramamayi Dasi* v. *Jogeschandra Dutt* (5); *Rai Bishenchand* v. *Asmaida Koer* (6).

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondents, argued that the judgment of the High Court was correct. There was in the first document, of which all the three constituted the will, an absolute gift of the corpus of the estate to the sons. This was capable of taking effect, and should be carried out. The illegal restrictions afterwards imposed from time to time as the testator in after years added them, with a view to keeping his estate together might be regarded as wholly inoperative. They should have no effect to invalidate the previous legal disposition. They referred to *Soorjeemoney Dosee* v. *Deno*-[**419**]*bundo Mullick* (7) With regard to the objection as to the gift over, they contended that it was good as to the sons in existence, and there was no reason why the latter part of the provision as to unborn sons should invalidate the former, when no difficulty had as yet arisen on account of the bequest including an indefinite class.

Reference was made to *Sonatun Bysack* v. *Juggutsoondcree Dossee* (8); *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikareswar* (9); *Ramlal Mookerjee* v. *The Secretary of State* (10); *Soudamini Dassee* v. *Jogesh Chunder Dutt* (11); *Kherodmoney Dassee* v. *Doorgamoney Dassee* (12); *Bhoobunmohini Debia* v. *Hurrish Chunder Choudhry* (13); *Bramamayi Dassee* v. *Jogeschunder Dutt* (5); *Callynath Nagh Choudhry* v. *Chundernath Nagh Choudhry* (14); *Ganendramohun Tagore* v. *Upendramohun Tagore* (*Tagore case*) (1); *Rai Bishen Chand* v. *Mussamut Asmaida Koer* (6); *Hori Dasi Debi* v. *The Sercetary of State* (15).

Mr. *J. D. Mayne* replied.

On a subsequent day (22nd December 1887) their Lordships' judgment was delivered by

JUDGMENT.

[**420**] SIR B. PEACOCK.—The respondents in this appeal were the plaintiffs in the action. They were four of the sons of Bishwanath Sircar.

(1) 4 B. L. R. 103=9 B. L. R. 377 (406)=I. A. Sup. Vol. 47.
(2) 12 I. A. 103=11 C. 684; and in the High Court, 7 C. 269.
(3) 2 Mer. 363. (4) 5 App. Ca. H. L. 715.
(5) 8 B. L. R. 400. (6) 11 I. A. 164=6 A. 560.
(7) 9 M. I. A. 123. (8) 8 M. I. A. 66.
(9) 10 I.A. 51, *nom. Tarakessur Roy* v. *Soshi Shikuressur Roy*, 9 C. 952; and in High Court, 6 C. 421.
(10) 7 C. 304=8 I. A. 46. (11) 2 C. 262.
(12) 4 C. 455. (13) 4 C. 23=5 I. A. 138.
(14) 8 C. 378. (15) 5 C. 228.

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The first defendant, Raikishori Dasi, was the widow of the late Gobindnath Sircar, who was an adopted son of Bishwanath. The plaintiffs claimed to be entitled under the will of their father to succeed, upon the death of Gobindnath without male issue, to the share of the father's property, to which he had succeeded on his father's death. The widow contended that the will of the father was illegal and void, and, consequently that, upon the death of her husband, Gobindnath, she as his widow succeeded to his share of the property, and acting upon that view she, by deed, dated the 9th of Falgoon 1285, transferred a portion of the property to the defendant No. 2 (Syed Abdul Sobhan Chowdhry). The plaintiffs by their plaint prayed that after putting a true construction on the will of the late Bishwanath Sircar, the Court would be pleased to pass a decree declaring that defendant No. 1, that is to say, the widow of Gobindnath, had no right to the property stated in the schedule marked (*ka*), and to declare the plaintiffs' right to the said property in accordance with the said will. They also prayed that after declaration of the plaintiffs' right, the Court would be pleased to pass a decree declaring that defendant No. 1 had no right to take possession of, or to transfer, any property stated in the said will, and that the registered kobala executed by defendant No. 1, dated 9th Falgoon 1285, was void.

The will was contained in three documents, which together formed the last will of the father Bishwanath. The first of these documents was dated January 1856; the second, May 1862; and the third, August 1870. The Subordinate Judge held that the will was void, and, consequently, that the widow succeeded to her husband's share. The High Court upon appeal reversed that decision, and held that the plaintiffs were entitled to it.

The will contained many provisions which could not legally be carried into effect, and which appeared to create a perpetuity, and consequently to render the will invalid.

At the close of the arguments their Lordships reserved judgment in order that they might carefully consider all the provisions of the three documents read together. They have [421] now done so, and although they cannot, after full consideration say that the case is free from doubt, they are not prepared to hold that the High Court came to an erroneous conclusion, or to advise Her Majesty to reverse the judgment.

Their Lordships observe that the High Court has declared the deed of conveyance to be void, and that it be cancelled and retained in Court. It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void or ought to be cancelled or retained by the Court. It was unnecessary to do more after declaring the plaintiffs' right than to declare that defendant No. 1 had no right to take possession of, or to transfer, any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the defendant No. 2.

Their Lordships will humbly advise Her Majesty to affirm the decree, so far as it declares that the defendant No. 1, Raikishori Dasi, had no right or interest in the property mentioned in the schedule "*ka*" attached to the plaint, and that the plaintiffs are entitled to the same, but that instead of declaring that the conveyance executed by Raikishori Dasi in favour of defendant No. 2, Syed Abdul Sobhan, is void, and that the said conveyance be cancelled and retained in Court, it be declared that the said conveyance transferred no interest in the property to the defendant No. 2, and that in all other respects the decree of the High Court be affirmed. This modification of the decree of the High Court does not

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affect the merits of the case as regards the parties to this appeal, and accordingly the appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Wrentmore & Swinhoe.*
Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*
C. B.

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15 C. 422 (P.C.)=15 I.A. 66=5 Sar. P.C.J. 107=12 Ind. Jur. 132=Rafique and Jackson's P.C. No. 100.

[422] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

SHANKAR BAKSH (*Plaintiff*) *v.* DAYA SHANKAR AND OTHERS (*Defendants*).

[9th, 10th, 19th, 22nd and 23rd November and 17th December, 1887.]

Civil Procedure Code (*Act VIII of* 1859), *s.* 114—*Civil Procedure Code* (1882), *s.* 103—*Identity of causes of action in two suits, notwithstanding difference of relief claimed.*

To a suit, brought in 1883, for redemption of a mortgage made in 1853, of villages in Oudh, subsequently included in the mortgagee's talukdari estate and sanad, the defence was that the mortgagor, having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under s. 114 of Act VIII of 1859.

Held, that, although the plaintiff, who had claimed in the prior suit the under-Proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was, in both cases, the refusal of the right to redeem; and that under s. 144 of the Act the judgment of 1864 was final.

[**F.**, 39 P.L.R. 1905=32 P.R. 1905; **R.**, 14 B. 31; 117 P.R. 1891; 19 C. 372 (379); 25 M. 736; 8 O.C. 389 (393); 14 O.C. 257=12 Ind. Cas. 993; 43 P.R. 1907=101 P.W. R. 1907=169 P.L.R. 1908; 2 Ind. Cas. 630; 28 P.R. 1907=93 P.L.R. 1908.]

APPEAL from a decree (3rd June 1885) of the Judicial Commissioner of Oudh, reversing a decree (7th April 1884) of the District Judge of Lucknow.

The questions raised by this appeal were: First, whether or not a judgment given by a Settlement Court on 12th July 1864, "on default," had been passed against the plaintiff by default, within the meaning of s. 114 of Act VIII of 1859, of the Civil Procedure Code, or the suit had been disposed of under s. 110 of the same Act; secondly, whether the cause of action, which was for the redemption of villages mortgaged by the plaintiff's ancestor to the defendant, was identical in both of two suits, the one suit having claimed possession of the mortgaged property in virtue of under-proprietary right upon sub-settlement, and the other suit having claimed possession of the same property in virtue of superior proprietary right.

The appellant, the plaintiff, talukdar of Pahu, claimed in the suit giving rise to this appeal, possession of villages Khanpur, Rajwara, and Sarai Mobarak, in the Unao district, by redemption of mortgage. The defendant, respondent, Daya Shankar, was [423] also a talukdar, to whom the villages had been mortgaged in 1853 by the plaintiff's

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grandfather, Thakur Bhup Singh, for a term of three years, to secure an advance of Rs. 7,441 made to him. The villages were, after the annexation of Oudh in 1856, included in the defendant's talukdari estate, and in his sanad obtained after the settlement.

On the 23rd June 1864 the original mortgagor Bhup Singh sued to redeem, and, as by that time the villages had been included in the schedule attached to Daya Shankar's sanad, he refrained from claiming proprietary rights, but claimed possession as under-proprietor, holding sub-settlement in accordance with the provisions of the Government rules on the subject. He stated that Rs. 3,000 had been paid and that he was ready to pay the balance.

The suit having come before a Settlement Officer on 18th July 1868, and the plaintiff not then appearing in person or by pleader, the Court passed judgment "in default." An application to the Court to issue a fresh summons, under s. 110 of Act VIII of 1859, was rejected (13th August 1868), as also was a petition (15th September 1868), presented more than thirty days after the 18th July, to set aside the order of that date. An appeal against this rejection was rejected by the Commissioner who recorded the following (16th May 1871): "The lower Court is correct. The order of 13th August ought to have been appealed. The appellant is now without redress, but this is of the less consequence since the principle has not heretofore been recognized of a talukdar suing another talukdar for the redemption of a village in the sanad of the latter."

The present suit (6th September 1883) stated the mortgage, and the acquisition of an interest therein by defendants other than Daya Shankar (not material to this report), and that the plaintiff had, under the provisions of s. 83 of Act IV of 1882 (Transfer of Property) deposited the mortgage money in Court, and that on the 14th June 1883, which was the Khali Fasl of the month of Jeth, the defendant had refused to restore the property.

By his written statement the defendant alleged that the suit was barred by the proceedings of 1864, and the judgment of the Commissioner (16th May 1871). On issues raising [424] this question, the District Judge being of opinion that a decision on one grade of right, the practice of the settlement Courts having been to try each grade of right separately was no bar to a suit claiming another grade of right or to a decision thereupon, made a decree in favour of the plaintiff.

On appeal the Additional Judicial Commissioner held that the former suit brought in 1864 for the recovery of the mortgaged property was in all essentials the same as the present suit, that s. 6, Act I of 1869 did not confer a fresh cause of action on plaintiff, nor did it relieve him from the consequences of having permitted judgment to be given against him by default; and that it was difficult to see how the practice (alluded to by the District Judge) of the Settlement Court could have been followed in suits for redemption of mortgaged property in which a plaintiff would be bound to include in one suit whatever rights he might have mortgaged under the same deed. The Judicial Commissioner, therefore, held that the suit was barred under the provision of s. 114, Act VIII of 1859, and s. 103 of Act XIV of 1882. He reversed the decision of the District Judge, and gave the defendants the costs of both Courts.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson*, for the appellant, contended that the proceedings in 1864 did not bar the present suit. The

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order of 12th July 1864 was not made under s. 114 but under s. 110; nor, even if it had been made under s. 114, would it have barred the present suit. Nor until 1869, when Act I of 1869 (the Oudh Estates' Act), s. 6 came in aid, was it open to plaintiff to sue for the proprietary right. After the settlement of Oudh he was not in a position to claim that right from the mortgagee in whose sanad and in whose talukdari estate, were comprised the villages now claimed, until s. 6 of the above Act had authorised the claim. In 1864 the plaintiff was only in a position to claim that for which he had sued, *viz.*, that a sub-settlement should be made with him as under proprietor (1). He referred to Acts XVI of 1865, XIII of 1866 and I of 1869 (1), and contended that the causes of action in [**425**] 1864 and 1883 were not identical. He referred to *Shampersad Roy Chowdhry* v. *Rampersad* (2), where the rule of *res judicata* was held only to apply to a case in which the question to be determined in a suit was the same that had been already heard and decided; and not to a case where new circumstances had intervened and altered the nature and character of the question to be determined.

For the respondents, Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* argued that the order was made under s. 114 ,and fell within the provisions of that section, making it final. This ground of appeal had not been taken in the lower Court. The appellant had himself treated the order, in applications afterwards made, as having been passed under s. 114, and the Courts had dealt with it as an order under that section.

SIR B. PEACOCK referred to s. 6 of Act I of 1869, pointing out that the order of 1864 was made in a suit for the under-proprietary right. Whether that left open the claim now preferred was a point on which further argument might be heard.

LORD FITZGERALD said that their Lordships would hear one counsel on either side, on a subsequent day, on the question whether, at the time of the institution of the suit, the plaintiff had a right of redemption of mortgage not barred by the order of 12th July 1864, or by limitation.

On the 19th November, Mr. *R. V. Doyne*, with whom was Mr. *J. H. A. Branson*, for the appellant, and Mr. *J. D. Mayne*, with whom was Mr. *C. W. Arathoon*, for the respondents, were heard on the above question.

Mr. *R. V. Doyne* contended that, by the effect of the confiscation of the rights of proprietors in 1858, the original rights of the mortgagor had been swept away, and the restoration which followed had left no right in the mortgagor to redeem; the talukdari settlement having been made with the mortgagee, [**426**] and having, as well as the sanad afterwards obtained, comprised the villages in suit. Section 6, however, of Act I of 1869 provided for the redemption of mortgages. Before that Act there did not exist the cause of action of which the identity with that now in suit had been assumed. Therefore the plaintiff was not debarred from suing by the order of 1864, which did not, and could not, deal with the cause of action now presented; nor was the suit barred by limitation.

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(1) Act I of 1869 (the Oudh Estates' Act), s. 6 enacted that nothing in ss. 3 and 4 of that Act (defining rights of talukdars), or in the orders of Government on the subject, or in any sanad, should be a bar to a suit for redemption where a mortgage, dated on or after 13th February 1844, fixed no term for redemption, or a term not expiring before 13th February 1856.

(2) 10 M. I. A. 203 (209).

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The confiscated estates of the Oudh talukdars were restored to them unincumbered, save so far as the talukdar might have recognized any equitable charges in favour of others, and save so far as equities might have arisen against him out of his acts in obtaining the settlemnt and sanand. In this particular case there was no conduct on the part of the talukdar from which a trust, preserving the right to redeem, could be inferred. [LORD HOBHOUSE referred to the previous contract.] In support of the above proposition reference was made to *Shunkersahai* v. *Raja Kashipershad* (1); *Rani of Chittaree* v. *The Government of India* (2); *Nawab Malka Jahan Sahiba* v. *The Deputy Commissioner of Lucknow* (3); *Hurdeo Baksh* v. *Jowahir Singh* (4); *Brij Inder Bahadur* v. *Janki Koer* (5); *Romanund Koer* v. *Raghinath Koer* (6); *Jehan Kadr Bahadur* v. *Badshoo Bahoo Sahiba* (7).

[SIR B. PEACOCK referred to *Nelson* v. *Couch* (8), as showing that, to constitute a good defence of *res judicata*, the former suit should have been one in which the plaintiff might have recovered to the same extent what he seeks to recover in the second.]

Mr. *J. D. Moyne* contended that the right of the mortgagor under the original contract, being to obtain a re-transfer upon payment of the mortage money, did not fall within the proclamation of confiscation of 1858. He referred to its terms as printed at the [**427**] end of the report of *Nawab Malka Jahan Sahiba* v. *The Deputy Commissioner of Lucknow* (3).

Also to the cases above cited and to *Gauri Shankar* v. *The Raja of Bulrampore* (9).

Also to the Oudh Government orders, relating to this subject, that had under the Indian Councils' Act, 1861, 24 and 25 Vic., c. 67, s. 25, obtained the force of law; and to the Acts abovementioned. The effect of a usufructuary mortgage was explained in *Pattabhiramier* v. *Venkatarow Nicken* (10); and *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen* (11).

Regulation XVII of 1806 was also referred to. The Acts of 1865, 1866 and 1869 showed that the mortgages executed before annexation were not regarded as extinguished. At all events, the plaintiff could not have had his rights altered or his position improved by s. 6 of Act I of 1869. The effect now sought to be attributed to the Act would be to negative the result of a decree made some years before its passing. Such a retrospective effect could not be attributed to it. In connection with this he cited *Gardner* v. *Lucas* (12) in regard to the non-retrospective construction put upon an Act. He relied on s. 114 of Act VIII, corresponding to s. 103 of the Code of Civil Procedure, and urged that it was impossible that the relation of mortgagor and mortgagee, having been swept away in 1858, had been restored in 1869 in the manner alleged.

Mr. *R. V. Doyne*, replied.

JUDGMENT.

On a subsequent day their Lordships' judgment was delivered by

SIR R. COUCH.—On the 6th of December 1853 Bhup Singh, the grandfather of the appellant, describing himself as zemindar and talukdar of Pahu and Golaria &c., by an agreement of that date, mortgaged

(1) I. A. Sup. Vol. 220. (2) I.A. Sup. Vol. 237. (3) 6 I.A. 63.
(4) 4 I.A. 178. (5) 5 I.A.1. (6) 9 I.A. 41=8 C. 769.
(7) 12 I.A.124=12 C. 1. (8) 15 C.B.N.S. 99. (9) 6 I.A. 1=4 C. 839.
(10) 13 M.I.A. 560. (11) 2 I.A. 241.
(12) L.R. 3 App. Cas. H.L. 582.

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three villages in pargana Maurawan, in Oudh, to the respondent Daya Shankar for three years for Rs. 7,441-6, the mortgagee to have the profits and produce and being put in [428] possession. And the mortgagor stipulated that he would repay the mortgage money in Khali Fasl, and redeem the mortgaged villages, and, "unless he shall have paid the mortgage money in full to the said mortgagee, he shall not redeem the villages; at the time the mortgage money shall be paid up by the declarant (mortgagor) he shall have the mortgaged villages released in Khali Fasl."

On the 6th September 1883 the appellant brought a suit in the Court of the District Judge of Lucknow against the respondent to redeem the mortgage. Other persons were made defendants as having become entitled to a half share in the right of the mortgagee, but the case may be treated as if Daya Shankar had remained sole mortgagee. The plaint stated the mortgage; that the three years expired on the 6th December 1856, and although the villages were included in the talukdari sanad of Daya Shankar, yet, under the terms of the mortgage deed and s. 6, Act I of 1869, the plaintiff was entitled to redeem; that under s. 83, Act IV of 1882, the plaintiff had deposited the mortgage money in Court, but on the 14th of June 1883, the Khali Fasl, the defendants refused to allow him to redeem the property. The written statement of Daya Shankar stated that "on the 23rd of June 1864 Bhup Singh, plaintiff's ancestors, field against the defendant a regular suit for redemption of his property, and continually absented himself; on the death of Bhup Singh, which took place about the end of 1875, the plaintiff succeeded him, and he also failed to prosecute the case, so much so that on 18th July 1868 the claim was dismissed for want of prosecution, under s. 114, Act VIII of 1859, in the presence of defendant and absence of plaintiff." It was further stated that on 7th August 1868 the plaintiff filed an application for re-hearing, which was rejected on the 13th August; that another application for re-hearing was filed on 15th September 1868, which was also rejected on 17th March 1871; that an appeal was then preferred in the Court of the Commissioner, which was also rejected.

The sections of Act VIII of 1859, which was then in force, applicable to the dismissal of a suit, are 110, 114, and 119. Section 110 provides for the dismissal where neither party [429] appears and when a suit is dismissed under it the plaintiff is at liberty to bring a fresh suit, unless precluded by the rules for the limitation of actions, or if within thirty days he satisfies the Court that there was a sufficient excuse for his non-appearance the Court may issue a fresh summons upon the plaint already filed. Section 114 provides for cases where the defendant appears and the plaintiff does not appear, and then "the Court shall pass judgment against the plaintiff by default unless the defendant admits the claim," and it says that when judgment is passed against a plaintiff by default he shall be precluded from bringing a fresh suit in respect of the same cause of action.

Bhup Singh had, as was alleged, brought a suit in the Settlement Court on the 23rd June 1864, and the order, as it is called, of the 18th July 1868 appears to have been made in consequence of the Financial Commissioner, on the 29th of May 1868, calling the attention of the Settlement Officer to the provision in Act VIII of 1859, where the plaintiff does not attend to the process of the Court. The Settlement Officer appears upon that to have given notice to the parties, and the judgment says that "the 18th of June was fixed for the hearing, on which day

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plaintiff applied for a month's delay, it being the entering into engagements with tenants, and the defendant's agent agreeing to the delay, it was granted, and this day, the 18th of July, fixed for the hearing, but plaintiff is not present or represented by any accredited agent." At the foot of the judgment is the word "decree" and the signature of the Settlement Officer. There is also in the proceedings a paper in a tabular form, signed by the Settlement Officer, which seems to be the record of the decree. In a column headed "Particulars of case" are the words "plaintiff's suit for redemption of entire village Khanpur by right of inheritance and possession up to 1270 F. dismissed on default." The words "dismissed on default" were strongly relied upon before their Lordships as showing that the suit was dismissed under s. 110, but in another column it is stated that the decree was in favour of the defendants. The proceeding of the Settlement Court is recorded in such a loose way that no certain inference can be drawn from it as to the section under which the decree was made. The matter, however, did [430] not rest there. On the 7th of August 1868 the plaintiff applied that the suit might be reinstituted under s. 110. This application was rejected on the 13th August. On the 15th September 1868 the plaintiff made an applition to set aside the order of the 18th July. The order upon this application was not made until the 17th March 1871. The cause of this delay does not appear. The application was refused by the Settlement Court because it was not made within 30 days after the 18th July. The plaintiff then appealed to the Commissioner of the Rae Bareli Division, who dismissed the appeal, saying that "the order of 13th August ought to have been appealed." The explanation of this will be found in s. 119. It has been seen that when an order is made under s. 110 there is no appeal; the plaintiff is at liberty to bring a fresh suit. But s. 119 provides that in all cases of judgment against a plaintiff by default (that is, cases under s. 114) he may apply within 30 days from the date of the judgment for an order to set it aside, and that in all cases in which the Court shall pass an order under that section for setting aside a judgment the order shall be final, but in all appealable cases in which the Court shall reject the application an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable. Thus the plaintiff, by appealing against the order of the 17th March 1871, treated the application of the 15th September 1868 as an application to set aside an order made under s. 114, and when the Commissioner said that the order of the 13th August ought to have been appealed he must have considered that the order of 18th July 1868 was made under that section. Indeed the objection that it was made under s. 110 does not seem to have been taken in the lower Courts. No issue was framed by the District Judge distinctly, if at all, raising it and here is no notice of it in his judgment. The Appellate Court says the suit was dismissed under s. 114, and the whole of the judgment assumes that it was. Their Lordships are satisfied that the dismissal of the suit was under s. 114.

It is, therefore, necessary to decide whether the present suit is for the same cause of action as the former. The plaint in this suit has been stated. The suit in 1864 was begun by a petition to the Settlement Court, which then had the [431] jurisdiction. It stated the claim thus: "Claim to order proprietary (sub-settlement) right by redemption of mortgage in respect of villages Khanpur, Rajwara, and Sari Mobarak, which were mortgaged to defendant on the fourth Rabiul Awal 1270 H.,

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in lieu of Rs. 7,441-6, with stipulation that whenever, after expiry of the period of three years, the mortgagor paid the mortgage money in full, he shall redeem the property. Accordingly he paid Rs. 3,000 but of the aforesaid amount on the 7th Ramzan 1273 H. He is ready to pay up the balance Rs. 4,441-6, but the defendant does not act up to the terms of the mortgage deed." The prayer was that the plaintiff might, on payment of Rs. 4,441-6 in cash, be put in possession of the mortgaged villages as under-proprietor, holding sub-settlement in accordance with the provision of the rules of the Government on the subject. The proceedings in the Settlement Court appear to have been in a different form from that now in use in the District Court *viz.*, plaint and written statement, but no objection has been taken in the lower Courts that the suit in 1864 was not in proper form, or that it was then necessary to deposit the money. That has been made necessary by a subsequent Act. That in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action. It is not as the District Judge thought part of the cause of action. It is the manner in which the redemption of the mortgage was to be given. Various questions have been raised, and very fully argued, before their Lordships in order to show that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion that the causes of action are not the same, and that the judgment of the Additional Judicial Commissioner, who held that the suit was barred under the provisions of s. 114, is wrong. They will, therefore, humbly advise Her Majesty to affirm his judgment, and to dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

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[432] CIVIL RULE.

Before Mr. Justice Norris and Mr. Justice Ghose.

GOBINDA RAM MONDAL (*Petitioner*) *v.* BHOLANATH BHATTA (*Opposite party*).* [28th February, 1888.]

Review—Second application for Review—"Final"—Civil Procedure Code (Act VIII of 1859). *s.* 378—*Civil Procedure Code (Act XIV of* 1882), *ss.* 623, 629.

There is nothing in the Civil Procedure Code (Act XIV of 1882) which prevents a second application for a review being made after a previous application for review has been made and rejected, and such an application can therefore be entertained.

The word "final" in s. 629 of Act XIV of 1882 bears the same meaning, and ought to have the same construction put upon it, as was put upon the same word

* Civil Rule No. 5 of 1888 against the order passed by Baboo B. C. Chatterjee, Small Cause Court Judge of Midnapore, dated the 12th of September 1887, on the second application for review, confirming the order passed on the first application for review by Baboo G. C. Chowdhry, Small Cause Court Judge of Midnapore, dated 6th October 1885.

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in s. 378 of Act VIII of 1859 by the Full Bench in *Nasiruddin Khan* v. *Indronarayan Chowdhry* (1).

[F., L.B.R. (1893-1900), 580 (582); R., 26 B. 485 (490); 9 P.R. 1905 (Rev.)=65 P. L.R. 1906, 39 C. 265=14 C.L.J. 481=12 Ind. Cas. 151 (153); 10 Ind. Cas. 679 (681)=25 P.W.R. 1911; Cons., 7 C.L.J. 16 N.]

THE facts of the case were as follows:—

In August 1885 a suit was instituted by Bholanath Bhatta against Gobinda Ram Mondal for the recovery of Rs. 264 upon a money bond. The bond was alleged to be dated the 24th of March 1883. The defendant pleaded that the bond was a forgery. On the 8th of September 1885 the Small Cause Court Judge of Midnapore decreed the plaintiff's suit. On the 12th of September 1885 the defendant applied for a review of judgment. His application was rejected on the 6th of October 1885. Early in 1887 a notorious forger named Haradhan Maiti was arrested by the Police, and upon his premises being searched, it was alleged that the Police found there a *fac-simile* of the bond upon which the suit was brought with the defendant's signature and seal upon it, and also a petition purporting to bear his seal. Haradhan Maiti was convicted and sentenced to seven years' rigorous imprisonment on the 23rd of March 1887. On the 1st of April 1887, having obtained copies of certain papers which were produced at the Sessions Court upon the [433] trial of Haradhan Maiti, the defendant made a second application for a review of judgment. This application was also refused, and the judgment of the then Small Cause Court Judge was as follows: "This is an application for a second review of a decree passed by the late Judge. The first application was rejected by him. According to s. 629, paragraph last, of the Code, this application cannot be granted. If this be an application to review a second time the decree, it is *res judicata*. If it be an application to review an order passed on review, or on an application for a review, s. 629 bars the application. Ordered that this application be disallowed with costs." Upon this the defendant applied for and obtained a rule from the Chief justice and Mr. Justice Tottenham calling upon the plaintiff to show cause why the order refusing the application should not be set side, and why the Small Cause Court Judge should not be directed to entertain the second application for a review.

The rule was granted upon a petition of the defendant, verified by an affidavit, setting out the above facts, and alleging that the papers found in Haradhan Maiti's house were false and fabricated in precisely the same manner as he had always alleged, and still insisted that the bond in suit was fabricated. He further stated in his affidavit that he had examined the *fac-simile* of the bond and compared it with that sued upon, and that the handwriting in the body of both was the same, and he believed them to have been written by one and the same individual; that at the time of the trial of the suit and of his first application for review the existence of the *fac-simile* of the bond and the other papers referred to above was not within his knowledge, and that he could not have produced them at the trial or at the hearing of such application, and he charged that the judgment had been obtained against him by means of false and suborned testimony by which the Court was misled and deceived.

In his application to the High Court the defendant submitted that the Small Cause Court Judge was wrong in holding that a second

(1) B.L.R. Sup. Vol. 367.

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review of judgment is barred by the rule of *res judicata* and that upon the facts submitted he was entitled as of right to have the judgment reviewed. He further contended that as the judgment had been obtained by fraud and by means of false and [434] suborned evidence, the plaintiff was not entitled to retain any benefit he had thereby obtained.

The rule now came on to be heard.

Baboo *Uma Kali Mookerjee*, for the petitioner.

Dr. *Rash Behari Ghose*, for the opposite party.

Baboo *Uma Kali Mookerjee* for the petitioner contended that the lower Court was wrong in holding that the principle of *res judicata* applied to the present case, and that s. 13 of the Civil Procedure Code had nothing to do with the present application. He further contended that the word "final" in s. 629 of the Code meant that the order was not appealable. He relied on the Full Bench Rulling in *Nasiruddin Khan* v. *Indronarayan Chowdhry* (1), and referred to the last para. of s. 588 of the Civil Procedure Code. He further contended that the last clause of s. 629 had nothing to do with the present case, as this was a second application for reviewing the decree.

Dr. *Rash Behari Ghose* for the opposite party contended that it was never the intention of the Legislature that there should be more than one review, and that the last para of s. 629 covered the present case. He referred to s. 623, and argued that the words "a review," meant only one review. He also cited and relied on the case of *Vencama Shetty* v. *Pamoo Shetty* (2).

JUDGMENT.

The judgment of the High Court (Norris and Ghose, JJ.) was delivered by Norris, J., who after setting out the facts continued as follows:—

The rule has been argued before us to-day, Dr. *Rash Behari Ghose* showing cause against it, and Baboo *Uma Kali Mookerjee* appearing in support of it. In support of the rule reliance has been placed upon a Full Bench decision in the case of *Nasiruddin Khan* v. *Indronarayan Chowdhry* (1). That was a decision upon s. 378 of the old Code of Civil Procedure, the corresponding section to s. 629 of the present Code. In showing cause Dr. *Rash Behari Ghose* has urged that the reasons which led the Judges who were in a majority in the Full Bench case to put the interpretation they did upon the word "final" do not operate for giving the word the same meaning now, because [435] s. 629 of the present Code is drawn in an entirely different manner from s. 378 of the old Code, and has created a considerable alteration in the law. Dr. *Rash Behari Ghose* further urges that the last paragraph of s. 629 was really introduced to meet the point which has now arisen; he argues that the words "no application to review an order passed on review or on an application for a review shall be entertained" are tantamount to saying, "No second application for review shall be made." The learned Vakil's third argument is based upon the use of the article "a" before the words "review of judgment" in s. 623, which is the first section of the present Code which deals with reviews of judgments. Dr. *Rash Behari Ghose* says that "an" application for a review means only one application for review, not more than one; and he refers to the case of *Vencama Shetty* v. *Pamoo Shetty* (2).

(1) B.L.R. Sup. Vol. 367. (2) 5 M.H.C. 323.

We have considered these arguments and the cases cited, and are of opinion that the word "final" in s. 629 bears the same meaning, and ought to have the same construction put upon it, as the word "final" in s. 378 of the old Code. We are also of opinion that we must gather the intention of the Legislature from the words they have used. It is impossible to say what was passing in their minds. It seems to us that if they intended to prohibit a second application for review they would have, and could have, said so in precise words. They would have said, "No second application for a review shall be entertained." We do not think that the words "no application to review an order passed on review or on an application for a review shall be entertained" are wide enough to bar a person in the position of the present defendant from making a second application for a review.

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It is to be noted further that this is a Procedure Code, and the widest possible construction should be put upon Codes of Procedure as distinguished from substantive law. It is also to be observed that this is not an application to review an order passed on review, or to review an order passed on an application for a review. The defendant's case is that the first application for a review was properly rejected. He does not ask to review [436] that order. He asks simply to make a second application to have the original judgment reviewed upon new materials.

Under these circumstances we think that the application is one which ought to be entertained.

The rule will be made absolute with costs.

H. T. H. *Rule made absolute.*

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15 C. 436.

CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt. Chief Justice and Mr. Justice Tottenham.

KHOSHDEB BISWAS (*Plaintiff*) v. SATAR MONDOL AND OTHERS (*Defendants*).* [26th March, 1888.]

Transfer of Property Act (IV of 1882), *s.* 135—*Actionable claim—Transfer of a claim for an amount less than its value—Recovery of full amount of debt.*

Section 135 of the Transfer of Property Act does not protect a defendant from payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim, where the money is recovered by suit after a contest as to the liability of the defendant.

Grish Chandra v. *Kashisauri Debi* (1) followed.

[Diss., 13 A. 102 (107); 13 M. 225 (**F.B.**); 5 C.P.L.R. 13; **F.**, 18 C. 510 (513); 23 C. 713; **Appr.**, 19 B. 290 (292); 21 C. 568 (**F.B.**)]

ONE Khoshdeb Biswas, on the 12th Srabun 1294, purchased for Rs. 100 from one Mothura Nath Dutt a Kistibundi under which a sum of Rs. 156 was due, and subsequently sued the executants of the kistibundi and the transferer for Rs. 156 due thereunder, plus a further sum for interest which had accrued due since his purchase and the cost of the transfer.

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* Civil Reference No. 2A of 1888 made by Baboo Juggobundhoo Gangooly, Judge of the Small Cause Court, Jessore, dated the 24th of January 1888.

(1) 13 C. 145.

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The defendants amongst other matters contended that the plaintiff was not entitled, under s. 135 of the Transfer of Property Act, to recover more than the Rs. 100 which was the consideration for the transfer.

The Judge of the Court of Small Causes at Jessore, on the authority of *Grish Chandra* v. *Kashisauri Debi* (1), held that the plaintiff was entitled to recover the whole amount sued for, but having regard to the decision of *Jani Begum* v. *Jahangir Khan* (2) [437] made his judgment contingent on the opinion of the High Court on the question whether, under s. 135 of the Transfer of Property Act, the plaintiff could recover the whole amount due under the kistibundi.

No one appeared on the reference.

The opinion of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was as follows:—

OPINION.

In this case we are of opinion that the plaintiff can recover the whole amount due on the bond, notwithstanding s. 135 of the Transfer of Property Act. We agree with the decision of this Court in *Grish Chandra* v. *Kashisauri Debi* (1), that the section does not apply where the money is recovered by suit after a contest as to the liability of the defendant. We think, however, that if the money paid by the plaintiff for the claim, with interest and expenses, were paid into Court immediately on the suit being brought, that would be a payment within the meaning of the section, and would release the defendant from further liability.

T. A. P. *Decree affirmed.*

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15 C. 437=12 Ind. Jur. 460.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

ROOP LALL DASS AND ANOTHER (*Decree-holders*) v. BEKANI MEAH (*Judgment-debtor*).

MOHINEE MOHUN ROY AND ANOTHER (*Decree-holders*) v. BEKANI MEAH (*Judgment-debtor*).* [24th January, 1888.]

Appeal—Attachment—Objection to attachment by judgment-debtor on behalf of others—Order against decree-holder—Civil Procedure Code (Act XIV of 1882), ss. 244, 278, 279, 280, 281, 282, 283.

Where a judgment-debtor claims property which is the subject-matter of attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which capacity he has been sued, the question between him and the attaching creditor is properly one between the parties to the suit under s. 244 of the Code of Civil Procedure. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, [438] the order passed thereon must be regarded as an order under s. 280 of the Code, and the only mode in which that order can be contested is in a regular suit as provided by s. 283.

In execution of a decree against a judgment-debtor in his private capacity the judgment-creditor attached certain property. Thereupon the judgment-debtor objected that the property attached had been dedicated by him some tiime previous as *wakf* under a registered *wakfnamah*, and that he was only in possession as *mutwali* under the deed. The lower Court found that the document created a valid *wakf* and allowed the objection and released the property from attachment. The judgment-creditor appealed. At the hearing of the appeal it was

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* Appeal from Orders Nos. 134 and 164 of 1887, against the orders of Baboo Beni Madhab Mitter, First Subordinate Judge of Dacca, dated the 14th of March, 1887.

(1) 13 C. 145. (2) 9 A. 476.

contended that no appeal lay, inasmuch as the order was one under s. 280 of the Civil Procedure Code. On behalf of the judgment-creditor it was contended that the order was one under s. 244 and was thus appealable. **1888** JAN. 24.

Held, that the order was under s. 280 and that no appeal lay, the remedy of the judgment-creditor being by way of a regular suit as provided by s. 283. APPELLATE CIVIL.

[**F.**, 12 Ind. Cas. 411; **Appl.**, 12 A. 73 (78)=10 A.W.N. 13; **R.**, 12 A. 313 (326) (**F.B.**); 19 B. 328 (330); 23 B. 237 (242); 23 M. 195 (**F.B.**); 6 C.W.N. 63 (65); 1 O.C. Sup. 11 (12); 39 C. 298=14 C.L.J. 425=16 C.W.N. 26=12 Ind. Cas. 163; **D.**, 16 C. 603 (607).] 15 C. 437 = 12 Ind. Jur. 460.

THESE were two appeals from an order of the First Subordinate Judge of Dacca under the following circumstances. Certain properties alleged to belong to Haji Bekani Meah, the judgment-debtor, having been attached, he preferred an objection to the attachment, alleging that the properties which had formerly belonged to him had been made *wakf* on the 4th Aghran 1281 by a registered *wakfnamah* of that date, and that he was in possession of them merely as *mutwali* under the *wakfnamah*, and had no saleable interest therein. In answer to that objection the decree-holders contended that the *wakfnamah* was invalid and merely a deed of family management, and had been executed by the judgment-debtor to defraud his creditors.

Two issues were framed by the Subordinate Judge, the first being on the question as to whether the *wakfnamah* had been executed by the judgment-debtor in order to defraud his creditors, and the second as to whether it constituted a valid *wakf* under the Mahomedan law.

The Subordinate Judge found, that at the time of the execution of the document, the judgment-debtor was only indebted in the sum of Rs. 1,400 or thereabout, and that he was possessed of properties other than those dedicated, which were more than sufficient to cover such debts, and that therefore, it could not be [**439**] said that the document was executed with a view to defraud his creditors; and upon the second issue he found that the *wakfnamah* was valid under the Mahomedan law.

He accordingly allowed the objection and released the properties from attachment.

Against that order the decree-holders preferred these appeals to the High Court, and at the hearing of the appeals a preliminary objection was taken that no appeal lay from the order, inasmuch as it was made under s. 280 of the Code, and that the decree-holders' only remedy was to institute a regular suit in accordance with the provision of s. 283.

Mr. *Woodroffe*, Baboo *Troyluckyo Nath Mitter* and Baboo *Lal Mohun Dass*, for the appellants.

Mr. *Evans*, Baboo *Okhil Chunder Sen*, Baboo *Kashi Kant Sen*, and Moulvie *Seraj-ul-Islam* for the respondent.

Mr. *Evans*.—No appeal lies from the order which was passed under s. 280 of the Civil Procedure Code, the decree-holders' remedy being by way of a regular suit—*Shankar Dial* v. *Amir Haidar* (1); *Nath Mal Dass* v. *Tajammul Hussain* (2). It cannot be said that the order was one passed under s. 244, as the judgment-debtor was sued in his private capacity and not as representing the beneficiaries under the *wakfnamah*, and therefore the decisions in the cases of *Chowdry Wahed Ali* v. *Mussamut Jumaee* (3) and *Ram Ghulam* v. *Hazaru Kuar* (4), which will be relied on by the other side, do not support their contention, the question in this case not being one arising between the parties to the suit. Here it cannot be

(1) 2 A. 752. (2) 7 A. 36.
(3) 11 B.L.R. 159=18 W.R. 185. (4) 7 A. 547.

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said that the judgment-debtor represented the beneficiaries, as their interest conflicted with his, and therefore s. 437 of the Code could not properly be applied to this case (see the decisions referred to by Mr. O'Kinealy in his notes to that section).

Bahori Lal v. *Gauri Sahai* (1) and *Nimba Harishet* v. *Sitaram Paraji* (2) are also authorities in my favour, and [**440**] there is nothing in those cases which really goes against the direct decisions of the Allahabad High Court. Here the *wakfnamah* is a dedication for the benefit of the settlers' children with an ultimate trust for the poor, and therefore the Advocate-General would also be entitled to appear—*Fatmabibi* v. *The Advocate-General of Bombay* (3). This affords an additional reason for holding that the order must be taken to be one under s. 280, and that therefore under s. 283 no appeal lies.

Mr. *Woodroffe* (for the appellants). The whole of Mr. *Evans'* argument is based on the supposition that his client is a bare trustee, and that upon the true construction of the deed he is not entitled to any interest in the property; but under the deed he has a life interest and that is attachable. The order was one between the parties to the suit relating to the execution of the decree and was therefore an order under s. 244. Such on order amounts to a " decree " as defined in s. 3, and an appeal therefore lies under s. 540. Under these circumstances, no separate suit would lie. The " party " referred to in s. 283 can only refer to a third party who may have preferred a claim or objection of the nature indicated in ss. 278—282, which do not refer to any questions raised between the parties to the suit. Further, the word " conclusive " in s. 283 does not mean that no appeal will lie against the order. In s. 246 of Act VIII of 1859, which was the corresponding section, the words used were " shall not be open to appeal," and that was held not to include a review—*Cochrane* v. *Heera Lal Seal* (4). Upon this point I rely on the decision in *Manjunath Badrabhat* v. *Venkatesh Govinda Shanbhog* (5) and *Bagubai* v. *Kazi Sayad Nizumuddin* (6). Upon the question as to whether an appeal lies, *Mulmantri* v. *Ashfak Ahmad* (7) is an authority in my favour. Besides, I contend that under s. 437 the judgment-debtor as trustee did represent the beneficiaries, and in addition the Court has always power under s. 26 to add any parties it thinks proper.

Mr. *Woodroffe* also referred to the following cases in support [**441**] of his argument: *Nimaye Churn Puteetundee* v. *Jogendro Nath Banerjee* (8); *Ameeroonnissa Khatoon* v. *Meer Mahomed Mozuffar Hossein Chowdhry* (9); *Kuriyali* v. *Mayan* (10); *Rahiman Khan Samoji Sahib* v. *Patcha Miyah* (11); *Arundadhi Ammyar* v. *Natesha Ayyar* (12); *Nimba Harishet* v. *Sitaram Paraji* (2); *Amrutlal Kalidas* v. *Shaik Hussein Mahomed Ebrahim* (13) and *Hamid Bakhut Mozumdar* v. *Baktear Chand Mahto* (14); and contended that, even if no appeal lay, the Court had power to interfere under s. 622.

Mr. *Evans* in reply.—In *Mulmantri* v. *Ashfak Ahmad* (7) the judgment-debtors objected that the property attached was their own private property, so that case is clearly distinguishable from the present; and the remarks of the Chief Justice must be read as limited to the facts of the case before him. There was no question raised there as to what would

(1) 8 A. 626. (2) 9 B. 458. (3) 6 B. 42. (4) 7 W.R. 79. (5) 6 B. 54. (6) 6 B.H.C. 205. (7) 9 A. 605. (8) 24 W.R. 365. (9) 20 W.R. 280. (10) 7 M. 255. (11) 4 M. 285. (12) 5 M. 391. (13) 11 B. 492. (14) 14 C. 617.

have been the position of a trustee. In *Nath Mal Dass* v. *Tajammul Hussain* (1) the distinction was expressly drawn.

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Mr. *Evans* was then stopped by the Court.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

These are appeals from an order of the First Subordinate Judge of Dacca under s. 280 of the Code of Civil Procedure, releasing from attachment certain property of the judgment-debtor on the ground that the property in question was *wakf* property, and that the judgment-debtor was merely in possession of it as a trustee.

A preliminary objection has been raised that no appeal lies from an order under s. 280 of the Code, and that the decree-holders' proper course, if dissatisfied with that order, was to institute a regular suit in accordance with the provisions of s. 283.

On the other hand it is contended for the decree-holder that this was an order between the parties to the suit relating to the [442] execution of the decree, and was therefore an order under s. 244 of the Code; that under the definition of " decree " in s. 3 of the Code the order in question was a " decree " from which an appeal lies under s. 540; and that under s. 244 no separate suit will lie.

For the respondent Mr. *Evans* argues that, this being a claim or objection set up by the judgment-debtor on behalf of third parties—that is to say, the beneficiaries under the *uakfnamah*—the order was an order properly made under s. 280 of the Code, and that by s. 283 that order is conclusive between the parties subject to the result of any suit that may be brought under the provisions of that section.

On the other hand, Mr. *Woodroffe*, for the decree-holder, appellant, contends that the " party " spoken of in s. 283 means a third party who may have preferred a claim or objection; that the provisions of ss. 278 to 283 do not refer to questions raised between the parties to the suit, which are questions to be decided under s. 244 of the Code; and that such decisions are appealable under s. 3. And further that, even assuming that s. 283 will apply to an order made against the judgment-debtor the word " conclusive " does not necessarily mean that no appeal will lie against such order.

It appears that this question has been before the Courts on several previous occasions, and we think that the various cases which have been cited before us indicate very clearly the proper principle upon which it should be decided. That principle appears to be this, that where the judgment-debtor claims the property which is the subject of the attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which representative capacity he has been sued, the question is properly one between the parties to the suit under s. 244. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, the order made must be regarded as an order under s. 280, and the only mode in which that order can be contested is in a regular suit as provided by s. 283.

We are of opinion that this view of the law is not inconsistent with the sections of the Code (278-283) which treat of [443] this matter. When a claim or objection is preferred to property which has been attached, the

(1) 7 A. 36.

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investigation which is to be made under those sections is an enquiry as to whether the property is liable to attachment. By s. 279 the claimant or objector is required to show that at the date of attachment he had some interest in, or was possessed of, the property. Then ss. 280 and 281 proceed to lay down the principles upon which the Court is to decide whether or not property is liable to attachment. Section 280 says that if upon such investigation the Court finds that the property (1) was not when attached (*a*) in the possession of the judgment-debtor, (*b*) or of some person in trust for him, (*c*) or in the occupancy of a tenant or other person paying rent to him; or that (2) being in the possession of the judgment-debtor it was in his possession (*i*) not on his own account or as his own property, but on account of and in trust for some other person; or (*ii*) partly on his own account, and partly on account of some other person, the Court shall pass an order releasing the property wholly, or to such extent as it thinks fit, from attachment.

If, on the other hand, the Court is satisfied that the property was at the date of the attachment (*a*) in the possession of the judgment-debtor as his own property, and not on account of any other person; or (*b*) in the possession of some other person in trust for the judgment-debtor; or (*c*) in the occupation of a tenant or other person paying rent to the judgment-debtor, s. 281 says that the Court shall disallow the claim.

Section 282 deals with the case of a claimant or objector who has a mortgage or other lien upon the property. And then s. 283 gives the "party" against whom an order may be made under the three previous sections a right of suit to establish his claim, but subject to such suit, declares that the order made under those sections shall be conclusive.

It is clear that the sections are wide enough to include, and in fact do contemplate, objections raised by the judgment-debtor as well as by third parties who may claim to be possessed of, or to have an interest in, the property. But we think that any objection raised by the judgment-debtor, in order to come within the purview of these sections, must be an objection in [**444**] the interests of third parties—that is to say, an objection that he is merely holding possession of the property in trust for third parties who are not before the Court, and whose rights cannot therefore be properly and finally adjudicated upon in the execution proceedings. If the objection is raised by the judgment-debtor in his own behalf or in a representative capacity in which he has been sued, it is a question between the parties to the suit which may properly, and which the law says shall, be decided in the execution proceedings, and not by a separate suit. The object of this provision of the law is apparently to prevent needless litigation; and the test, as to whether the order made upon the objection falls within section 244 or not appears to depend on whether or not all the necessary parties are before the Court. If they are before the Court, there is no reason why the Court should not finally adjudicate upon the matter in issue. If they are not before the Court, the Court is to make a summary order for the purpose of the execution proceedings, leaving the parties free to contest the matter further, if necessary, in a regular suit to which all persons interested could be made parties.

We think that on examination all or nearly all of the decided cases will be found to be in accordance with this principle. The decision of the Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jamaee* (1) established

(1) 11 B.L.R. 149=18 W.R.185.

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the proposition that where a decree was properly passed against a person in a representative capacity, that person was a party to the suit with respect to any question that might arise relating to the execution of the decree, and that any such question should be decided in the execution proceedings and not by separate suit. That decision was expressly followed in *Ameeroonnissa Khatoon* v. *Meer Mahomed Mozuffur Hossein Chowdhry* (1); in *Ram Ghulam* v. *Hazaru Kuar* (2); in *Nimba Harishet* v. *Sitaram Paraji* (3); in *Arundadhi Ammyar* v. *Natesha Ayyar* (4); and in *Kuriyali* v. *Mayan* (5). Similarly, in *Rahiman Khan Samoji Sahib* v. *Patcha Miyah* (6), [**445**] it was held that the representatives of one of the defendants were parties to the suit, and any question raised by them relating to the execution of the decree should be heard and determined by the Court executing the decree and not by regular suit. It is true that a somewhat contrary view was taken in the case of *Abdul Rahman* v. *Muhammad Yar* (7); and in that of *Awadh Kuari* v. *Raktu Tiwari* (8); but those cases do not seem to have been fully argued, and the decisions are distinctly opposed to the proposition laid down by the Privy Council in *Wahed Ali's* case.

In the case of *Mulmantri* v. *Ashfak Ahmad* (9) the objection was preferred by the judgment-debtors who claimed the property in their own right, and not as the representatives of the obligor under the bond in which capacity they were sued. It was held, in accordance with the principle laid down in *Wahed Ali's* case, that the question was one under s. 244 of the Code and that an appeal would lie.

On the other hand, it has been held in several cases in which the judgment-debtor claimed to be holding the property in trust, or on behalf of third parties who were not before the Court, that the order made was final, and could only be contested in a regular suit. Some of these cases were almost on all fours with the present. In *Nimaye Churn Puttetundee* v. *Jogendro Nath Banerjee* (10), in *Shankar Dial* v. *Amir Haidar* (11), and in *Nath Mal Das* v. *Tajammul Hussain* (12), the objection was that the judgment-debtor was holding the property on account of an endowment. In *Bahori Lal* v. *Gauri Sahai* (13) the objection seems to have been made by a person who was no party to the suit; and it was held that the mere fact that her legal representative was also the representative of the judgment-debtor was not sufficient to bring the case within s. 244.

In the present case, the judgment-debtor claims to hold the property which is sought to be attached as a trustee for third parties, and, following the decisions already referred to, we are [**446**] of opinion that the decision of the Subordinate Judge that he was so holding the property was a decision under s. 280 and not under s. 244. That being so, we think that under s. 283 no appeal lies against that decision.

These appeals are accordingly dismissed with costs.

H. T. H. *Appeals dismissed.*

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(1) 20 W.R. 280. (2) 7 A. 547. (3) 9 B. 458. (4) 5 M. 391.
(5) 7 M. 255. (6) 4 M. 285. (7) 4 A. 190. (8) 6 A. 109.
(9) 9 A. 605. (10) 21 W.R. 365. (11) 2 A. 752.
(12) 7 A. 36. (13) 8 A. 626.

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FEB. 8.

CIVIL RULE.

15 C. 446.

15 C. 446.

CIVIL RULE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

KRISHNA MOHINI DOSSEE (*Petitioner*) v. KEDARNATH CHUCKERBUTTY AND ANOTHER (*Opposite Parties*). [8th February, 1888.]

Execution of decree—Civil Procedure Code (Act XIV of 1882), *ss.* 232, 612—Assignee *of decree, Execution by—Cross-decrees—Discretionary power of Court under s* 232 *of Act XIV of* 1882.

The discretion given to a Court under s. 232 of the Code of Civil Procedure as to allowing execution of decrees by assignees must be exercised reasonably. The mere fact of the existence of a cross claim against the assignor of a decree by his judgment-debtor is no reason for refusing issue of execution on the application of the assignee.

Section 622 of the Code is one of very limited operation; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions.

Amir Hassan Khan v. *Sheo Baksh Singh* (1) followed.

[F., L.B.R. (1893—1900), 548 (549); Cons., 2 L.B.R. 333 (335); R., 9 Bom. L.R. 728 (729)=31 B. 462; 4 N.L.R. 184.]

ON the 30th June 1883 one Amsal Barkhat obtained a money decree against Kedarnath Chuckerbutty and Troylokonath Chuckerbutty in the Court of the Subordinate Judge of Bhagulpore. The decree-holder on several occasions took out execution of this decree, and there remaining after such issue of execution a sum of Rs. 4,379 still due and owing under the said decree, the decree-holder assigned the unrealized portion thereof to one Krishna Mohini Dossee for valuable consideration by a registered conveyance dated the 29th June 1886.

[447] On the 23rd March 1887 the judgment-debtors obtained a cross-decree against Amsal Barkhat for possession of certain immoveable property, and for mesne profits, the decree directing a future enquiry as to the amount of mesne profits actually due to the judgment-debtors. On the 30th March 1887 Kristo Mohini Dossee, at a time when the amount due as mesne profits was as yet unascertained, applied to the Court under s. 232 of the Code of Civil Procedure for execution of the decree assigned to her. The Subordinate Judge refused the application, leaving the application to establish her right, if any, by regular suit, holding that under s. 232 of the Code it was discretionary in the Court to allow an assignee to take out execution, and that the fact that the judgment-debtors were the holders of a cross-decree against the original decree-holder was a sufficient reason justifying him, when exercising such discretion, in refusing the application.

On the 8th June 1887 the assignee obtained a rule calling upon the original judgment-debtors to show cause why the order of the Subordinate Judge should not be set aside, and why execution should not be proceeded with.

At the hearing of this rule, Mr. *O. C. Mullick* and Baboo *Navadip Chunder Roy* appeared to show cause, and Mr. *Woodroffe*, Baboo *Troilokyanath Mitter*, and Baboo *Saroda Churn Mitra* in support of the rule.

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* Motion on Miscellaneous Case No. 113 of 1887 against the order of the Subordinate Judge of Bhagulpore, dated the 29th June 1887.

(1) 11 C. 6.

Mr. *O. C. Mullick*, after submitting that the Judge had exercised his discretion rightly in refusing to allow execution, contended that the order made by the Judge was not capable of revision under s. 622 of the Code of Civil Procedure, inasmuch as in deciding the case he had exercised a jurisdiction vested in him by law; and submitted that the case fell within the rule laid down by the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) and within the cases of *Tej Ram* v. *Harsukh* (2); *Magni Ram* v. *Jiwa Lal* (3); *Luckhykant Bose, In the matter of* (4); and *Rabbaba Khanum* v. *Noorjehan Begum* (5).

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Mr. *Woodroffe* contended that the High Court of Calcutta in *Sew Bux Bogla* v. *Shib Chunder Sen* (6) had decided that the [448] Privy Council had included in s. 622 questions relating to the exercise of the jurisdiction of the Court, and that in this case the Subordinate Judge had decided wrongly in refusing, in the exercise of his descretion, to allow the assignee to execute this decree; and cited *Jugobundhu Pattuck* v. *Jadu Ghose* (7).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

PETHERAM, C.J.,—This rule comes before this Court for the purpose of our revising an order of the Subordinate Judge of Bhagulpore, refusing to allow the assignee of a decree to execute the decree in her own name. The facts of the case appear to be that the decree was obtained some time ago, and was partially executed; but a considerable amount of the decree still remained to be realized when the decree-holder assigned the decree for valuable consideration to the person who has now petitioned the Subordinate Judge for execution. Upon the hearing of that application, it appeared that the judgment-debtor had obtained against the decree-holder who had assigned to the petitioner a decree for the recovery of certain immoveable property, and had also obtained an order that an enquiry should be made with the view of ascertaining what, if any, mesne profits were due from the decree-holder to the judgment-debtor, and upon that state of things the Subordinate Judge, acting under s. 232 of the Code of Civil Procedure, refused, as we have said before, to allow the assignee to execute the decree, because he considered that it would be unfair and inequitable that he should do so by reason of the cross-claims existing between the decree-holder and the judgment-debtor.

We think that he was wrong in the conclusion at which he arrived, and we think that under the circumstances the assignee ought to have been allowed to execute the decree in her own name.

The discretion given to Judges as to allowing execution of decrees by assignees is a discretion which must be exercised reasonably, and it is perfectly clear that, unless there is a reasonable cause for refusing the assignee to issue out execution in his own name, the Judge ought not to exercise his discretion in [449] that way and refuse to allow execution to proceed in the assignee's name; and we do not think that the mere existence of an order that an enquiry shall take place to ascertain whether anything is or is not due from the decree-holder to the judgment-debtor is any reason whatever for such refusal. We do not say any reasonable excuse, but we do not think it is any reason that ought to induce

(1) 11 C. 6. (2) 1 A. 101. (3) 7 A. 336. (4) 1 C. 180.
(5) 13 C. 90. (6) 13 C. 225. (7) 15 C. 47.

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the Subordinate Judge to refuse to allow the decree to be executed in the name of the assignee; and consequently, we are of opinion that, both as a matter of discretion and as a matter of law, the Judge was wrong in the view that he took, and that he ought to have allowed execution to go in the name of the assignee.

But then comes a very different and more difficult question, and that is the question whether this order can be revised by the Court under s. 622 of the Code of Civil Procedure. This is a section which has been a good deal enquired into.

In our opinion it is a section of very limited operation. What the section says is that the High Court may revise a decision of the Court by which the case was decided if the Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Now, it seems to us, that the meaning of this section is that, whenever a Court has jurisdiction to decide a question whether it is a question of law or a question of fact, its decision on that question is not revisable by this Court.

Unless it is a matter in which there is an appeal, its decision on that matter is final, and that decision cannot be reviewed by this Court because it is wrong either on the question of law or on the question of fact. It is perfectly clear that in this case the question whether the Subordinate Judge was wrong in not allowing execution to issue in the name of the assignee was a question which he had jurisdiction to decide. It was a matter either of absolute discretion, in which case of course he might act as he thought fit, or it was a matter of discretion controlled by legal principles, in which case it comes to be a question of law, and the Subordinate Judge has decided that question of law, and has decided it in favour of the judgment-debtor. That [450] being so, his decision cannot, in our opinion, be revised by the Court under s. 622 of the Code, notwithstanding the fact that, in our opinion, the conclusion he came to on the question of law is erroneous.

In this particular case we do not see that any injustice is likely to arise, because, so far as we can ascertain, there is no reason why this application by the assignee should not be repeated, and if the application is repeated, and is accompanied, as no doubt it will be, with a note or report of the views expressed by this Court, in all probability justice will be done in this matter and no hardship will be done in this case.

In our opinion the view which we have expressed of the meaning of s. 622 of the Code is in accordance with the view which has been taken of it by the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1).

In the result the rule will be discharged with costs.

T. A. P. *Rule discharged.*

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(1) 11 C. 6.

1888
FEB. 2.

APPELLATE CIVIL.

15 C. 450.

15 C. 450.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

CHUNDER KISHORE DEY *alias* MUKHORI DEY (*Defendant No.* 1) *v.* RAJ KISHORE MOZUMDAR AND OTHERS (*Plaintiffs*).*
[2nd February, 1888.]

Bengal Tenancy Act (VIII of 1885), *s.* 184, *and sch. III, part I, art.* 3*—Occupancy Raiyat—Suit—Limitation.*

The suit mentioned in s. 184 and sch. III, part I, art, 3 of the Bengal Tenancy Act, 1885, means a suit by an occupancy raiyat as such, that is, an occupancy raiyat claiming a right of occupancy as against his landlord.

[**R.**, 3 C.W.N. 499; 15 C.P.L.R. 125 (127); **D.**, 24 C. 40 (43).]

RAJ KISHORE MOZUMDAR, Krishna Kishore Mozumdar and Bhobani Kishore Mozumdar, three brothers, brought this suit against Chunder Kishore Dey and three others in the Court of the Second Munsif of Hosenpore to recover possession of eight plots of land as tenants having a right of occupancy under certain proprietors, alleging that they had been dispossessed by the [**451**] defendants in Magh 1289 (January 1883), and Bysack 1290 (April 1883).

The defendant Chunder Kishore Dey, who alone appeared, stated that plot No. 1 was potit land and plots Nos. 2 to 4 were khamar lands of the proprietors; that the former had been let to him and the other defendants in Kartick 1289 (October 1882), and that the latter were in the possession of the proprietors themselves. As to plots Nos. 5 to 8, he stated that they were his jote lands and had been in his possession for a very long time.

The plea of limitation was raised at the trial.

The Munsif found that, though the proprietors were not parties to the suit, they had virtually dispossessed the plaintiffs; and held that, as the suit had not been brought within two years from the date of dispossession, it was barred by limitation under sch. III, part 1, art. 3 of Act VIII of 1885. He therefore dismissed the suit.

The plaintiffs appealed to the Subordinate Judge, who held that sch. III, part 1, art. 3, Act VIII of 1885, did not govern the case, and that it was not barred by limitation. He also found that the plaintiffs had been wrongfully dispossessed by the defendants, and therefore decreed the appeal.

The defendant Chunder Kishore Dey appealed to the High Court.

Baboo *Jogesh Chunder Roy*, for the appellant.

Baboo *Dwarkanath Chuckerbati*, for the respondents.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

We think that the view of the law taken by the lower Court is correct. Section 184 of the Bengal Tenancy Act says that the suits, appeals and applications specified in sch. III annexed to the Act shall be instituted

* Appeal from Appellate Decree No. 1257 of 1887 against the decree of Baboo Hemango Chunder Bose Subordinate Judge of Mymensingh, dated the 23rd of March 1887, reversing the decree of Baboo Rojoni Kanth Mukerjee, Munsif of Hosenpore, dated the 17th of November 1886.

1888 FEB. 2. — APPELLATE CIVIL. — 15 C. 450.

and made within the times prescribed in that schedule; and then sch. III, art. 3, mentions suits "to recover possession of land claimed by the plaintiff as an occupancy raiyat," and gives two years as the time of limitation. These words occurring in a Tenancy Act, [452] the object of which is stated to be to amend and consolidate certain enactments relating to the law of Landlord and Tenant, naturally mean a suit by an occupancy raiyat as such, that is, an occupancy raiyat claiming a right of occupancy as against his landlord.

The result is that the appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

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15 C. 452.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

QUEEN-EMPRESS *v.* RAMDHANI PASSI.* [28th February, 1888.]

The Cantonments Act (III of 1880), s. 14—Bengal Excise Act (Bengal Act VII of 1878), ss. 4 11, 29, 32—Sprituous liquor—Tari—Cantonment Magistrate, Powers of, to cancel license—Revenue authorities.

"Tari" or "toddy" is "spirituous liquor" within the meaning of s. 14 of Act III of 1880. The words "spirituous lipuor," "wine" and "intoxicating drugs" in that section must be taken in their popular and ordinary meaning.

A Cantonment Magistrate in his judicial capacity has no authority to cancel a license. The power to cancel licenses belongs to the Revenue authorities.

THIS was a reference to the High Court by the Sessions Judge of the 24-Pergunnahs under the provisions of s. 438 of the Code of Criminal Procedure. Ramdhani Passi, who held a license under the Bengal Excise Act of 1878 for the sale of fermented tari or toddy, on the 10th of November 1887 was convicted by the Cantonment Magistrate of Dum-Dum under s. 14 of Act III of 1880 of selling tari to a European soldier. The Magistrate sentenced him to pay a fine of Rs. 50, and directed the cancellation of his license.

The terms of the reference were as follows:—

"The applicant in this case has been convicted of selling toddy to a European soldier under s. 14, Act III of 1880, and has been sentenced to pay a fine of Rs. 50. It does not appear [453] from the papers whether the tari sold was fermented or unfermented, but the dealer appears to hold a license for the sale of fermented toddy, and it is reasonable to suppose that he sold the article in which he dealt, *viz.*, fermented toddy.

"Act III of 1880 prohibits the sale of three articles to European soldiers, *viz.*, spirituous liquor, intoxicating drugs and wine. Fermented toddy clearly is neither spirituous liquor nor an intoxicating drug. The question is whether it is "wine." Wine is an intoxicating liquor obtained by fermentation, and toddy answers this description; the applicant's pleader says that wine is an intoxicating liquor fermented from the juice of grapes; but if it be necessary to prove that the wine sold to a soldier was the fermented juice of the grape, it would scarcely ever, I suppose, be possible to obtain a conviction under the Act. Fermented toddy appears

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* Criminal Reference No. 357 of 1887 made by C. B. Garrett, Esq., Sessions Judge of 24-Pergunnahs, dated the 30th of December 1887, against the order passed by W. Hopkinson, Esq., Cantonment Magistrate of Dum-Dum, dated the 10th of November 1887.

to be wine, as that liquor is strictly defined, and if so, the conviction would appear to be right. It is, however, certainly a matter of doubt, and I think I ought, as requested by the applicant, to lay the matter before the High Court for orders."

1888 FEB. 28. — CRIMINAL REFERENCE. — 15 C. 452.

Baboo *Obhoy Churn Bose*, for the petitioner.—The conviction must be set aside. Section 14 of Act III of 1880 prohibits the sale of spirituous liquors, wines and intoxicating drugs to European soldiers, but not tari. The intention of the Legislature is not to forbid the sale of all excisable articles, but only two, namely, spirituous liquors and intoxicating drugs; because if such was its intention the words "fermented liquor," which includes tari, would have been used. Spirituous liquors, fermented liquors, and intoxicating drugs are excisable articles (s. 4 of Bengal Act VII of 1878). Tari is neither a spirituous liquor nor an intoxicating drug. It is not wine. Wine, though not defined either in the Bengal Excise Act, 1878, or in the Cantonments Act, 1880, is, no doubt, a fermented liquor, and, therefore, an excisable article; but it does not include tari. Therefore no offence under s. 14 of Act III of 1880 has been committed.

Even if an offence has been committed, the Magistrate has no power to cancel the license. The Collector is the proper person to grant licenses and to cancel them (ss. 11 and 29, Bengal Act VII of 1878).

Mr. *Kilby*, for the Crown.—Spirituous liquor is any liquor with [**454**] alcohol in it, and it is reasonable to say that tari is spirituous liquor within the meaning of s. 14 of Act III of 1880. According to the Bengal Excise Act, 1878, tari is fermented liquor, but that Act has not been incorporated in the Cantonments Act, 1880, which stands by itself. The words "spirituous liquor" must, threfore, be taken in their ordinary meaning and not in any technical sense.

As regards the cancellation of the license, the Magistrate as Magistrate has no power to cancel the license; but he is ex-officio a Superintendent of Excise, and as such has all the powers of a Collector of Excise (s. 32 of Bengal Act VII of 1878), and therefore he could cancel the license.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

Two points have been raised before us in this reference. The conviction is a conviction under s. 14, Act III of 1880, for selling toddy, which it has been found was fermented toddy, to a European soldier within prohibited limits. The first point raised is this: it is said that fermented toddy does not come within the words of s. 14, which forbids the sale of any spirituous liquor wine or intoxicating drug to European soldiers. In many different Acts in this country words of a somewhat similar import to these have been used in a defined and limited sense, such as the words "spirituous liquors," "fermented liquors," "intoxicating liquors." In the Excise Act, for instance, they have been so used. But this is an Act which stands by itself; the Excise Act has nothing to do with it; and we have to read these words as any ordinary person acquainted with the English language and unacquainted with any technical use of such terms would understand them. I do not think there can be the least doubt that the words "spirituous liquor" in the popular sense of the word include an alcoholic liquor of the kind that was sold to the soldier by the petitioner in this case. The first point taken before us therefore fails.

1888 FEB. 28. — CRIMINAL REFERENCE. — 15 C. 452.

The second point is this: as part of his sentence the Cantonment Magistrate has cancelled the license of the person convicted. We have nothing to do of course with the action of the Cantonment Magistrate, except in so far as he acts as a judicial officer, [455] that is to say as a Cantonment Magistrate strictly. In his judicial capacity it appears to us that the Magistrate had no authority to cancel this license, the power to cancel licenses belonging to the revenue authorities. It may be that the same officer may also be vested with powers as a revenue officer, and he may as such have authority to cancel the license; but there is nothing before us to show whether that is so or not.

The only course, therefore, is for us to set aside so much of the judicial sentence of the Cantonment Magistrate as cancelled the license upon this narrow ground, that as a judicial officer he had no power to cancel that license. If it be that the same gentleman or any other revenue officer has the power to cancel the license, nothing that we have said or could say would interfere with their power of doing so now. Nor is there, in our decision, anything which can tend to affect the discretion of any revenue officer in dealing with the question whether this license should be cancelled or not.

C. D. P. *Conviction upheld.*

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15 C. 455.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

QUEEN-EMPRESS ON THE PROSECUTION OF PALAKDHARI MAHTON AND OTHERS *v.* GAYITRI PROSUNNO GHOSAL.*
[20th February, 1888.]

Bail--Illegal Practice—Police Officer—Court, Duty of—Criminal Procedure Code (Act X of 1882), ss. 344, 526, 526A.

The practice of leaving to the Police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself and not with the Police.

M, the complainant, on the 19th November 1887, made an application to the Deputy Magistrate, under s. 526A of the Criminal Procedure Code, for the postponement of his case against *G* to enable him to apply to the High Court under s. 526 for a transfer of the case from the file of the Deputy Magistrate to that of another officer. On the same date the Deputy Magistrate refused the application, and proceeded with the case, acquitting *G*.

[456] *Held,* having regard to the words "the Court shall exercise, &c.," in s. 526A. the order of the Deputy Magistrate of the 19th November refusing to grant the application was illegal.

[F., 29 C. 211 (214)=6 C.W.N. 251; 24 P.L.R. 1904; 33 C. 1183=10 C.W.N. 793=3 C.L.J. 637 (644); 3 S.L.R. 155=4 Ind. Cas. 379; **Expl.,** 19 M. 375 (378)=2 Weir 682; **R.,** 6 C.W.N. 717; **D.,** 31 C. 715 (718).]

[456] THIS was a reference to the High Court by the Sessions Judge of Sarun under s. 438 of the Criminal Procedure Code and Rule 34 of the

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* Criminal Reference No. 360 of 1887 made by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 22nd of December 1887, against the order passed by Baboo Ram Anugraha Narain Singh, Deputy Magistrate of Chupra, dated the 21st of November 1887.

Circular Orders (Criminal) of the High Court. The terms of the reference were as follows:— 1888 FEB. 20.

"On the 16th November 1887 one Palakdhari Mahton and others complained to the District Magistrate that the Court Sub-Inspector Gayitri Prosunno Ghosal had attempted to obtain from them an illegal gratification in regard to bail tendered by them on behalf of Bidya Mahton and others, then under trial for certain offences before the Deputy Magistrate of Chupra. The complaint was made over on the same date by the District Magistrate to Mr. Martin, Deputy Magistrate, for enquiry; and subsequently on the 18th idem the District Magistrate transferred it to the file of Baboo Ram Anugraha Narain Singh, Deputy Magistrate, for reasons recorded in the order sheet. CRIMINAL REFERENCE. 15 C. 455.

"On the 19th November the complainant Palakdhari petitioned the Deputy Magistrate under s. 526-A of the Criminal Procedure Code to adjourn the hearing of his case against the Court Sub-Inspector, to enable him to make an application to the High Court under s. 526 of the Criminal Procedure Code to transfer the case to the file of another Magistrate; and on the same date the Deputy Magistrate refused this application for reasons recorded thereon, and proceeded with the trial; and on the 21st November 1887 he acquitted the accused Gayitri Prosunno Ghosal.

"Subsequently Gayitri Prosunno Ghosal applied to the Deputy Magistrate under s. 195 of the Criminal Procedure Code for sanction to prosecute Palakdhari and one Malang Meah (a witness for Palakdhari) under ss. 211 and 193 of the Penal Code, and sanction was accordingly granted and a rule was also issued on certain other persons to show cause why they should not be prosecuted for abetment under ss. 211 and 109 of the Penal Code.

"It is now urged before me among other points that the Deputy Magistrate acted illegally in refusing to allow the complainant [457] a reasonable time to apply to the High Court under s. 526-A of the Criminal Procedure Code. I think this contention is valid. The language of s. 526-A is imperative; and I think, therefore, the Deputy Magistrate was bound to grant the complainant such a postponement as would afford him a reasonable time to make the application under s. 526 of the Criminal Procedure Code, and this, too, without determining whether the application to him was or was not a *bona fide* one. As his order of the 19th November refusing the application is, in my opinion, illegal, all his subsequent proceedings in continuing to try the case, and his order of sanction under s. 195 of the Criminal Procedure Code, which is based on his judgment in that case, are null and void; and I recommend that these proceedings be set aside, and that the Deputy Magistrate be directed to re-try the case from the point where his action was illegal, *viz.*, his refusal to grant the complainant time under s. 526-A of the Criminal Procedure Code."

Baboo *Ambica Churn Bose* and Baboo *Ashootosh Dey*, for Palakdhari Mahton.

Baboo *Rajendra Nath Bose*, for the opposite party.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

We agree with the Sessions Judge in thinking that in the proceedings in this case there has been such irregularity, and indeed illegality, that they must be set aside from a certain point. What appears is this: Two persons were ordered by the Deputy Magistrate to be discharged on bail,

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and enquiries took place before the Police Sub-Inspector with regard to the bail. There in the first instance, it is necessary to point out what seems to be an impropriety of practice. According to the statement of the Sub-Inspector, it would seem that, under the practice in vogue in that district, the decision as to the sufficiency of bail, when bail has been ordered by the Court, is left to the Police Sub-Inspector. That is clearly contrary to what is intended by the law. If the Court admits a man to bail, it is of course at liberty to call for a report from the Police as to the sufficiency of the bail, but the duty of deciding as to its sufficiency or otherwise is with the Court itself, and not with the Police. If [458] that irregularity had not been allowed to prevail, it seems very likely that the incidents which followed would never have happened. If such duties are irregularly entrusted to the Police, two dangers are likely to arise: first, a Police Officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him, as is alleged in the present case, for the purpose of extortion. On the other hand, the same irregular practice may lead to another evil, only second to the first, namely, the bringing of false charges against Police Officers. If the Police were limited to their proper functions, both these dangers might be diminished, if not wholly avoided. The next thing that happened was that certain persons were tendered as bail, and were rejected by the Police Officer who enquired into the matter. On the 16th of November a complaint was made by two people to the District Magistrate to the effect that the Police Officer in question had endeavoured to extort from them a sum of Rs. 50 before he would accept certain persons as bail..................The order that was made by the District Magistrate is this; he referred it to Mr. Martin, a Deputy Magistrate, for enquiry..................That order was made on the 16th November, on the same day that the complaint was made. Then on the 18th of November there is another order by the District Magistrate, also written on the back of the complaint, *viz.*, "Transferred to the file of Baboo R. A. N. Singh—*vide* order sheet."............The case accordingly having been transferred to the file of the Second Deputy Magistrate, it was called on the 19th of November. On the 19th of November the complainants presented a petition asking for an adjournment sufficient to enable them to apply to this Court for a transfer of the case from that Magistrate to another. That petition was refused in these terms: "It was urged by the opposite party that the present charge has been got up by conspirators, and the complainant is merely a tool in the hands of others; that the consideration of this petition be deferred until after the cross-examination of the complainant. It is urged that the aiders of the complainant by obtaining postponement wish to have time to concoct evidence against the accused. *Ordered*: that the consideration of this petition be deferred until after examination of the complainant."

That was the order made on the 19th, and the complainant [459] was required there and then to go on with his case, and certain witnesses were examined..............Then another order was made, apparently on the same day, as follows: "Consideration resumed after examination of complainant. Without expressing any opinion on the merits of the case at this stage of the proceedings, I find facts have been elicited from the complainant's examination which would tend to show that he is a mere tool in the hands of others, and any postponement will be detrimental to the accused. *Ordered*: that the petition be refused." Accordingly, the complainant's witnesses having been examined on the 19th of November,

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Criminal Reference.

15 C. 455.

the matter was adjourned to the 21st November..................On the 21st of November the complainant put in a petition asking for some time to produce further evidence, and the order upon that application was this: "At the instance of the pleader for the defence the petitioner was asked what were the contents of this petition. The petitioner said in this petition he prays for five or six days' postponement to bring more witnesses, and that this petition also contains a statement that he petitioned the Magistrate-Collector for the examination of his witnesses, and that he wired the High Court for the trial of this case by that Hon'ble Court;" and it was ordered "that the Court does not think it necessary to go into the irrelevant matters alleged to have occurred four months before, which have no bearing on the present case. The prayer of the applicant for six days' postponement to examine fresh witnesses for prosecution is untenable, as he closed his case on 19th instant, and said that he had no other witnesses to examine. Application refused." On the same day, the 21st, two witnesses for the defence were examined, and then the accused person was acquitted. On the same day an order was made directing proceedings to be taken against the complainants for having made a false complaint..................We agree with the Sessions Judge that on the grounds pointed out by him these proceedings are wholly illegal. Under s. 526-A, added by Act III of 1884 to the Criminal Procedure Code, we think the Sessions Judge is right in saying that the Public Prosecutor, or the complainant or the accused, has the right to notify to the Court before which a case [460] or appeal is pending, before the commencement of the hearing of the case, that he intends to make an application to this Court to transfer the case from one officer to another: and if he does so the words of the section are: "The Court shall exercise the powers of postponement or adjournment given by s. 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal." These words are obligatory; and the refusal to grant the application was illegal, and the whole of the proceedings that followed cannot be supported. The result is that, after hearing those who have appeared on behalf of all parties, the Crown, the complainant, and the accused, we have no hesitation in saying that the order recommended by the Sessions Judge should be made, *viz.*, that the proceedings in this case from the 19th of November, when the application for postponement was made and refused, must be set aside. The whole trial must be begun over again from that point; and of course the order directing the prosecution of the complainants for making a false complaint is set aside also.

Order set aside.

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FULL BENCH.

15 C. 460 (F.B.) =12 Ind. Jur. 425.

15 C. 460 (F.B.)=12 Ind. Jur. 425.

FULL BENCH.

Before Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, Mr. Justice Pigot and Mr. Justice Ghose.

CHUNILAL (*Defendant*) *v.* RAM KISHEN SAHU (*Plaintiff.*)*
[28th March, 1888.]

Specific Relief Act (I of 1877), s. 42—Obstruction to alleged highway—Criminal Procedure Code, Act X of 1882, ss. 133, 137—Parties—Evidence Act, s. 42.

An owner of land has right to bring a suit under s. 42 of the Specific Relief Act against any one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party.

[461] Such a suit is not barred by an order of a Criminal Court under s. 137 of the Criminal Procedure Code.

Khodabuksh Mundul v. *Manglai Mundul* (1) overruled.

[**F.**, 17 B. 293 (299); 6 Ind. Cas. 46; **R.**, 2 L.B.R. 134; 15 C. 564 (574); 17 C.W.N. 73=18 Ind. Cas. 67 (68).]

REFERENCE to a Full Bench made by Mr. Justice TOTTENHAM and Mr. Justice NORRIS.

The facts in this case were that the plaintiff, who was a tenant of a piece of land under the defendant No. 3, had obtained permission from him to build a thatched house on this land; and that defendant No. 1, one Chuni Lall, alleging that the land formed part of a public highway, took proceedings, through his servant, defendant No. 2, before a Magistrate under s. 133 of the Criminal Procedure Code against the plaintiff for obstruction to the alleged highway; that the Magistrate in such proceedings passed an order absolute, under s. 137 of the Criminal Procedure Code, directing the removal of this obstruction; and that the plaintiff thereupon brought a suit against defendants Nos. 1, 2 and 3 practically for the purpose of obtaining a declaration of his right to the land freed from any right of way. The defence to this suit and the decisions of the lower Courts are set out in the order of reference, which was as follows:—

"The plaint in this case alleged that the plaintiff had taken a lease of a small piece of land from the third party defendants, and with their consent had built thereon a thatched house which he used and occupied as a shop; that the first party defendant, through his servant, the second party defendant, had obtained an order from the Sub-Divisional Magistrate for the removal of the house within a month, on the ground that it was as unlawful obstruction to a public way.

"The relief sought was a declaration that the defendants had no right to have the house removed, and, 'on declaration of the right, the plaintiff's possession over the land under claim may be confirmed, and the disputed house may be allowed to stand in its state.'

"Defendant No. 1 pleaded that plaintiff had no right to come into the Civil Court; that the suit ought not to be heard unless the public officials were made parties; that the public had a **[462]** right to the disputed land; and that the decision of the Criminal Court was final and conclusive.

* Full Bench on Special Appeal No. 2498 of 1886, against the decree of Babu Grish Chunder Chatterjee, Second Subordinate Judge of Tirhoot, dated 9th August 1886, affirming the decree of Baboo Gokul Chand, Munsiff of Sitamarhi, dated 27th February 1886.

(1) 14 C. 60.

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"The Munsiff framed the following issues:—

"*First.*—Whether it is necessary to make the criminal authorities party or not?

"*Second.*—Whether the plaintiff's claim is cognizable by the Civil Court or not?

"*Third.*—Whether the plaintiff has continued in possession of the property in suit by lawful authority or not?

"*Fourth.*—Whether the plaintiff is entitled to what he claims?

"The Munsiff on the authority of *Nilkanthapa Nalkapa* v. *The Magistrate of Solapur Taluqa* (1) decided the first issue in favour of the plaintiff; and on the authority of *Raj Koomar Singh* v. *Shahebzada Roy* (2), *Balaram Chatrukalal* v. *Magistrate of Taluqa Igatpuri* (3), and *Makhan Lal Saha* v. *Makan Chora Saha* (4) decided the second issue in favour of the plaintiff. The third issue he also decided in favour of the plaintiff, finding that the disputed land was not a public road; and gave him a decree in terms of the prayer of the plaint.

"The defendant first party appealed and contended that the suit was not cognizable by the Civil Court, and that the Munsiff's decision upon the merits was erroneous.

"The Subordinate Judge 'found as a fact that the land in suit was the private property of the plaintiff as tenant of the *malik*.'

"Upon the question of jurisdiction the Subordinate Judge said: 'The Civil Court has no jurisdiction to set aside the order of the Magistrate, but irrespective of that order it can try the question whether the land which formed the subject of such order is private property and not a thoroughfare or public place—*Mutty Ram Sahoo* v. *Mohi Lall Roy* (5). A *bona fide* question as to whether there ever was a public road in the place in question is raised in this case, and it is for the Civil Courts to decide that question—*Askar Mea* v. *Sabdara* (6). The decree of the Munsiff is substantially correct.'

"On second appeal it was argued that the suit would not lie, [463] and reliance was placed upon the cases of *Rooke* v. *Pearee Lall Coal Co.* (7) and *Khodabuksh Mundul* v. *Monglai Mundul* (8).

"The question is one of considerable importance, and in view of the conflicting decisions of this Court, we refer the question to a Full Bench.

"The questions which we refer to a Full Bench are:—

"*First.*—Will the plaintiff's suit as at present framed lie?

"*Second.*—If plaintiff's suit as at present framed will lie, to what relief is he entitled?

"*Third.*—Will the plaintiff's suit lie if the Secretary of State for India be made a party defendant?

"*Fourth.*—If the plaintiff's suit will lie if the Secretary of State be made a party defendant, to what relief is the plaintiff entitled?"

At the hearing Baboo *Durga Das Dutt* appeared for the appellant.

The suit does not lie; the case of *Baroda Pershad Moostafee* v. *Gora Chand Moostafee* (9) gave a reason for such suit not lying. [GHOSE, J. —Section 132 of the Criminal Procedure no doubt lays down that no suit will lie, but the section which deals with the order being made absolute contains no such restriction.] Under the old law no such suit would

(1) 6 B. 670. (2) 3 C. 20. (3) 6 B. 672. (4) 11 C. 271.
(5) 6 C. 291. (6) 12 C. 137. (7) 11 W.R. 434=3 B.L.R. App. 43.
(8) 14 C. 60. (9) 12 W.R. 160=3 B.L.R.A.C. 295.

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FULL BENCH.

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lie—*Meechoo Chunder Sarcar* v. *Ravenshaw* (1). [WILSON, J.—*The* last paragraph of that judgment was unnecessary for the purposes of that case.] *Rooke* v. *Pearee Lall Coal Co.* (2) is to the same effect; see also *Chinta Monee Bapoollee* v. *Digamber Mitter* (3). The case of *Khodabuksh Mundul* v. *Monglai Mundul* (4) is similar to the present, and therein the case of *Mutty Ram Sahoo* v. *Mohi Lall Roy* (5) was dissented from. With regard to parties, in *Balaram Chatrukalal* v. *Magistrate of Taluqa Igotpuri* (6) the Magistrate was made a party, and the Court directed the Secretary of State to be substituted in his place. [PIGOT, J.—Merely because under s. 37 of Bombay Act V of 1879 it is necessary to do so.]

No one appeared on behalf of the respondent.

OPINION.

[**464**] The opinion of the Court (WILSON, TOTTENHAM, NORRIES, PIGOT and GHOSE, JJ.) was delivered by

WILSON, J.—We must take the facts before us to be that the plaintiff is the owner of a piece of land, that the substantial defendant alleges that that piece of land forms part of a public highway, that he took proceedings before the Magistrate under s. 133 of the Criminal Procedure Code against the plaintiff for obstruction to the alleged highway, and that an order absolute was made by the Magistrate under s. 137 directing the removal of the obstruction. The present suit has been brought practically for the purpose of obtaining a declaration that the plaintiff is the owner of the land free from any right of highway. The questions referred to us are these:—

[His Lordship here read the questions referred and continued.]

It seems convenient to examine this matter under two separate heads, and to consider first whether, upon general principles, the present suit, either in its existing form or with any modifications, can lie, and what relief, if any, can be given in it; and, secondly, to consider whether, if so, the suit is barred by the provisions of the Criminal Procedure Code, or by the proceedings which have been taken under it.

With regard to the first of these questions, it may be useful to premise that by the common law of England there are three distinct classes of rights of way and other similar rights. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication.

It is unnecessary to enquire whether the mode of acquiring each of these classes of rights is necessarily the same in all cases in England and in India. But it is, I think, important to remember that these three classes of rights exist in the one [**465**] country as well as in the other. The first class, strictly private rights, we are all familiar with. The third class, public rights, are of frequent occurrence. The second class, of rights

(1) 11 B.L.R. 9=19 W.R. 345.
(2) 11 W.R. 434=3 B.L.R. App. 43.
(3) 10 W.R. 409=2 B.L.R.S.N. 15.
(4) 14 C. 60.
(5) 6 C. 291.
(6) 6 B. 672.

belonging to a portion of the public, are also to be found in India. They are expressly recognised by the Legislature in s. 42, Illustration A, and s. 54, Illustration P, of the Specific Relief Act. It is especially important that this class of rights should be clearly understood and borne in mind in a country like India, where interests of the most essential importance depend so largely upon custom. And I am not sure that the existence of this class of rights has not sometimes been overlooked. I think there is reason to suspect that, in some cases, ways and other claims of a like nature have been treated as public rights, when perhaps they might have been both more correctly and more conveniently regarded as village ways and village rights; more correctly, because I think there is reason to suppose that such village roads as distinguished from public roads are of very common occurrence: more conveniently, because, as I shall show later, there may be more easy civil remedies for treating questions of village roads than questions relating to public roads.

With regard to private roads strictly so called, the provisions of the law for asserting rights of way on the one hand, or resisting them on the other, in the Civil Courts are too well known to require detailed consideration here. With regard to rights vested in classes, it is unnecessary to enquire for the present purpose how far the same civil remendies are available on the one side and on the other, as in the case of strictly private ways. But it is, I think, important to observe that there are some additional remedies certainly open. First, where such a right is claimed, it would seem that a member of the class entitled might, by taking the proper steps under s. 30 of the Civil Procedure Code, obtain permission to sue, on behalf of himself and the other members of the class, any one who disturbed or sought to disturb the right of way. Upon the other hand, in s. 42, Illustration A of the Specific Relief Act, it seems to be distinctly pointed out that where such a right is claimed, a suit will lie by the owner of the soil for declaration negativing the right, and I presume under s. 30 of the Civil Procedure Code [**466**] a suit might be so brought, with the permission of the Court, against one or more members of the class as representing the rest. Section 54, Illustration P of the Specific Relief Act, further shows that if the owner of the soil obtained a declaratory decree against several villagers negativing a right of way, this would be good ground for restraining by injuction suits subsequently brought by the others. Again, a remedy is probably given for preventing the infringement of such a right of way under s. 133 and the following sections of the Criminal Procedure Code, no less than in the case of a public way in the full sense of the term.

When we turn to the case of public ways in the full sense of the term (and the present case falls under that heading), it is not quite so easy to say what remedies are open in the interest of the public on the one side and on the other side of the owner of the land who denies the public right. Certain suggested classes of suits directly connected with proceedings such as those which in this case have taken place before the Magistrate may be very briefly dismissed, but I shall consider them one by one. In the first place, it is plain both on principle and authority that no suit will lie to set aside the Magistrate's order. It is sufficient on this point to refer to the cases of *Ujalamayi Dasi* v. *Chundra Kumar Neogi* (1) *Mutty Ram Sahoo* v. *Moti Lall Roy* (2) and *Rooke* v. *Pearce Lall Coal Co.* (3). Nor can the plaintiff sue the Magistrate personally, for the Magistrate

(1) 4 B.L.R.F.B. 24. (2) 6 C. 291. (3) 11 W.R. 434=3 B.L.R. App. 43.

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has only acted in the discharge of his legal duty in a judicial character. For this may be cited *Ujalamayi's case cited above* and *Meechoo Chunder Sircar* v. *Ravenshaw* (1). Nor can the person who institutes proceedings be sued for damages, for he has only set the law in motion. For this, may be cited *Chinta Monee Bapoolee* v. *Digamber Mitter* (2).

But putting all these forms of suit aside as out of the question, it remains to consider what remedies there are on one side and on the other for trying the question of the existence of a public right of way. In the Bombay Presidency no difficulty arises [**467**] because by s. 37 of the Bombay Act V of 1879 the soil of public roads is vested in the Secretary of State. Accordingly every question of highway becomes of necessity a question of conflicting titles to the soil, and can be treated as such. The case is probably much the same in Calcutta by reason of s. 189 of the Calcutta Municipal Consolidation Act, 1876, which vests the soil of public streets in the Commissioners, and perhaps also in Mufussil Municipalities, under s. 30 of Bengal Act III of 1884. But there is no such law applicable to the Province of Bengal generally.

If any one obstructs a public highway he may be liable to a criminal charge of nuisance under s. 283 of the Penal Code, or of mischief under s. 431, if the circumstances be such as to sustain either of these charges. Any one who sustains special injury by reason of an obstruction to a highway may bring a suit, claiming damages, and any other appropriate relief. And further, under s. 133 and the following sections of the Criminal Procedure Code, summary proceedings may be taken by a Magistrate to prevent or remove any such obstruction injurious to the public.

On the other hand, if a man owns land and anybody trespasses upon it, claiming a right to use it as a public highway, there can be no doubt that a suit for damages will lie. Under special circumstances, and if the injury likely to result were of a grave nature, I presume an injunction might be granted to restrain the threatened invasion of a man's property under a claim of public highway. Neither of these remedies is available under the circumstances of the present case. But I can see no reason, on principle, why a suit for a declaration of right should not lie, under s. 42 of the Specific Relief Act, on the part of an owner of land, against any one who has formally claimed to use the land as a public road, and thereby endangered the title of the owner. Such a suit could not have been maintained before the Specific Relief Act, because no consequential relief could have been claimed, and on this ground the decision proceeded in *Madhub Chunder Gooho* v. *Kumla Kant Chuckerbutty* (3). But the law upon this point has been altered by that Act. It is true that the declaration [**468**] given would be absolutely binding only on the defendant to the suit, but it may be that no one but the defendant raises any claim adverse to the plaintiff, and that a decision binding upon the defendant will be sufficient for the plaintiff's protection, and if so, I do not see why he should not have such a declaration. Moreover, though such a declaration would not be conclusive against a stranger, it would be admissible against a stranger under s. 42 of the Evidence Act; and if the suit were fairly and properly conducted. the decision would, I think, be practically conclusive in any subsequent proceeding. It should be remembered, too, that exactly the same inconvenience or defect would occur, either in this country or in England, if the suit were one complaining of an actual tres-

(1) 11 B.L.R. 9=19 W.R. 345. (2) 10 W.R. 409=2 B.L.R.S.N. 15.
(3) 6 B.L.R. 643=15 W.R. 293.

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pass, in which the defendant justified his act under a claim to use the place in question as a public road, and if his claim were rejected. If such a suit as this does not lie, there seems to be no provision in the law by which a man can establish his title to enjoy his own land freely, as against one who claims to use it as a highway, and that is a state of things which I think we should not accept as the law, unless we are constrained to do so.

The second branch of the enquiry is whether, assuming such a suit to lie on general principles, it is barred by the provisions of the Criminal Procedure Code or by the proceedings which have taken place under them. It has been decided by a Full Bench in *Raj Koomar Singh* v. *Shahebzada Roy* (1) that the existence of these provisions is not a bar to a suit brought for an obstruction on a highway by a person who has suffered special damage, and I think it clear that it can no more be a bar to a suit of the converse kind brought to negative the existence of a highway.

The question remains whether the proceedings that have taken place before the Magistrate are a bar to this suit; in other words, whether an order absolute by a Magistrate for the removal of an obstruction from a place held by him to be a highway is final and conclusive upon the question of highway or no highway. The decision of a Magistrate in a [**469**] summary proceeding is not, I think, ordinarily final and conclusive on a question of title, and does not exclude the jurisdiction of the Civil Courts to enquire into the matter, unless the intention of the Legislature that it shall have such effect is shown. In the present case, no such intention is expressly declared, and such indications of intention as are to be found seem to me to point in the other direction. It is expressly said that a preliminary order under s. 133 is not to be called in question by a Civil Court, and that no suit shall lie (which means I apprehend no suit for damages) for anything done in good faith under s. 140 or s. 142. But nothing is said as to the order absolute which, if anything does so, affects the title.

The authorities upon this point appear to stand thus: Act XXI of 1841 differed much in its language from the sections we now have to construe, especially in that it gave an appeal from the Magistrate's order. Under that Act there was some conflict of decision as to whether the Magistrate's order precluded a civil suit to try the existence of a highway. In *The Government* v. *Choonee Lall* (2) it seems to have been thought that such a suit would not lie, and the same view was taken in *Prankishen Surma* v. *Ramrooder Surma* (3), and apparently in *Kedarnath Mookerjee* v. *Parbutty Peishtar* (4). On the other hand, in *Anundmohun Khan* v. *Roy Shambhoonath Chuckerbuttee* (5), it was held that a civil suit lay to establish that a place was not a highway which the Magistrate had held to be one, and this was followed in *Sham Doss* v. *Bhola Doss* (6).

Under s. 308 of the Criminal Procedure Code (Act XXV) of 1861, there was again some conflict of opinion. In *Bhakas Ram Sahoo* v. *Chummun Ram* (7) the question was treated as an open one, but it was said that if a suit lay the Government must be a party, a view also thrown out in the case cited from the Sudder Dewanny Adawlut, 1858. In *Azeezoolleh Gazee* v. *Bunk Beharee Roy* (8) and in *Ram Shodoy Ghose* v. *Juttadharee Holdar* (9) [**470**] the jurisdiction of the Civil Court was expressly upheld. Some observations of Peacock, C.J., in *Boroda Pershad Moostafee* v. *Gora Chand Moostafee* (1) are rather against the juris-

(1) 3 C. 20. (2) S.D.A. (1853) 929. (3) Marsh 214=2 Hay 86.
(4) 2 W.R. 267. (5) S.D.A. (1858) 938. (6) 1 W.R. 324.
(7) 7 W.R. 11. (8) 7 W.R. 48. (9) 7 W.R. 95.

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diction and in *Meechoo Chunder Sarcar* v. *Ravenshaw* (2) COUCH, C. J., expressed a decided opinion that a Magistrate's decision bars a civil suit.

Under the Code now in force in *Khodabuksh Mundul* v. *Monglai Mundul* (3) PRINSEP and BEVERLEY, J.J., decided that a civil suit is barred by the Magistrate's order. On the other hand, in this Court, WHITE and FIELD, J.J., in *Motty Ram Sahoo* v. *Mohi Lall Roy* (4), held that the Magistrate's decision did not preclude a Civil Court from enquiring into the question of title. And in the Bombay High Court this view has been repeatedly accepted, both under the earlier and under the present Acts. It was taken by MELVILLE and KEMBALL, J.J., in *Lalji Ukheda* v. *Jowba Douba* (5); by WESTROPP, C.J., and F. MELVILLE, J., in *Nilkanthapa Malkapa* v. *Magistrate of Sholapur* (6); and by MELVILLE and WEST, J.J., in *Bulram Chatrukalal* v. *Magistrate of Taluqa Igatpuri* (7).

I should answer the first question referred to us in the affirmative. I should answer the second by saying that the declaratory decree given is correct. The third and fourth I should answer by saying that the Secretary of State could not properly be made a party. And I should dismiss the appeal without costs.

T. A. P. *Appeal dismissed.*

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15 C. 471 (P.C.)=15 I.A. 18=12 Ind. Jur. 172=5 Sar. P.C.J. 121.

[471] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

KALI PERSHAD AND OTHERS (*Plaintiffs*) *v.* ANAND ROY AND OTHERS (*Defendants*). [30th November, 5th and 7th December, 1887.]

Ghatwali tenure—Ghatwali tenure in Bhagulpore—Ghatwal's right of alienation—Sale of ghatwal's estate in execution of decree against him.

Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances, and to them the law of the Mitakshara, to its full extent, is not entirely applicable; yielding, in their case, to a custom, though only to the extent of the custom proved.

On a question whether the sale of a ghatwali tenure in the Kharagpore zemindari, in Bhagulpore, in execution of a decree against the ghatwal, had transferred the inheritance as against the ghatwal's son: *Held,* in regard to a proved custom, that the ghatwali was not inalienable, but might be aliened by the ghatwal, or sold in execution of a decree against him, if such alienation was assented to by the zemindar, this power of alienation not being limited to the life-interest of the ghatwal for the time being but forming part of his right and title to the ghatwali.

[R., 34 C. 753=12 C.W.N. 193=5 C.L.J. 583.]

APPEAL from a decree (21st April 1884) of the High Court (8) reversing a decree (13th February 1882) of the Subordinate Judge of Bhagulpore.

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(1) 12 W.R. 160=3 B.L.R.A.C. 295. (2) 11 B.L.R. 9=19 W.R. 345.
(3) 14 C. 60. (4) 6 C. 291.
(5) 8 B.H.C.R.A.C. 94. (6) 6 B. 670.
(7) 6 B. 672. (8) See *Anand Rai* v. *Kali Prosunno Singh,* 10 C. 677.

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Privy Council.

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The question on this appeal was whether the sale of a ghatwali tenure in execution of a decree against the ghatwal operated to transfer to the purchaser the whole interest therein, or only the interest of the ghatwal, judgment-debtor, for life, as against his son.

In the suit out of which this appeal arose the plaintiffs claimed a ghatwali mehal, named Kharna in the zemindari of Kharagpore, zillah Bhagulpore, of which Raja Lilanand Singh was zemindar, consisting of twenty-two mouzahs.

The grounds of the claim were the right of Tekait Kali Pershad Singh, the first plaintiff, as the son of Tekait Meghraj Singh, formerly ghatwal of Kharna, to the ancestral estate. This was under the Mitakshara, by which it was alleged [**472**] that the family was governed, coupled with, and modified by, a custom giving the ghatwali to the eldest son alone. Kali Pershad, as it was claimed by him and others making title through him, on his birth in 1833, acquired an interest jointly with his father, who was then in possession and who died in 1871.

Meghraj in 1858 borrowed money of Alam Roy, the father of the first defendant, who in execution of a decree for the debt caused to be attached and sold in execution, on 13th August 1868, Meghraj's interest as ghatwal of Kharna. Kali Pershad alleged that he, by inheritance, had obtained a right to the permanently-assessed ghatwali of Kharna, which was an istemrari mokurari tenure, under a custom of impartibility and primogeniture; no more than his father's life-interest having passed to the purchasers at the sale of 1868.

The defence, so far as is material to this report, was that Meghraj had the full proprietary right in Kharna, sufficient to enable him to sell, or transfer, the whole estate, and not merely a life-interest.

Acquiescence on the part of the son was also set up; and it was alleged that his interest, he being bound by his father's debt, was sold at the execution sale. Also, that the mehal had been purchased subject to a *zur-i-peshgi* lease, forming a mortgage for Rs. 4,923, executed by Meghraj, and notified at the sale, which mortgage the defendants had paid off, and had thus gained a lien against the plaintiffs.

The issues now material raised questions as to what was the tenure and the custom of succession; also, whether the ghatwal holding possession had the sole right of transfer, and whether the son had any interest in the ghatwali during his father's possession of it.

At the hearing before the Subordinate Judge, Hafiz Abdul Karim, Khan Bahadur, it appeared that mehal Kharna, with three other mehals—Patharkara, Kalsakra and Chundwara—were granted in 1780 by the then zemindar of Kharagpore to Ajit Singh, the ancestor of the plaintiff, to hold on the condition of his rendering service as a ghatwal. The original sanad was not forthcoming, but the nature of the ghatwali tenures of Kharagpore was stated in a judgment of the Judicial Committee in *Lilanand Singh* [**473**] v. *The Government* (1), which related to mehal Dhamsain, situate in the same zemindari. In that case the Government sought to maintain the claim to resume the ghatwali tenure, on the ground that under the prevailing system of administering the country ghatwali services were no longer necessary. This claim of the Government was held untenable, the right of resumption no more existing in regard to ghatwali tenures than others, merely because the services formerly required were required no longer. The order of Her Majesty in Council was taken as governing the

(1) 6 M.I.A. 101.

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case of other mehals affected by similar incidents, among which was included mehal Kharna.

Subsequently, the zemindar endeavoured to resume the ghatwali tenures. His suit in respect of mehal Kharna was dismissed, and no settlement was made between him and the ghatwal, who accordingly continued to hold under his ancient right. The decision in the dispute as to the respective rights of the zemindar and the ghatwal, was given in the suit relating to mehal Kakwara, *Lilanand Singh* v. *Thakoor Munoorunjun Singh* (1), in which case it was decided that the ghatwali tenures were not granted as remuneration to hired servants, resumable upon the services not being required, but were granted, and were held upon grants at a fixed rent, subject to certain services to be rendered by the grantee; and that so long as the holders of these grants were able and willing to perform the services the tenures could not be determined, whether the services were actually required or not. The tenure in that case was held to be hereditary, a usage to that effect being coupled with the terms of the original grant. The decision in reference to mehal Kakwara was taken by the High Court as an example for the case of mehal Kharna in an appeal, decided on the 29th June 1865, *viz.*, *Meghraj Singh* v. *Lilanand Singh*, which was not on the record of this appeal, (though its effect was stated by the Subordinate Judge in his judgment) and was not reported.

The judgment of the Subordinate Judge related to two principal matters, one being the incidents of the tenure, and the other [**474**] the rights of the parties therein. With regard to the incidents of the tenure, he held that the ghatwali tenure of mehal Kharna was an ancestral estate, held at a perpetually assessed jumma by the father of the plaintiff, joined to which was also the condition of the performance of service, and that so long as he was ready to serve, the zemindar had no power either to dispossess him or to enhance the rent, and that no alteration in this had occurred. He also held that the tenure was indivisible apparently as an incident of the tenure rather than as a custom in the family of the tenant; also that it was transferable subject to the approval of the zemindar, but that no such practice, or usage, as that the holder should have absolute power to alienate as an incident of his ghatwali tenure, had been proved.

In reference to the rights of the present parties in the tenure in question, the Subordinate Judge held—first, that it was not disputed that the family of Meghraj Singh was governed by the law of the Mitakshara; secondly, that, though the possession of the ghatwal for the time being was exclusive, he had no right, after the birth of a son, to alienate without the consent of that son; thirdly, that the debt was Meghraj's own, incurred by himself, and the suit, and decree therein, were against him alone; fourthly, as the result of the above, that only Meghraj's right and interest in the mehal for his own life had passed at the sale in question.

Having regard to these points, the Subordinate Judge held that the share of Meghraj, the judgment-debtor, being in the Judge's opinion only one-third of the ghatwali, was all that had passed to the purchaser; and that the appellants were entitled to recover the remaining two-thirds, subject to payment by them of two-thirds of the money advanced on the *zur-i-peshgi* lease.

With regard to mesne profits, the appellants were referred to another suit, as they had not claimed them in this.

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(1) Sup. Vol. I.A. 181=13 B.L.R. 124, in which the judgment of the High Court, reported 3 W. R. 84. was affirmed.

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Both parties appealed from this decree, the defendants contending that the ghatwal had, as an incident of his tenure, full power of alienation, notwithstanding the existence of a son. The plaintiffs, on the other hand, in their memorandum, contended that, upon the finding of the Court below as to the facts, the whole estate should have been decreed to them with possession as from the date of the death of Meghraj, the father.

[475] The High Court (TOTTENHAM and NORRIS, JJ.) in its judgment (1) did not dissent from any of the findings of the lower Court as regards the sale, or as regards the law and usages governing the plaintiffs' family. They disposed of the question whether the ghatwali tenure was in its nature alienable. They held that it was alienable if the zemindar consented to the alienation, and that this consent might be implied. The rules of descent declared by the Mitakshara were not applicable. The suit was by the High Court dismissed with costs. The judgment, having been reported at length, need not be here further stated.

On this appeal,—

Mr. *T. H. Cowie, Q.C.*, and Mr. *H. Cowell*, for the appellants, argued that the estate that was alienated was only the right, title, and interest of the then ghatwal in mehal Kharna. The zemindar's approval was an essential condition to a transfer of the ghatwali, and such a restriction limited the right of the ghatwal to alienate. In the appeal, relating to mehal Kakawara—*Lilanand Singh* v. *Thakoor Munoorunjun Singh* (2)—the decision was that the ghatwali was not granted merely by way of wages to an hereditary servant, but to be held as upon a grant at a fixed rent, subject to certain services; and whether the latter were required or not, the tenure could not be brought to an end so long as the holder was able and willing to perform them. The tenure was held to be hereditary, a usage being coupled with terms of the original grant. The decision in reference to mehal Kakwara had been held by the High Court applicable to the case of Mehal Kharna in *Meghraj Singh* v. *Raja Lilanand Singh* (not reported) on the 29th June 1865. In *Harlal Singh* v. *Jorawan Singh* (3) a ghatwali in zilla Birbhum was held not divisible on the death of a ghatwal among his heirs, but to devolve upon the eldest son. Reference was made also on this point to *Teetoo Koonwuree* v. *Surwan Singh* (4); and *Sartuk Chunder Dey* v. *Bhagtu Barut Chunder Singh* (5).

[476] As to the disallowance of resumption by the zemindar, reference was made to *Kolodeep Narain Singh* v. *Mahadeo Singh* (6); *Lilanand Singh* v. *Thakoor Munoorunjun Singh* (2); and *Nilmoni Singh* v. *Bakra Hath Singh* (7). In regard to the general effect of the Mitakshara rule of inheritance, *Chowdhry Chintamun Singh* v. *Nowlukka Kunwari* (8) and *Raja Rup Singh* v. *Rani Baisni* (9) were referred to.

It was not contended that the ghatwali tenure was inalienable because it was impartible, impartible estates not being inalienable merely on account of their impartibility—see *Udaya Aditya Deb* v. *Jadub Lall Aditya Deb* (10). But it was contended that, as the estate was impartible, the judgment-debtor's interest therein could not, under any circumstances have been represented by one-third or any other share; and as to Meghraj's

(1) 10 C. 680. (2) Sup. Vol. I.A. 181=13 B.L.R. 124.
(3) 6 Sel. Rep. S.D.A. 169; In ed. of 1873, p 204=7 I.D. (O.S.) 829.
(4) S.D.A. (1853) 765. (5) S.D.A. (1853) 900.
(6) B.L.R. Sup. Vol. 549=6 W.R. 199; affirmed, 11 B.L.R. 71=14 M.I.A. 247.
(7) 9 I.A. 104=9 C. 187. (8) 2 I.A. 263=1 C. 153.
(9) 11 I.A. 149=7 A.1. (10) 8 I.A. 248=8 C. 199.

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interest, his proprietary right was that of a member of a joint family in the joint family estate, coupled with and controlled by the right, which was a customary one, of exclusive possession during his life. It was this right alone which passed at the sale.

It was further contended that only the right, title, and interest of Meghraj Singh in mehal Kharna were expressed by the sale certificate to have been sold, as well as by the execution proceeding to have been attached. Thus the right, title, and interest were limited to the right of possession during his life. Whether the Mitakshara law was referred to, or the nature of the tenure only was considered, the interest of the son was not transferred. On the death of the father the son succeeded, and held the tenure, subject to readiness on his part to perform the services now in fact no longer required. This impartible tenure also was alienable only with the consent of the zemindar, even for the life-interest to which the right of the ghatwal extended. The zemindar had the right to resume if the conditions of the tenure were broken, and his consent to an alienation, whether express or [477] implied, did not operate to extend the ghatwal's power to transfer; but, in effect, to limit it. Reference was made to *Kustoora Koomaree* v. *Benode Ram Sein* (1), in which it was held that these tenures were not liable to attachment in execution of decree; and in regard to what passed upon sales of family estate in execution generally, *Ramnarain Singh* v. *Pertum Singh* (2) and *Simbhunath Pande* v. *Golab Singh* (3) were cited.

Mr. *R. V. Doyne*, for the respondents was not called upon.

JUDGMENT.

Their Lordships' judgment, on a subsequent day (7th December), was delivered by

LORD FITZGERALD.—The appellant, Tekait Kali Pershad Singh, son of Tekait Meghraj Singh, deceased, instituted this suit on the 7th of April 1881 against Dhanraj Roy, son of Alam Roy, deceased, and several others, to recover possession of the ghatwali mehal Kharna, comprising 22 mouzahs out of the mehals Kharagpore, which he alleges to be his ancestral ghatwali right.

The plaint, *inter alia*, alleged that the family of the plaintiff was governed by the Mitakshara law, but subject to a family custom that the eldest son became the malik without dividing with the other brothers, who are entitled to maintenance only, that the Tekait Meghraj was in possession, and that plaintiff No. 1, his eldest son, was born in Aughran 1241, and thereupon acquired a right with his father in the mehal; that Tekait Meghraj, without the consent of the plaintiff No. 1, who had then attained his majority, under the bond dated the 26th Cheyt 1265, borrowed the sum of Rs. 1,300 from Alam Roy, ancestor of the defendants Nos. 1, 2, and 3; that the aforesaid Alam Roy, on the basis of that bond, obtained a money decree against Meghraj without making the plaintiff No. 1 a defendant, on the 18th July 1862; that on the sale in execution of that decree he got only the right and share of the said Tekait in the ghatwali mehal of mouzah Kharna sold by auction, and he purchased them himself at a reduced price, that is, for the sum of Rs. 3,525 on the 13th July 1868; that Tekait Meghraj died in the month of Bhadon 1278 Fusli (that is, August 1871); that the plaintiff, [478] agreeably to the usage of the family, governed by the Mitakshara-law, acquired

(1) 4 W.R. Mis. 5. (2) 20 W.R. 189. (3) 14 I.A. 77=14 C. 572.

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the right of direct possession in respect of the whole of mehal Kharna aforesaid, since the death of the said Tekait. The defendants in their written stament, denying most of the allegations in the plaint, specially contended that the plaintiff had not any joint estate with his father, who was the sole proprietor; that the restrictions on the Mitakshara law did not affect the estate or the sale in question, and that the particular nature of the ghatwali tenure, which was based on actual service is contrary to the joint right of the sons according to the Mitakshara law. The defendants further relied on their title under the execution sale, and as to the allegation of the plaintiff that the property was sold for a trifling sum, they pointed out that it was sold subject to a zuri-i-peshgi lease, which is in effect a mortgage for Rs. 4,923, which the purchasers had to redeem; that incumbrance had been created by Meghraj.

There were thirteen issues, but for the purposes of the present appeal it is only necessary to refer to one question, *viz.*, What did the defendants purchase, and what right did they obtain in mehal Kharna as purchasers under the sale in execution of the decree?

The decision of the Subordinate Judge of Bhagulpore was given on the 13th February 1882. It occupies 23 large and closely printed pages of the record. It exhibits great care and research, and is very full and very learned, but as it has been read at full length in the discussion at the bar, it is not necessary to observe upon its reasoning. The decision of the Subordinate Judge is: That the claim of the plaintiffs in respect of two-thirds' share of mehal Kharna be decreed; that the plaintiffs do get possession of the aforesaid two-thirds' share on payment of two-thirds' of the amount covered by the previous mortgage, amounting to Rs. 3,282, and it is peculiar in this respect that it is inconsistent with the case of plaintiff and equally so with the defence. If the plaintiff was entitled to relief on the case he has made, it was by a decree for the possession of the whole of the mehal Kharna.

Both parties were dissatisfied, and both parties appealed to the High Court. The decision of the High Court was given on the appeal, of the defendants on the 21st of Appril 1884, and was that the plaintiffs' suit be dismissed with costs.

[479] The High Court justly criticises the inconsistencies of the cases of both parties on the pleadings, and the peculiarity of the decision of the Subordinate Judge, and adds: " The tenure being undoubtedly a ghatwali, the lower Court, we think, made a mistake in attempting to apply to the case the rules of the Mitakshara law." Their Lordships read this observation as confined to the Mitakshara rule by which a son when born takes a share equally with his father. The High Court then proceeds: " We concur with the counsel for the appellants in his contention that, in dealing with a ghatwali, the Court must have regard to the nature of the tenure itself, and to the rules of law laid down in regard to such tenures and not to any particular school of law, or to the customs of particular families. The incidents of a ghatwali tenure are the same, whether the ghatwali be a Hindu or a Mussulman, or a follower of any other system of religion; and the same ghatwali might be held successively by persons governed, as to other property by totally different rules of law. A ghatwali is created for a specific purpose, and has its own particular incidents." The High Court, continuing its reasons, adds: " The real and only material questions for us to decide are, first, whether the sale of this ghatwali in execution of a decree against the ghatwal was invalid and

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liable to be set aside by reason of the tenure being in its nature inalienable; and, second, if the alienation was bad, are the present plaintiffs entitled to recover the property? The second question also involves one of limitation." Their Lordships will deal with the first question alone.

The High Court, after considering the authorities which it deemed to be applicable, and pointing out the difference between the two classes of cases where the ghatwal is appointed by and holds direct under the Government and protected by Ordinances as in the Birbhum cases, and where he is appointed by and holds under the zemindar who retained in his hands the power of appointing and the power of dismissing the ghatwal in case of non-performance of his duties, goes on to say: "We think we must hold upon the authority of the cases, and upon the evidence of many such transfers having been effected [480] and unquestioned, as well as in consideration of the long silence of the present plaintiff No. 1, and the silence, too, of his father while he lived, that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transference; and in the present case we think the lower Court was justified in holding that the zemindar in making no objection within twelve years of the sale acquiesced in it, and that the transfer was therefore one which the Court ought to recognise. And looking to the fact that the purpose for which the Kharagpore ghatwalis were created no longer exists, we should greatly regret being compelled to come to the contrary conclusion. We accordingly decide the first question in favour of the defendants, appellants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure." The plaintiffs appeal against that decision.

Their Lordships are of opinion that the doctrines of the Mitakshara, which govern in some districts the Hindu law of inheritance, are not to their full extent applicable to a ghatwali tenure. By the general Hindu law of inheritance, where the Mitakshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs, each son immediately on his birth takes a share equal to his father in the ancestral immoveable estate. Having regard to the origin and nature of ghatwali tenures and their purposes and incidents as established by decided cases, most of which have been referred to in the course of the argument it is admitted that such a tenure is in some particulars distinct from, and cannot be governed by, either the general objects of Hindu inheritance as above stated, or by the before-quoted rule of the Mitakshara.

It is admitted that ghatwali estate is impartible—that is to say, not subject to partition; that the eldest son succeeds to the whole to the exclusion of his brothers. These are propositions that seems to exclude the application of the Mitakshara rule that the sons on birth each take an equal estate with the father and are entitled to partition. The allegation, too, that the state is not in the whole or in part alienable, or, if alienable, is only so for the life of the alienor, must largely depend on local and family [481] custom, and such custom, if proved to exist, may supersede the general law, though in other respects the general law may govern the relations of parties outside that custom. Thus the rules of the Mitakshara yield to a well established custom, though only to the extent of that custom.

The question then which their Lordships have to consider and decide is whether the sale and transfer of a zemindari ghatwali in Kharagpore

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under a decree is invalid by reason of the tenure being in its nature inalienable?

The evidence establishes a number of instances in which there have been unquestioned transfers and sales applicable to mehals in Kharagpore, and some to portions of the same estate which the plaintiff describes as part of his ancestral, inalienable, ghatwali right. This custom of alienation has been proved in fact by oral and documentary evidence to the satisfaction of the Subordinate Judge and of the High Court, and their Lordships see no reason to doubt the correctness of the conclusion in that respect of the two Courts.

It seems to their Lordships that the true view to take is that such a tenure in Kharagpore is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar.

The plaintiff was of full age at the time of the sale. He does not appear to have made any objection to the sale or transfer, or to have taken any action during the period of twelve years that intervened between the sale and the institution of this suit, or during the period of ten years that elapsed between the death of Meghraj in 1871 and the 12th April 1881, when the suit was instituted. The zemindar made no objection, expressed no disapproval, was not asked to interfere, and did not interfere. It may reasonably be inferred that the zemindar and the officers of his zemindari were brought constantly into intercourse with the purchasers during their possession of twelve years after the sale, and could not have been in ignorance of the sale.

Their Lordships are of opinion that the Subordinate Court was justified in assuming under the circumstances the acquiescence of the zemindar in the sale and transfer under the decree, and that conclusion in fact has been approved and adopted by the High [482] Court. Their Lordships do not deem it to be necessary to criticise the various decisions which have been brought so fully under their notice, and are of opinion that the High Court was correct in its conclusion that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transferenee.

There remains only to be noticed the argument that, though the ghatwal might alien, it could only be for the life of the alienor. It seems to their Lordships that there is no foundation for this argument. When once it is established that the ghatwal had the power of alienation, as before stated, that power forms an integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer. In this respect the present case so far differs from *Dindyal's case* (1), and some other decisions of this Board that followed, as to render them wholly inapplicable.

Their Lordships are of opinion that the judgment of the High Court should be affirmed and this appeal dismissed, and will so humbly advise Her Majesty. The appellants must pay to the respondents the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants; Messrs. *Barrow and Rogers.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

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(1) 4 I.A. 247=3 C. 198.

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15 C. 482.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Tottenham and Mr. Justice Pigot.

RAJENDRO NARAIN ROY (*Petitioner*) *v.* PHUDY MONDUL (*First party*) AND ANOTHER (*Second party*).*
[25th April, 1888.]

Bengal Tenancy Act (Act VIII of 1885), s. 174—Judgment-debtor, Meaning of—

The words "judgment-debtor" as used in s. 174 of Act VIII of 1885 do not include a transferee or assignee from a judgment-debtor, but must be construed strictly as referring to a judgment-debtor alone.

[F., 16 C.L.J. 546=15 Ind. Cas. 561.]

[**483**] APPEAL under the s. 15 of the Letters Patent. The facts were as follows:—

One Rajendro Narain Roy obtained a money decree against the holder of a durputni tenure in a putni mehal, and in execution of this decree attached the tenure, and at the sale subsequently held in June 1887 purchased it in satisfaction of his decree. On the 13th August this sale was confirmed. The putnidar, Phudy Mondul, sued the durputnidar for arrears of rent, obtained a decree, and in execution of this decree attached the tenure, and on the 1st August 1887 purchased it himself. On the 26th August Rajendro Narain Roy first learnt of the sale of the tenure in satisfaction of the putnidar's decree, and thereupon applied under s. 174 of Act V of 1885 to be allowed to pay into Court the amount recoverable under the decree against the durputnidar, together with costs and interest thereon at 5 per cent. The Munsif held that no person other than a judgment-debtor could take advantage of that section; and that Rajendro Narain Roy, even if he were to be considered as a representative of the judgment-debtor, could not come in under the section. The District Judge on appeal upheld this view.

Rajendro Narain Roy then applied to the High Court under s. 622 of the Code, and obtained a rule calling upon Phudy Mondul to show cause why the orders of the Munsif and the District Judge should not be reversed, and the sale held on the 1st August 1887 set aside.

At the hearing of this rule before Mr. Justice Norris and Mr. Justice Beverley, Mr. *Bell* and Baboo *Troylokya Nath Mitter* appeared in support of the rule, and Mr. *Twidale* to show cause, and the following orders were delivered by the Court:—

ORDERS.

BEVERLEY, J. (after stating the facts).—It is contended before us by Mr. *Bell* on the part of the petitioner that the term "judgment-debtor" in s. 174 of the Bengal Tenancy Act ought to be liberally construed so as to include a judgment-debtor's assignee or transferee. And the arguments that have been addressed to us are three. Mr. *Bell* first contends that if the word "judgment-debtor" is strictly construed the heir or successor of a judgment-debtor, in case the judgment-debtor died, would be debarred from the privilege conferred by this [**484**] section.

* Letters Patent Appeal No. 1 of 1888 against the judgment of Mr. Justice Norris and Mr. Justice Beverley, two of the Judges of this Court, dated the 27th of January 1888, in Rule No. 1582 of 1887.

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He further urges that under s. 311 of the Code of Civil Procedure an assignee from the judgment-debtor might apply to have the sale set aside for irregularity; and by analogy he contends that the assignee is similarly entitled to have it set aside under the terms of s. 174 of the Bengal Tenancy Act. And, again, he has drawn our attention to s. 170 of the Bengal Tenancy Act, cl. 3, under which " the judgment-debtor, or any person having in the tenure or holding any interest voidable on the sale, may pay money into Court under this section," and obtain the release of the tenure or holding from attachment.

As regards the first argument, it would appear that the heir of a judgment-debtor may take advantage of s. 174 by causing his name to be substituted on the record as the legal representative of the judgment-debtor. Nor do I think there is much force in the other arguments adduced. Section 311 of the Code of Civil Procedure provides that any person whose property has been sold may apply to have the sale set aside on the ground of material irregularity in the proceedings and consequent substantial injury. That is a different thing from an application to have the sale set aside where there has been no irregularity, and the Legislature may have had an object in conferring the privillage in the latter case to the judgment-debtor. Speaking for myself, I am of opinion that the term " judgment-debtor " in the section must be construed strictly. In the Code of Civil Procedure the term " judgment-debtor " is defined to mean " any person against whom a decree or order has been made." On the other hand, the term " decree-holder " not only means " any person in whose favour a decree or any order capable of execution has been made " but " includes any person to whom such decree or order is transferred," and it appears to me that if the Legislature intended that the term " judgment-debtor " should also include a transferee or assignee from the judgment-debtor, words to that effect would have been incorporated in the section, as has been done in the case of s. 170, cl. 3. The fact that in cl. 3, s. 170, the language is "the judgment-debtor or any person having in the tenure or hodling any interest voidable on the sale," while in s. 174 [485] simply the term " judgment-debtor " is used, shows, I think that the Legislature did intend that there should be a distinction.

It was open to the petitioner under s. 170 to save the tenure from sale; not having done so, I am unable to hold that he has now a right to come in under s. 174 to have the sale set aside.

I am, therefore, of opinion that we should not be justified in construing the term " judgment-debtor " as used in s. 174 so as to include a transferee or assignee from a judgment-debtor. I would accordingly discharge this Rule.

Norris, J.—In this case the petitioner before us obtained a money decree against a tenure-holder, and in execution of his decree attached the tenures, and at the sale subsequently held purchased them in satisfaction of his decree. The sale took place in June last, and was confirmed on the 13th of August last. The judgment-debtor held these tenures under a putnidar the opposite party in this Rule. He, the putnidar, sued the judgment-debtor for rent, obtained a decree, and in execution of his decree attached the tenures and purchased them on the 1st of August. On the 26th of August the petitioner before us first learnt of the sale of the tenures in satisfaction of the putnidar's decree for rent, and applied under the provisions of s. 17 of the Bengal Tenancy Act to be allowed to pay into Court the amount recoverable under the decree with costs

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and 5 per cent. interest. His application was refused by the Munsif, and the Munsif's order has been affirmed by the District Judge.

It has been contended before us by Mr. *Twidale* for the opposite party, in the first place, that we ought not to interfere under s. 622 of the Code, because there was a second appeal, in this case. We are satisfied that there was no second appeal, and that if we interfere at all we can only do so under s. 622.

Mr. *Bell*, for the petitioner, has argued that his client is a judgment-debtor within the meaning of s. 174 of the Bengal Tenancy Act.

Upon the best consideration that I have been able to give to this matter, I think that Mr. *Bell's* contention ought to prevail. I express this opinion with very considerable hesitation and doubt, first of all because it is opposed to the opinion expressed [**486**] by my learned colleague, whose experience in this branch of the law is a very much wider and longer one than mine; and, secondly, because I have reason to believe that my opinion is not shared in by the majority of my colleagues.

When I look at the provisions of s. 170 of the Bengal Tenancy Act, I see that if the petitioner had appeared in the sale room at the time the tenure was being sold for arrears of rent, and before the auctioneer had knocked the hammer down and declared the tenure to be sold, and had tendered the amount of the decree together with the costs of the sale and paid that into Court, he would have been entitled to the release of the tenure from attachment. When he might do that at any time the sale was proceeding, and before the property was actually knocked down, I am at a loss to understand why he should not have the same privilege after the property has been actually sold. It may be that there are some latent reasons which have induced the Legislature to refuse the privilege to a person in the position of the petitioner after the sale has actually taken place; but I confess I am at a loss to understand what those reasons can possibly be. It does not seem to me that the least evil or inconvenience can result from holding that the term " judgment-debtor " in s. 174 is wide enough to include and was intended to include, a person in the position of the present petitioner, who, to all intents and purposes, is the assignee of the judgment-debtor. I think I am fortified in this liberal construction of the section when I find that two other learned Judges of this Court have in *Abdul Huq Mozumdar* v. *Mohini Mohan Shaha* (1), given a very wide, and, if I may be permitted to say so, a justly wide interpretation to the words in s. 311 of the Code—" any person whose immoveable property has been sold under this chapter."

I am therefore of opinion, though, as I have said before, with considerable hesitation and doubt, and upon the best consideration I can give to the case, that the petitioner is a " judgment-debtor " within the meaning of s. 174.

For these reasons I would make the Rule absolute. But as my learned colleague is of a contrary opinion, the Rule, in accordance [**487**] with the provisions of ss. 575 and 590, Civil Procedure Code, will be discharged with costs.

Rajendro Narain Roy appealed under s. 15 of the Letters Patent against the decision of Mr. Justice Beverley.

Mr. *Evans* (with him Baboo *Troylokya Nath Mitter*), for the appellant, submitted that the word " judgment-debtor " in s. 174 was wide enough to include the appellant, who was the transferee of the judgment-debtor.

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(1) 14 C. 240

Mr. *Twidale*, for the respondents, was not called upon. 1888 April 25.

OPINION.

The opinion of the Court (PETHERAM, C.J., TOTTENHAM, J., and PIGOT, J.) was delivered by

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PETHERAM, C.J.—The only question which is raised in this appeal is the question, what is the meaning of the word "judgment-debtor" in s. 174 of the Bengal Tenancy Act. So far as I can see, the expression "judgment-debtor" is an expression which is so well understood that it is impossible to give it any other than its well understood meaning, and that is, the person against whom a decree has been obtained. Mr. *Evans* suggests to us that it means not only the judgment-debtor himself, but also the assignee of the judgment-debtor's property, and that is the view which has been taken by Mr. Justice Norris. Mr. Justice Norris, in discussing the matter, discusses it on the ground that the Legislature may well have taken a wider view of the matter, but the question is not what they might have done, nor what it would have been wise for them to do, but what they have done, and they have said, in this particular case, that the only person who is to have this privilege is the judgment-debtor, and I do not think we can extend it beyond that.

Then in s. 170 the Legislature gives another right under different circumstances, and in that section they extend the power not only to the judgment-debtor, but to other persons besides, but they have refrained from doing so in s. 174, and from this also it would appear that they have done so intentionally.

On the whole, we think that the view taken by Mr. Justice Beverley is the correct view of the section, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

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15 C. 488 (F.B.)=13 Ind. Jur. 54.

[488] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Tottenham, Mr. Justice Pigot, Mr. Justice Macpherson and Mr. Justice Ghose.

ASMUTUNNISSA BEGUM (*Petitioner*) v. ASHRUFF ALI AND OTHERS (*Auction-purchasers*).* [25th April, 1888.]

Civil Procedure Code (Act XIV of 1882), s. 311—*Objection to sale by wife of judgment-debtor—Execution.*

A person who claims to be a purchaser from a judgment-debtor prior to an attachment is not entitled to come in under s. 311 of the Civil Procedure Code and object to the sale of the judgment-debtor's property.

Abdul Huq Mazumdar v. *Mohini Mohun Shaha* (1) overruled.

Rule that a person applying to set aside a sale for irregularity must prove substantial injury arising therefrom, as laid down in *Joge Narain Singh* v. *Bhugbano* (2) and explained by *Krishnarav Venkatesh* v. *Vasudev Anant* (3) approved.

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* Full Bench on Original Order, No. 33 of 1888, against the order of Baboo Upendro Chunder Mullick, Subordinate Judge of Zilla Monghyr, dated the 17th December 1887.

(1) 14 C. 240. (2) 2 W.R. Mis. 13. (3) 11 B.H.C. 15.

1888 APRIL 25. [Diss., 12 A. 440 (456)=11 A.W.N. 103 (F.B.); F., 20 C. 418; 23 B. 450 (453); Compared, 21 M. 416 (417); Cons., 29 C. 1 (F.B.)=5 C.W.N. 821; Disc., 29 C. 548 (554); R., 16 M. 476 (478); 19 M. 167 (168); 4 C.W.N. 542 (554); 7 C. W.N. 243 (244); 15 C.L.J. 83 (87)=10 Ind. Cas. 880 (883)=C.W.N. 904; D., 22 C. 802 (804)]

FULL BENCH. REFERENCE to a Full Bench made by Mr. Justice Norris and Mr. Justice Beverley.

15 C. 488 (F. B.) =13 Ind. Jur. 54.

The facts were as follows:—

On the 23rd May 1887 one Abdul Wahid applied for execution of a decree against one Minnat Hossein and obtained an order for attachment of certain properties belonging to the judgment-debtor. In execution of this decree the property was put up for sale on the 8th August 1887, and was purchased by one Ashruff Ali. On the 22nd August, Asmutunnissa, the wife of Minnat Hossein, applied to have the sale set aside on the ground that the property was given to her by her husband under *a bai mocasa* duly executed by him, and also on the ground of irregularity in the conduct and publication of the sale proceedings.

The Subordinate Judge held that s. 311 of the Code of Civil Procedure had reference to the admitted or undisputed interest of third parties to the property to be sold, but that here the claimant's interest was disputed, and that the objections put forward by [489] Asmutunnissa were objections which could only be put forward by the judgment-debtor; and he therefore dismissed the application.

Asmutunnissa appealed to the High Court; and the learned Judges who heard the case referred to a Full Bench the question whether a person, who claims the property sold adversely to the judgment-debtor, and whose claim is disputed, is a " person whose immoveable property has been sold " within the meaning of s. 311 of the Civil Procedure Code.

The referring order was as follows:—

" The question raised in this appeal is whether a third party who alleges that her property has been sold in execution as the property of the judgment-debtor can apply to the Court under s. 311 of the Code of Civil Procedure to have the sale set aside on the ground of irregularity in publishing or conducting the sale? If we felt ourselves at liberty to follow a recent decision of a Divisional Bench of this Court in the case of *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha* (1), the appeal should be allowed; but we are not prepared to agree in the correctness of that decision; and as it apperas to us to be opposed to the current of decisions in this Court, no less than to the object of the section itself, we are of opinion that the point should be referred for the decision of a Full Bench."

" The Code of 1859, s. 256, did not specify by whom such an application might be made, but this Court always held that it could only be made by the judgment-debtor, and refused to hear third parties. It will be sufficient to refer to the case of *Mina Koer* v. *Luchmun Bhuggat* (2), and it will be observed that in that case the Judges were of opinion that the practice then in force was in conformity with the rule laid down in the present Code."

" In *Bhagabuti Churn Bhuttacharjee Chowdhry* v. *Bisheshwar Sen* (3) the Judges expressed the opinion that the words " any person whose immoveable property has been sold " were not to be restricted to the judgment-debtor alone, but they held that they do not include a person who has purchased the same property at [490] a prior execution sale which had not been confirmed at the time of the subsequent sale.

(1) 14 C. 240. (2) 1 C.L.R. 250. (3) 8 C. 367.

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15 C. 488 (F. B.) =13 Ind. Jur. 54.

"In the case of *Panye Chunder Sircar* v. *Hurchunder Chowdry* (1) certain remarks are made which seem to show that one of the Judges who decided that case was of opinion that the words were sufficiently wide to include a private purchaser from the judgment-debtor prior to the date of auction.

"In *Rakal Chunder Bose* v. *Dwarka Nath Misser* (2) it was held that a mortgagee who had obtained a decree for foreclosure of the property sold was a person who had such an interest in the property sold as entitled him to make an application under the section in question.

"In the present case, however, as in the case of *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha* (3), the applicant is a person who claims not through but adversely to the judgment-debtor. She says: 'The property was not the property of the judgment-debtor, but belongs to me and the question is whether a claim of this sort can be entertained under s. 311. We are of opinion that it cannot be entertained under that section. It seems to us that the object of that section is to allow objections to be preferred to the regularity of the sale proceedings by those interested in the sale *on the supposition that it was a sale of the judgment-debtor's property;* and that the section ought not to be used for the purposes of allowing third parties to advance claims to the property on the ground that it was not the property of the judgment-debtor.

"This view is, however, opposed to that taken in the case of *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha*, to which reference has been made."

Moulvi *Surajul Islam*, for the appellant.

The words of s. 311 of the Code are wide enough to include a purchaser from the judgment-debtor; the section is not confined to a judgment-debtor—see *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha* (3) and *Bhagabuti Churn Bhattacharjee Chowdry* (4). A mortgagee was held to come within the section—*Rakat Chunder Bose* v. *Dwaraka Nath Misser* (2).

[**491**] Mr. *Twidale*, for the respondent.

The objector has no *locus standi;* s. 311 only refers to persons whose property has been sold under Chap. XIX, and it is only the judgment-debtor's property that the chapter deals with. Sections 254 and 266 clearly show this; persons who are not judgment-debtors claiming property sold under a decree come in under a different chapter of the Code.

OPINION.

The opinion of the Court (Petheram, C.J., Tottenham, Pigot, Macpherson and Ghose, JJ.) was delivered by

Petheram, C.J.—This is an appeal from an order confirming the sale of immoveable property under a decree, notwithstanding an objection under s. 311 of the Civil Procedure Code, on the ground of irregularities. The objector was not the judgment-debtor, but was a person who claimed the property as her own, alleging that she had bought it of the judgment-debtor prior to the attachment. The question which we have to consider is whether such a person is entitled to object to a sale under s. 311.

The case of *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha* (3) is a clear authority that the words "any person" in that section are to receive the widest meaning, and that any person whatever may come in

(1) 10 C. 496. (2) 13 C. 346. (3) 14 C. 240. (4) 8 C. 367.

1888 APRIL 25 — FULL BENCH. — 15 C. 488 (F. B.) = 13 Ind. Jur. 54.

and claim an interest in the property, and may apply under that section to set aside the sale. The earlier cases in this Court are under the section of the old Code, and take the opposite view.

The case of *Krishnarav Venkatesh* v. *Vasudev Anant* (1) shows, and we think rightly shows, that the words *any person* were used intentionally to enable other persons than the judgment-debtor to apply if they were injured by the irregularity. Upon this state of the authorities, we have to decide what is the meaning of the section. The words are "any person whose immoveable property has been sold under this chapter may apply," but the sale is not to be set aside unless the applicant proves that he has sustained substantial injury. We think that this means that the substantial injury must be the direct result of the irregularity, and that this could only be the case where the property of the person applying had not only been put up [492] for sale and knocked down, but had been sold in the sense that the applicant's interest had been legally affected by such sale, as in the case of *Krishnarav Venkatesh* v. *Vasudev Anant* (1), but that a person claiming by title paramount to the judgment-debtor is not within the meaning of the words "any person" in the section, inasmuch as his title to the property is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale.

On the whole we are of opinion that the decision of *Abdul Huq Mozumdar* v. *Mohini Mohun Shaha* (2), cannot be sustained, but that the rule in *Joge Narain Singh* v. *Bhughano* (3), followed in *Mina Koer* v. *Luchman Bhuggat* (4) and *Rakal Chunder Bose* v. *Dwarka Nath Misser* (5), as explained by the Bombay case, is correct. We therefore answer this question in the negative.

The result is that the appeal is dismissed with costs.

T. A. P. *Appeal dismissed.*

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15 C. 492.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

FOTICK CHUNDER DEY SIRCAR (*Decree-holder*) *v.* E. G. FOLEY AND OTHERS (*Judgment-debtors*).* [23rd November, 1887.]

Execution of decree—Decree for arrears of rent—Under-tenure—Sale of property other than under-tenure—Arrest of judgment-debtor—"Charge"—Bengal Tenancy Act (VIII of 1885), *s.* 65— *Transfer of Property Act* (*IV of* 1882), *ss.* 68, 100.

A landlord, who has obtained a decree for arrears of rent of an under-tenure, is not restricted by the provisons of the Bengal Tenancy Act (Act VII of 1885) to executing such decree in the first instance by sale of the under-tenure, but is at liberty to execute it in the ordinary manner against the person or other property whether moveable, or immoveable of his judgment-debtor.

[493] The provisions of s. 68 of, the Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section.

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* Appeals from Appellate Orders, Nos. 253 to 259 of 1887, against the orders of J. Posford, Esq., Judge of Backergunge, dated the 6th of June 1887, reversing the orders of Baboo Mohim Chander Ghose, Munsif of Burrisal, dated the 2nd of March 1887.

(1) 11 B.H.C.15. (2) 14 C. 240. (3) 2 W.R. Mis. 13.
(4) 1 C.L.R. 250. (5) 13 C. 346.

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APPELLATE CIVIL.

15 C. 492.

Semble.—The "charge" referred to in s. 65 of the Bengal Tenancy Act (VIII of 1888) is not such a "charge" as that defined by 100 of the Transfer of Property Act.

Lalit Mohun Roy v. *Binodai Dabee* (1) explained.

[**Appr.,** 10 C.P.L.R. 48 (49); **Commented upon,** 11 C.P.L.R. 95 (98, 100); **R.,** 33 C. 985=4 C.L.J. 219 (227); 26 C. 103 (108); 18 C.L.J. 29 (31)=16 Ind. Cas. 355.]

THESE appeals arose out of applications made by the appellant Fotick Chunder Dey Sircar to execute certain decrees against the respondents for arrears of rent of certain under-tenures held by them. The decrees had been passed by the third Munsif of Patuakhali, and the appellant had them transferred to the Court of the first Munsif of Burrisal for the purpose of executing them within the jurisdiction of that Court. The manner in which the decrees were sought to be executed was by attachment of the moveable property of the judgment-debtors, and also by the arrest of their persons. The latter part of the application was refused, but upon writs of attachment of the moveable property being issued the judgment-debtors applied to the Munsif to stay execution upon two grounds: first that the decree-holder was not entitled to proceed against them personally or against their property, moveable or immoveable, without, in the first instance, proceeding against the defaulting under-tenures for the respective arrears of rent of which the decrees had been passed; and, second, that the certificates had been illegally issued.

The decree-holder thereupon objected that the Munsif had no jurisdiction to determine either of these questions, but the Munsif overruled that objection as regards the first point, and decided that the decree-holder was entitled to execute the decrees in the way he sought, and that the judgment-debtors' objections on that ground were invalid. As regards the second point, he held he had no jurisdiction to determine it, and, therefore, disallowed the objections of the judgment-debtors.

The latter thereupon appealed to the District Judge, and the only question raised in the appeal was the first of the above mentioned two points. Upon that question the District Judge reversed the Munsif's order, holding that a rent decree should first of all be executed by sale of the defaulting tenure or [494] saleable holding before it could be executed against the person or other property, moveable or immoveable, of the judgment-debtor.

Against that order the decree-holder now appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Dr. *Rash Behari Ghose*, for the appellant.

Dr. *Guru Dass Banerjee*, Baboo *Boikunt Nath Dass* and Baboo *Chunder Kant Sen*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—The question that arises for consideration in this case is whether, since the passing of the Bengal Tenancy Act, 1885, a landlord who obtains a decree for rent is entitled, if he pleases, in the first instance, to attach the moveable property, and, if he pleases, the person of his judgment-debtor, or whether he is obliged, in the first instance, to endeavour to execute his decree by putting up for sale the tenure, the

(1) 14 C. 14.

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APPELLATE CIVIL.

15 C. 492.

rent in respect of which is in arrear, and for which he has obtained a decree.

The District Judge has held that the landlord is not entitled, in the first instance, to attach the moveable property, and, if he so pleases, the person of the defaulting tenant.

In support of this view, the District Judge has relied upon the case of *Lalit Mohun Roy* v. *Binodai Debee* (1). With reference to that case, which was decided by Mr. Justice Ghose and myself, two observations are to be made. First, it was a decision under the old rent Act (Act VIII of 1869), and we especially called attention, at the conclusion of our judgment, to the fact that the conditions of things as they existed under that Act had been entirely altered by the Bengal Tenancy Act.

In the second place it is to be observed that in that case we held that if the landlord wished, in the first instance, to proceed against any *immoveable* property of the defaulting tenant, the *immoveable* property which he must attach and put up for sale is the tenure, in respect of the rent of which he has obtained a decree.

[**495**] We said nothing as to the landlord's right to proceed against the *moveable* property of the defaulting tenant in the first instance. That question was not before us.

Upon these grounds we are of opinion that the case cited does not support the conclusion at which the District Judge has arrived.

On behalf of the respondents it has been pointed out that, by virtue of s. 65 of the Bengal Tenancy Act, 1885, rent is declared to be " a first charge " on the tenure; this " charge," it was argued, was such a " charge " as is defined by s. 100 of the Transfer of Property Act, and being such a " charge " it was argued that " all the provisions thereinbefore contained " (*i.e.*, in the Transfer of Property Act) " as to a mortgagor," so far as might be, " applied to the plaintiff, appellant, as the owner of the tenure," *i.e.*, " as the owner of the property;" and that the provisions of ss. 81 and 82 of the Transfer of Property Act, and all the provisions thereinbefore contained (*i.e.*, previous to s. 100) " as to a mortgagee instituting a suit for the sale of the mortgaged property, so far as might be, applied to the plaintiff, he being a person having such charge;" and it was further contended that amongst the provisions thereinbefore contained applicable to the plaintiff were the disabilities contained in s. 68 of the Transfer of Property Act.

One answer to this argument is this: The provisions of s. 68 are not amongst those which are referred to in s. 100.

S. 100 speaks of the " provisions contained as to a mortgagor " and " as to a mortgagee instituting a suit for the sale of the mortgaged property." The provisions dealing with the rights and liabilities of a mortgagor are contained in ss. 60 to 66 inclusive.

Ss. 67 to 77 inclusive deal with the rights and liabilities of a mortgagee; and of those sections the only one which s. 100 makes applicable to " a person having a charge not amounting to a mortgage " are those relating to " a mortgagee instituting a suit for the sale of the mortgaged property;" and s. 68 is not one of those sections.

And, further, supposing that s. 68 has any application to the matter it only deals with cases where a mortgagee, *may* [**496**] *bring a suit* for the mortgage money; it can have no reference to cases where *after a suit has been brought and a decree obtained*, the mortgagee seeks to

(1) 14 C. 14.

sell any property in satisfaction of his decree. The disability, if there was any, ceased with the decree. 1887 Nov. 23

This, we think, is a sufficient and complete answer to Dr. Banerjee's argument. But we are not prepared to admit that the "charge" referred to in s. 65 of the Bengal Tenancy Act, 1885, is such a "charge" as is defined by s. 100 of the Transfer of Property Act. Section 65 of the Bengal Tenancy Act, 1885, is an enactment for the benefit of the landlord. It gives him rights which are denied to other creditors. The effect of acceding to Dr. Banerjee's argument would be to deprive the landlord, at any rate for a time, of one of the rights and remedies which an ordinary judgment-creditor enjoys. APPELLATE CIVIL. 15 C. 492.

Seeing that s. 65 of the Bengal Tenancy Act, 1885, is an enactment for the benefit of the landlord, and considering that the provisions of Beng. Act VIII of 1869 as contained in ss. 59 to 61, and s. 65 as to the order in which properties belonging to a defaulting tenant might be brought to sale, find no place in the Bengal Tenancy Act, 1885, we cannot believe that it was the intention of the Legislature to tie the hands of a landlord, as they were tied under the old act. We are fortified in the view we take by a decision (PETHERAM, C.J., and GHOSE, J.) where they held that the view taken by the District Judge, in the present case, was not correct.

Upon principle, therefore, and, so far as the cases go, upon authority, we are of opinion that the contention of Dr. Banerjee ought not to prevail.

We accordingly set aside the order of the lower Appellate Court and restore those of the first Court with costs of all Courts.

H. T. H. *Appeal allowed.*

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15 C. 497=13 Ind. Jur. 18.

[497] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ghose.

KALI CHARUN SINGH AND OTHERS (*Decree-Holders*) v. BALGOBIND SINGH AND OTHERS (*Judgment-Debtors*).* [18th February, 1888.]

Surety—Execution of decree against Surety—Surety for costs of appeal—Separate suit—Summary Procedure—Civil Procedure Code, 1882, s. 253.

Section 253 of the Civil Procedure Code is not applicable to a surety who has become security in an appellate Court. A security bond, therefore, executed by a surety on behalf of an appellant for the costs of an appeal under s. 549 of the Code, cannot be summarily enforced against the surety in the execution proceedings; the remedy is by separate suit.

Bans Bahadur Singh v. *Mughla Begum* (1) dissented from; *Radha Pershad Singh* v. *Phuljuri Koer* (2) followed.

[**Diss.**, 17 A. 99 (102)=15 A.W.N. 19; 4 L.B.R. 197 (198)=14 Bur. L.R. 170; **F.**, 22 C. 25 (27); 23 C. 212 (217); **Cons.**, 25 B. 409 (414); **R.**, 13 C.P.L.R. 101 (106).]

Two of the respondents, Rajroop Singh and Ranpal Singh, had become sureties on behalf of the judgment-debtor respondent, Balgobind Singh, to a security bond taken under s. 549 of the Civil Procedure Code for the costs of an appeal. The costs not having been paid the decree-holders applied in the course of the execution proceedings to enforce the

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* Appeal from Order No. 299 of 1887 against the order of Baboo Girish Chunder Chowdhry, Subordinate Judge of Patna, dated the 16th of August 1887.

(1) 2 A. 604. (2) 12 C. 402.

1888 FEB. 18. — APPELLATE CIVIL. — 15 C. 497=13 Ind. Jur. 18.

security bond against the judgment-debtor and the sureties. On this application the Subordinate Judge made the following order:—

"It seems to me that the security bond executed by the sureties Rajroop Singh and Ranpal Singh cannot be enforced in the execution. The security was taken under s. 549 of the Civil Procedure Code after the passing of the decree in the original suit and during the pendency of an appeal in the High Court against that decree. The provisions of s. 253 of the Civil Procedure Code therefore do not apply to this case. I am inclined to think that section applies to those sureties only who have made themselves liable before the passing of the decree of the first Court in an original suit. This view is supported by the ruling in the case of *Radha Pershad Singh* v. *Phuljuri Koer* (2). There is no other section in the Code under which the security bond may be enforced in execution of the decree. The pleader for the decree-holder argues that the second para. of ss. 582 and 583 [**498**] have the effect of extending the operation of s. 253 to sureties who become liable before the passing of the Appellate Court's decree. I do not think they have that effect. The application for execution against the sureties is disallowed."

From this order the decree-holders appealed on the grounds (*a*) that the Subordinate Judge was wrong in holding that, the security having been taken under s. 549 of the Civil Procedure Code pending appeal, it could not be summarily executed, but that a separate suit must be brought; (*b*) that the summary procedure was applicable to a security bond like the present one given pending appeal as a security for the performance of the decree which might be passed on the appeal, inasmuch as a suit cannot be said to be finally decided until the disposal of the appeal; (*c*) that the case relied on by the Subordinate Judge was not applicable to the present case; and (*d*) that, there having been no objection to the summary procedure, the application should not have been wholly dismissed.

Baboo *Karuna Sindhoo Mukerji*, for the appellants referred to the case of *Bans Bahadur Singh* v. *Mughla Begum* (1).

Baboo *Nil Madhub Sen*, for the respondents relied on the case of *Radha Pershad Singh* v. *Phuljuri Koer* (2).

JUDGMENT.

The judgment of the Court (MACPHERSON and GHOSE, JJ.) was delivered by

GHOSE, J.—The question involved in this appeal is whether a security bond executed by a surety on behalf of an appellant for the costs of an appeal, under s. 549 of the Code of Civil Procedure, can be enforced against the surety in execution of the decree of the Appellate Court, without a separate suit being brought against him.

The lower Appellate Court has held that it cannot be so enforced, and has accordingly disallowed the application of the decree-holder-

The main contention in appeal before us has been that the surety, by reason of the security bond executed by him in the Appellate Court, became as it were a party to the appeal, and that when s. 583 of the Code of Civil Procedure directs [**499**] that the decree of an Appellate Court shall be executed according to the rules prescribed for the execution of decrees in suits, it can be summarily executed against a surety in accordance with s. 253 of the Code.

(1) 2 A. 604. (2) 12 C. 402.

In order to be able to deal satisfactorily with this contention, it may be necessary to refer to some of the provisions of the old Code, Act VIII of 1859. Section 204 of that Code ran as follows: "Whenever a person has become liable as security for the performance of a decree or any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant." Section 342 was in these words: "It shall be in the discretion of the Appellate Court to demand security for costs from the appellant or not, as it shall see fit, before the respondent is called upon to appear and answer, provided that the Court shall demand such security in all cases in which the appellant is residing out of the British territories in India, and is not possessed of any land or other immoveable property within those territories independent of the property to which the appeal relates; and, in the event of such security not being furnished at the time of presenting the memorandum of appeal or within such time as the Court shall order, the Court shall reject the appeal." Section 362 provided that "application for the execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules hereinbefore contained for the execution of original decrees."

Now, there can be very little doubt that, regard being had to the words of s. 204 as they stood in the old Procedure Code, the decree therein referred to would be a decree not only of the Court of first instance, but also a decree of the second Court (s. 204 read with s. 362); and it appears that it was held in several cases, both in this Court and in some of the other High Courts in India, that a security bond, executed by a surety for the costs of an appeal, could be enforced against him summarily in the execution department without a regular suit being brought for that purpose. If the words with which we are [500] now concerned in the present Code of Civil Procedure—I mean the words of s. 253, to which I shall presently refer—were the same as those used in s. 204 of the old Code, there would not be any difficulty in accepting, the view which the appellant has placed before us. But it seems to us that the law upon this matter has been materially altered by s. 253 of the Code. That section runs thus: "Whenever a person has, before the passing of a *decree in an original suit*, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as the decree may be executed against a defendant." The words "a decree in an original suit" are significant enough as indicating the intention of the Legislature so far as the present question is concerned.

Now, looking to s. 380, Chap. XXIV, which contains the provisions, as regards security for costs, that may be required from the plaintiff in a suit in a Court of first instance, and to s. 253 just referred to, there can be no doubt that if a person becomes surety for a party before the passing of a decree in an original suit, he becomes, as it were, a party to the suit itself, and the security bond executed by him may be enforced in the same manner as a decree may be executed against a defendant.

The next section that has to be referred to in this connection is s. 549. This section empowers an Appellate Court to demand from the appellant, at its discretion, security for the costs of an appeal or of an original suit under certain circumstances; and it provides that if such

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security is not furnished when demanded within the appointed time, the Court shall repect the appeal. Then in s. 583 it is provided: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter, desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of the decrees in suits."

When, therefore, a decree-holder applies to execute a decree of an Appellate Court, the Court shall execute it according to the [**501**] rules prescribed for execution of decrees in suits; and we have to find out in Chap. XIX of the Civil Procedure Code the rules in accordance with which such a decree is to be executed. Now s. 253 is a section which occurs in Chap. XIX under the head "of the mode of executing decrees;" and the question that arises is whether, in providing that a decree of an Appellate Court is to be executed in accordance with the rules prescribed for execution of decrees in suits, the Legislature intended that s. 253, which expressly refers to a surety in an original suit, should be extended so as to bring in a surety, who becomes a surety in an Appellate Court, as if he were a party to the decree passed in appeal. It will be observed that s. 253 declares, in the first place, the liability of the surety, and, in the second place, the mode in which satisfaction can be had as against him; but this liability, as already noticed, is expressly declared in reference to a surety who becomes a surety in an original suit before the passing of a decree in that suit, and we are unable to say upon a consideration of the various portions of the Code that the provisions of this section can be extended and made applicable to cases not provided by the Code itself. There is no provision, so far as we have been able to discover, which prescribes expressly the liability of a surety who executes a bond in the course of an appeal in an Appellate Court. All that we find in s. 583, read with s. 549, is that an appellant is bound to furnish, when demanded by the Court, security for the costs of the respondent, and that where a decree is passed in an appeal, the decree of the Appellate Court is to be enforced in accordance with the rules prescribed for execution of decrees in suits. The decree of an Appellate Court is indeed to be executed according to the rules provided for execution of decrees in suits; but it does not follow from this that a surety who becomes a surety in an Appeallate Court becomes liable by reason thereof as if he were a party to the Appellate Court's decree, and that the said decree can be executed against him summarily.

Then, again, if we look to s. 336, we find an instance in which a Court of first instance is empowered to demand security from a judgment-debtor who is brought up under a warrant; and in this case, if a security bond be executed for the purpose of getting [**502**] the judgment-debtor discharged from arrest, a provision is made in this vise: "In the case of surety, such security may be realized in manner provided by s. 253." So that it seems to be perfectly plain that wherever the Legislature intended that a security bond might be enforced summarily without the intervention of a regular suit, it has distinctly provided for it; but in the case of a surety who becomes a surety in an Appellate Court we do not find such provision made. We think that it would be straining the law if we were to give effect to the contention of the appellant that the surety in this case has become a party to the appeal, and that, in accordance with s. 253, the security bond can be enforced against him summarily. Our

attention has been called to a Full Bench ruling of the Allahabad High Court in the case of *Bans Bahadur Singh* v. *Mughla Begum* (1), where a majority of three Judges against two held that under the provisions of ss. 602, 603, and 610 of the Code execution could be had against a surety for the costs of an appeal to the Privy Council in accordance with s. 253; but we are not prepared to take the same view of the matter. We are rather inclined to agree with the minority of the Judges who composed the Full Bench, and with the decision of a Divisional Bench of this Court upon the same question in the case of *Radha Pershad Singh* v. *Phuljuri Koer* (2).

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For these reasons we think that the judgment of the Court below is right, and that this appeal should be dismissed with costs.

J. V. W. *Appeal dismissed.*

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15 C. 502.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

MON MOHUN ROY (*Decree-holder*) *v.* DURGA CHURN GOOEE AND ANOTHER (*Judgment-debtor*).* [9th February, 1888.]

Limitation Act (XV of 1877), Sch. II, Art. 178—Execution of decree—Decree payable by instalments—Instalment, Default in Payment of.

When a decree or order makes a sum of money payable by instalments, on certain dates, and provides that, in default of payment of any instalment, **[503]** the whole of the money shall become due and payable and be recoverable in execution, by art. 178, Sch. II of the Limitation Act, limitation begins to run from the date of the first default, unless the right to enforce payment in default has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other.

R, obtained a decree against *D. C.* and *K. G.* for a sum of money on 21st June 1880. On 25th May 1882 an order was made in terms of the petition of both parties, providing that the amount of the decree should be paid by five instalments, the first instalment being due in July 1882, and that in default of payment of any instalment the whole amount should be due and recoverable in execution. Default was made in payment of the first instalment, nor was there any subsequent payment of that or any other instalment.

On 30th July 1886 *R* applied for execution of the four last instalments alleging that the first had been paid.

Held, that the application was barred by limitation under art. 178, sch. II, Limitation Act, 1877.

Hurronath Roy v. *Maheroollah Moollah* (3); *Dulsook Rattah Chand* v. *Chugon Narrum* (4); *Ship Dat* v. *Kalka Prasad* (5); *Cheni Bas Shaha* v. *Kadum Mundul* (6); *Asmutullah Dalal* v. *Kali Churn Mitter* (7); *Nil Madhub Chuckerbutty* v. *Ram Sodoy Ghose* (8); *Ram Culpo Bhattacharji* v. *Ram Chunder Shome* (9); *and Chunder Komal Das* v. *Bisassurce Dassia* (10) referred to.

[F., 13 C.W.N. 1010=4 Ind. Cas. 17; **Appr.**, 35 A. 178=18 Ind. Cas. 731 (733)=11 A.L.J. 224 (230); **R.**, 4 C.P.L.R. 21 (22); 20 C. 74 (78); 21 C. 542; 16 A. 371 (372); 27 B. 1 (**F.B.**); 100 P.R. 1902=131 P.L.R. 1902; 31 C. 297 (299); 36 C. 394=9 C.L.J. 226=13 C.W.N. 1004=1 Ind. Cas. 49; 2 Ind. Cas. 653; **D.**, 24 C. 281 (283); 31 C. 83 (87)=8 C.W.N. 66.]

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* Appeal from Order No. 359 of 1887 against the order of F. W. Badcock, Esq., Judge of Rajshahye, dated the 21st of July 1887 affirming the order of Baboo Surbanund Dass, Munsif of Shibgunge, dated the 5th of April, 1887.

(1) 2 A 604. (2) 12 C. 402. (3) B. L. R. Sup. Vol. 618=7 W.R. 21.
(4) 2 B. 356. (5) 2 A. 443. (6) 5 C. 97.
(7) 7 C. 56. (8) 9 C. 857. (9) 14 C. 352.
(10) 13 C.L.R 243.

1888 FEB. 9. — APPELLATE CIVIL. — 15 C. 502.

THIS was an appeal against the order of the lower Appellate Court by which it affirmed an order of the Munsif, refusing to issue execution on the ground that the application was barred by limitation.

Mon Mohun Roy (the decree-holder) on the 21st June 1880 obtained a decree against Durga Churn Gooee and Kally Prosonno Gooee (judgment-debtors) for arrears of rent. On the 25th May 1882, upon the petition of both parties, an order was made providing that the judgment-debtors should pay to the decree-holder the amount of the decree by five instalments, and that in default of payment of any one instalment, the entire amount of the decree should become recoverable by proceedings in execution. The first instalment fell due in July 1882; the second in September 1883; the third in April 1884; the fourth in October 1884; and the fifth in April 1885.

[**504**] On 30th July 1886 the decree-holder applied to the Munsif for execution of the last four instalments, it being alleged that the first had been paid.

The Munsif found that the first instalment had not been paid, and that, therefore, default had been made in the payment of an instalment in July 1882, more than three years before the date of the application for execution, and that no subsequent payment had been made. He, accordingly, held that the application was barred under art. 178, Sch. II of the Limitation Act, 1878.

On appeal the Judge upheld the finding of the Munsif; and dismissed the appeal on the grounds that it was barred by limitation, and that the Munsif could not make the order of 25th May 1882 by reason of art. 175, Sch. II of the Limitation Act, 1878.

The decree-holder appealed to the High Court.

Baboo *Gurudas Banerjee*, for the appellant.

Baboo *Kalikissen Sen*, for the respondents.

JUDGMENT.

The judgment of the Court (WILSON and O'KINEALY, JJ.) after stating the above facts continued as follows:—

Two points have been decided in the lower Court: *first*, it has been held that the order for payment by instalments made in May 1883 was improperly made on the ground that more than six months had elapsed after the date of the original decree. I do not think this is sustainable, inasmuch as the order was made with the consent and on the application of both parties, and it is not open to either to say now that it was an improper order. But the lower Court has decided, *secondly*, that the application is out of time on the ground that in July 1882, when the first default was made, the whole of the money secured by the decree became payable, and might have been recovered by execution, and that the present application was barred by the provisions of art. 179, sub-s. 6 of the second schedule of the Limitation Act. I think it unnecessary, and it would be unprofitable, to enquire how we might decide a question of this kind if it were a new question, for it is a question which has arisen many times in the course of a number of years. And in a matter of this kind it is all important that the current of [**505**] decisions should be uniform and consistent, and that it should be strictly adhered to.

I understand the authorities thus: First, it is a general rule that where a decree or order makes a sum of money payable by instalments on

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certain dates, and provides that, on default in payment of one of the instalments, the whole of the money shall then become due and payable, and be recoverable in execution, then under art. 178 of the Limitation Act already mentioned, as under corresponding articles in earlier Acts, limitation commencess to run when the first default is made. The principle was laid down in the case of *Hurronath Roy* v. *Maheroolah Mollah* (1) by a Full Bench. That was a case, not of execution, but of a suit upon a bond payable by instalments, and what was laid down was this: "Under these circumstances we are of opinion that limitation did run from the time when default was made in the payment of the first instalment, in consequence of which the whole amount became due." Under the successive Limitation Acts the same question has arisen very often. In the case of *Dulsook Rattan Chand* v. *Chugon Narun* (2) the question was considered with reference to execution, and Westropp, C. J., and Melville, J., held that limitation began to run from the date of the first default. The same question came before the Allahabad High Court in the case of *Shib Dat* v. *Kalka Prasad* (3), and the same conclusion was arrived at. The same view was taken by a Bench of this Court in the matter of *Cheni Bash Shaha* v. *Kadum Mundul* (4), and again in *Asmutullah Dalal* v. *Kally Churn Mitter* (5).

There has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this, that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived, by subsequent payment of the overdue instalment on the one hand and receipt on the other, then, the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred. It is only necessary to [506] refer to two cases upon this point; one is *Nil Madhub Chuckerbutty* v. *Ram Sodoy Ghose* (6). There the overdue instalments up to a certain date have been paid, and it was held that that being so, limitation would only run from the latter period, the first default having been waived. The same view was taken by Petheram, C. J., and Cunningham, J., in *Ram Culpo Bhuttacharji* v. *Ram Chunder Shome* (7). There again the prior instalments were paid and received, the penalty being thus waived, and a fresh period of limitation was held to run. On the other hand in the case already referred to of *Cheni Bash Shaha* v. *Kadum Mundul* (4) the distinction is expressly taken between a waiver by payment and receipt of an overdue instalment, and a mere omission to sue or take steps on the default; and it was held that, although there may be a waiver by the payment and receipt of the overdue instalment, there could be none by the mere fact of doing nothing.

These authorities are quite consistent with one another. The only case which seems to me to conflict in any way with these cases is a case of *Chunder Komul Das* v. *Bisassurree Dassia* (8). There it does appear to me to have been held that, although in a case similar to the present defaults had occurred, and no subsequent payment had been made in respect of the kists in default, it was still open to the creditor to say that the provision making the whole sum payable on default of payment of one instalment was one only for his protection, and that he might afterwards waive it and put it out of the way as regards the period of limitation. That seems to me irreconcilable, if I correctly understand it, with

(1) B.L.R. Sup. Vol. 618=7 W.R. 21. (2) 2 B. 356. (3) 2 A. 443.
(4) 5 C. 97. (5) 7 C. 56. (6) 9 C. 857.
(7) 14 C. 352. (8) 13 C.L.R. 243.

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the current of decisions on the subject, and especially inconsistent with the decision in *Cheni Bash Shaha* v. *Kadam Mundul* (1). I am disposed to think that there must have been some peculiarity in the case beyond what appears in the report, because the learned Judges cite as an authority in support of their view the case of *Asmutullah Dalal* v. *Kally Churn Mitter* (2), which appears to me, as I understand it, to be an authority for the contrary view. The result is that in my opinion there is an overwhelming [**507**] preponderance of authority in favour of the proposition that limitation runs from the date of the first default in the payment of an instalment, and that the present application for execution is barred by limitation. On that ground the decision of the lower Court can be supported, and this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

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15 C. 507=12 Ind. Jur. 458.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

NICOL *v.* MATHOORA DASS DUMANI. [2nd May, 1888.]

Costs—Practice—Costs of reference to High Court—Small Cause Court Act (Act XV of 1882), *s.* 69*—Civil Procedure Code (Act XIV of* 1882), *ss.* 220, 617, 620.

Under s. 620 of the Civil Procedure Code, the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.

ON the 10th August 1887, this suit, which was one to recover money on a breach of contract, was, on the ground that the plaint disclosed no cause of action, and that there was a variance between the pleadings and the proofs, dismissed by the Chief Judge of the Small Cause Court, subject to the opinion of the High Court on certain points referred to it.

At the hearing of this reference Mr. Justice WILSON and Mr. Justice O'KINEALY reversed the decision of the learned Chief Judge on the points above mentioned, and remanded the case to the Small Cause Court for re-hearing.

At the conclusion of the reference, Mr. Phillips, who appeared for the plaintiff, asked for the costs of the reference; the Court however, intimated that costs should be dealt with by the Small Cause Court, and therefore made no order as to costs.

On the day fixed by the Chief Judge for reading the opinion of the High Court on the reference, the plaintiff applied through his attorney to the Chief Judge of the Small Cause Court for cost of the reference, on the ground that he had been successful in the High Court. The defendant, through his attorney, objected and contended that the Small Cause Court was bound by s. 620 of the Civil Procedure Code, and that the costs must be costs in [**508**] the case. The learned Chief Judge decided that the plaintiff was entitled to costs and made an order to that effect.

The defendant thereupon applied to the High Court to have that order set aside; and Mr. Justice TREVELYAN granted to the defendant a rule *nisi* and called for the record of the case.

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(1) 5 C. 97. (2) 7 C. 56.

1888 MAY 2. — ORIGINAL CIVIL. — 15 C. 507=12 Ind. Jur. 458.

At the hearing of this rule,—

Mr. *Sale*, appeared in support of the rule, and

Mr. *Hill*, to show cause.

Mr. *Sale*.—Section 620 of the Code applies to the Small Cause Court, and the case being still pending, it is not open to the Chief Judge to deal with the costs until the case is determined.

Mr. *Hill*.—If s. 320 is to be so read, then the practice of the High Court has up to the present time been wrong. Since 1883 there have been various orders of the High Court on references from the Small Cause Court, all of which dealt with costs. [WILSON, J.—If the Court had power to do so, it is only on the ground that a reference is an application under s. 218 or 220 of the Code.] Section 620 has reference to costs generally, irrespective of when the order is made. The word "case" in s. 617 may cover a suit or an appeal under s. 69 of the Small Cause Court Act. There are two classes of references, one by the Judge and not by the parties, and the other by the parties irrespective of the wishes of the Judge. Although this reference is stated to be under s. 617, yet that section does not refer to compulsory references which this reference is. Is this practice to prevail alike for both classes of reference? If costs consequent on the reference are to be costs in the case, then the High Court ought to make no order as to costs, but I find it has been the practice to do so; costs were given by the High Court in *Maclin* v. *Weatherall*, decided on the 14th January 1884; in *Inderchund* v. *Puddun Singh*, decided on the 11th December 1886; and in the *Bombay Burmah Trading Co.* v. *Kanto Churn Ghose*, all unreported cases. The phrase "costs in the case" is not a technical phrase; it has its origin in Act XXIII of 1861, but there it only referred to suits. I submit that the Legislature never intended that a reference which did not fall under s. 617, but under s. 69 of the Small Cause Court Act, should be governed by the rule laid down in s. 620. Is the rule laid down in s. 620 to [**509**] apply to references made by a Judge for his own guidance? I submit not, because it may well be that a party to a suit might be confident of success, and might for the purpose of harassing his adversary bring up the case time after time on reference. [WILSON, J.—I think s. 620 means that the costs shall be dealt with like any costs in the case not dealt with at the time, and although your client may possibly lose his case eventually, yet he might obtain his costs of the reference.] If the words "costs in the case" can be so read, I shall not press my argument. Then as to the costs of this present rule, as the High Court has hitherto dealt with the costs of references before it, and it has also been the practice of the Small Cause Court to allow them, I ought to have my costs.

ORDER.

WILSON, J.—The point raised in this matter is a small one, but it is desirable that it should be settled, because it is one which may be of frequent occurrence. What happened was this: A case came on before the learned Chief Judge of the Small Cause Court in which a question arose which he referred to this Court, and which this Court decided in the plaintiff's favour, and it was directed that this case should go back to be decided on its merits. The matter came on again before the learned Chief Judge, who fixed a day dealing with the case on its merits, but in the meantime he made an order giving the plaintiff the costs of the reference to this Court. It is against that order that this rule has been obtained.

1888 MAY 2. — ORIGINAL CIVIL. — 15 C. 507 - 12 Ind. Jur. 458.

The question before me is the same as was raised before the learned Judge on behalf of the defendant, *viz.*, whether the learned Judge had power to deal with the costs of the reference at this stage, or must dispose of them at a later stage when dealing with the costs generally. I think this objection is well founded. Section 69 of the Presidency Small Cause Court Act directs the manner in which, in certain cases, references are to be made to this Court, and by that section they are to be referred under s. 617 of the Code of Civil Procedure. Now s. 617 of the Code of Civil Procedure provides for references on questions of law by the Judge of an inferior Court who feels any doubt on such questions. But s. 69 of the Small Cause Court Act is somewhat wider, because the reference may be made whether [**510**] there is a doubt or not, but nevertheless the reference is to be, in express terms, under that section. Now, when the reference is under s. 617, the costs are provided for under s. 620 of the Civil Procedure Code, which says: " Costs, if any, consequent on a reference for the opinion of the High Court shall be costs in the case."

Now the sole question here is what is the meaning of the words " costs in the case." On the one hand it is suggested that " the case " means " the reference," and that the costs of the reference may be dealt with as a thing apart. On the other hand a more extreme view is taken, namely, that the costs must follow the costs of the cause. Now I do not think that this can be the true meaning. The technical meaning of the words " costs in the cause " is quite unknown in this country generally, costs of every separate application being dealt with in the discretion of the Judge when dealing with the costs of the case. I think the meaning of the words is plain. Section 617 allows a reference in the hearing of a suit or appeal, and under s. 620 the costs are to be costs in the case. I entertain no doubt that this means costs of the suit or appeal as in s. 617, s. 620 being the section under which the costs are dealt with, and the costs being made costs in the case. Turning to the sections dealing with the question of costs in suits, s. 220 provides " that the Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of the power." And then comes the only proviso I think which makes costs *prima facie*, but not I think necessarily, abide the result of the suit: " Provided that if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing."

Now these costs, therefore, under s. 620 are in the same position as costs of a suit under s. 220. The costs of an application may be dealt with separately or reserved, but the costs of a suit can only be dealt with once and for all, *viz.*, at the termination of the suit.

The result is that I think this order is wrong, and the costs of the reference must be decided when the case is decided; but I desire [**511**] to say that when the learned Judge comes to deal with the costs of the reference he will not necessarily be bound to give them to the party who succeeds in the suit. He will be at perfect liberty to give them on their own merits. In the result this order directing the defendant to pay the costs of the reference must be set aside, and the applicant must have his costs of this rule.

Rule made absolute.

Attorneys for plaintiff: Messrs. *Morgan & Co.*
Attorney for defendant: Mr. *Leslie.*

T. A. P.

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FEB. 21.

APPEL-
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15 C. 511.

15 C. 511.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

ISHAN MUCHI AND OTHERS v. THE QUEEN-EMPRESS.*
[21st February, 1888].

Receiving stolen property—Evidence—Penal Code (Act XLV of 1860), s. 411.

To constitute the offence of receiving stolen property, there must be some proof that some person other than the accused had possession of the property before the accused got possession of it.

[**Diss.**, 1 L.B.R. 39 (41); **Appr.**, 15 A. 317=13 A.W.N. 101.]

ISHAN MUCHI, Ananda Muchi, Tushti Muchi, Bonomali Muchi and Istambar Muchi were tried by the Sessions Judge of Jessore for the offence or receiving stolen property, first, in respect of property belonging to one Taramoni Baishnavi; and, secondly, in respect of property belonging to another person of the name of Nimai Karikar. There were two trials and a conviction in each.

The facts of the first case were as follows: About midnight on the 16th June 1887 Taramoni Baishnavi was awaked by knocks at her door. She got up, lit a lamp, and called to a neighbour, but got no reply; she heard the sound of pots knocked about, and the voices of two neighbours talking. She called to them and to other neighbours, but got no satisfactory replies, till at length the chowkidar was sent for, who came with two neighbours, Mohun Das and Nado Kapali.

[**512**] She found a pillow torn up in her verandah; but these men after a cursory view left her. After staying about an hour in the verandah she entered her house, and was about to shut the door when two men entered, the foremost of whom resembled one Sona Kapali, and the second resembled one Ghulam Kahar in his voice. They put out the light, and one of them pulled off a gold bracelet from her wrist. They told her to go outside; and she went to her neighbour Nobin Dass's house. From there she saw several men go southward from her house past his, carrying a tin box. The tin box (which was a rather large one) contained two small wooden boxes, in which was a large quantity of jewellery. The wooden frame work, in which the tin box was, was found broken in the yard; and next morning the tin box and the two small boxes were found in the field opened. All the jewellery, which she valued at Rs. 308-10, was gone.

Next day, Taramoni complained to the Police, and they came to investigate on 19th June; but nothing material was discovered till 27th June. On 28th June the Sub-Inspector searched the house of the accused Ananda Muchi; and the Inspector searched the houses occupied by the other accused. Ananda lived in Paltadanga, and the other accused in Raghunathpur, about five miles apart. These villages are some miles distant from Gilapol, where Taramoni lives.

The prosecution proved that in Ananda's house, in a cowhouse, were found buried in the ground, beneath a heap of cowdung, a silver girdle and some other ornaments. In the house occupied by Ishan Muchi

* Criminal Appeal No. 16 of 1888 against the order passed by F. E. Pargiter, Esq., Sessions Judge of Jessore, dated the 2nd of December 1887, (?) committed for trial to the Court of Sessions by Baboo Kader Nath Biswas, Deputy Magistrate of Jhenidah, dated 2nd August 1887.

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were found hidden inside a pillow case two chains of a gold necklace and some gold "cocoanut flower" ornaments, and inside a pot of kalai were found one chain of a gold necklace and some "cocoanut flower" ornaments. In a heap of earth beneath the eave of Tushti Muchi's house were found one chain of a gold necklace and some "cocoanut flower" ornaments. Nothing was found in the house occupied by Bonomali and Istambar Muchi. The chains were all alike and the "cocoanut flowers" were also all alike. Taramoni identified them and the girdle as her property, which was stolen on the night of the robbery. The accused all admitted the property was found as stated by the prosecution, but denied all knowledge of it.

[**513**] The facts of the second case were very similar.

In both cases the Court found Ishan, Ananda and Tushti Muchi guilty under s. 411 of the Penal Code of dishonestly receiving stolen property; and sentenced them in the first case to three, five and one year's rigorous imprisonment respectively, and in the second case to one year's rigorous imprisonment each.

Bonomali and Istambar Muchi were acquitted in both cases.

The Court directed the restoration of the stolen property to Taramoni Baishnavi and Nimai Karikar.

Ishan, Ananda and Tushti Muchi appealed to the High Court.

No one appeared on the appeal.

The judgment of the Court (Prinsep and Pigott, JJ.) was as follows:—

JUDGMENT.

The prisoners are convicted of dishonestly receiving stolen property, first, under s. 411, in respect of the goods belonging to one person, and, second, in respect of goods belonging to another.

They were separately tried and sentenced on each of these charges.

There is no proof against them save the fact that the goods found in their possession were stolen from different persons, and were found in their possession under such circumstances as to prove a guilty knowledge on their part.

There is no proof as to their receipt of the goods; nothing to show that they received them at different times or from different persons. All the goods in the possession of each prisoner may have been stolen by the same thief, and may have been by him delivered to that prisoner at the same time, although stolen on different occasions.

If each prisoner received the goods found in his possession together at the same time, that would constitute only one offence.

There is nothing in the fact that the goods were stolen at different times, to constitute by itself proof that they were received at different times, or under such circumstances as to show that more than one offence was committed in receiving them.

It need not be considered whether, if a thief brought to a receiver, say, a coat and a ring stolen from different persons, and [**514**] on the same occasion gave them to the receiver, if he said—"Here is a coat stolen from A, take this," and the receiver took it, and also "here is a ring stolen from B, take this," and the receiver took it, these acts would or would not constitute different offences, because there is nothing to show that such a case existed here.

Here there is nothing but possession of stolen property found concealed established; and this is consistent with only one offence having

been committed, so far as receiving is concerned; but in truth the offence proved is only the retaining of stolen goods.

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In this case, as observed, there is no proof of actual receiving; and it has been held in England (2 Russell on Crimes, citing *R.* v. *Cordy*) that to constitute the offence of receiving there must be *some* proof that some person other than the prisoner had possession of the goods before the prisoner got possession of them; otherwise, possession of them is only proof of the stealing, which is not found here (1).

If this rule prevails under the Penal Code (and we see no reason why it should not), the prisoners should have been convicted of the retention of stolen goods, knowing or having reason to believe that they were stolen, of the existence of which knowledge or belief their concealment of the goods was evidence.

We, therefore, set aside the conviction in the second trial. The conviction in the first case we also set aside, and in lieu thereof we convict the prisoners under the same section (411) of dishonestly retaining stolen property, and sentence the prisoners on the findings in the first case, Ishan to four years, Ananda to six years, and Tushti to two years,—all in rigorous imprisonment.

C. D. P. *Conviction and sentences varied.*

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15 C. 515 (P.C.)=15 I.A. 77=12 Ind. Jur. 217=5 Sar. P.C.J. 165=Rafique and Jackson's P.C. No. 101.

[515] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

MADHO SINGH (*Plaintiff*) v. AJUDHIYA SINGH AND OTHERS (*Defendants.*) [4th and 7th February, 1888.]

Oudh Rent Act (*XIX of* 1868), *ss.* 41 *and* 83, *cl.* 4—*Liability of lessees in the position of under-proprietors not entitled to sub-settlement—The Oudh Sub-Settlement Act* (*XXVI of* 1866)—*The Oudh Land Revenue Act* (*XVII of* 1876), *s.* 158.

A decree, in 1869, of a Settlement Court, upon the compromise of a claim, made by village co-parcenary occupiers, to an order for sub-settlement as against the talukdar, declared the claimants to be entitled to a heritable, but not transferable, lease of the village, at a rent leaving twelve per cent. profit to the lessees. For default in payment of rent this lease was decreed to be in future liable to cancellation "by the decree of any competent Court, according to any law which may be in force in Oudh with respect to persons holding an under-proprietary right in land." Afterwards, in 1879, the parties agreed that the lessees might be dispossessed for non-payment of rent. Default occurred, decrees for arrears were made in 1882 and 1883, and remained unsatisfied. In a rent suit brought by the talukdar, *held,* that he could not sue in a Revenue Court to have the lease cancelled, under the terms of the Oudh Rent Act (XIX of 1868), either by virtue of the decree, or of the subsequent agreement.

APPEAL from a decree (9th April 1885) of the Judicial Commissioner of Oudh, affirming a decree (18th September 1883) of the Commissioner of Rae Bareli, affirming a decree (23rd June 1883) of the Deputy Commissioner of Sultanpur.

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(1) See the case of *Empress* v. *Uttom Koondoo,* 8 C. 634, where, however, the point does not seem to have been taken.—*Ed.*

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PRIVY COUNCIL.

15 C. 515 (P.C.) = 15 I.A. 77 = 12 Ind. Jur. 217 = 5 Sar. P.C. J. 165 = Rafique & Jackson's P.C. No. 101.

In the suit out of which this appeal arose the present appellant sued the first respondent and twenty-four other defendants for cancellation of a lease to them of a village, Chak Pindaria, pergunnah Amethi, in zillah Sultanpur; and also for possession.

The terms of the lease were stated in a decree ,2nd October 1869) of a Settlement Court; and were followed ten years afterwards by an agreement executed between the parties on 18th March 1879.

The present proceedings having been taken by the talukdar on non-payment of decrees for rent, under the Oudh Rent Act [516] (XIX of 1868), the question now was whether they were authorised under that Act, of which s. 83 states in cl. 4 that suits "for the ejectment of a tenant, or for cancelling any lease on account of the non-payment of arrears of rent, or on account of a breach of the conditions of such lease," may be brought under it.

The lease originated thus: In 1869 a claim was made before a settlement officer by the present respondents, who were villagers occupying mouzah Pindaria in co-parcenary, for sub-settlement of that village to be made with them and as between them and the Raja of Amethi, in whose taluk the village, which he held in maafi was situate. The claim as made was not allowed, not fulfilling the requirements of the rules regarding sub-settlements and other subordinate rights of property in Oudh, which are scheduled and made law by the Oudh Sub-Settlement Act (XXVI of 1866). By those rules, to entitle a claimant to sub-settlement, he must show that he possesses an under-proprietary right; and also that he, or some person from whom he has inherited, has by virtue of that under-proprietary right, and not merely through privilege granted on account of service, or by favour of the talukdar, held the land under contract (theka) with some degree of continuousness since the village came into the taluka. He also must have been entitled to profits exceeding twelve per cent. of the gross rental. However, in regard to this, a decree (2nd October 1869) was made in terms of an agreement to which the parties came, similar to another agreement between the Raja and other village claimants in the neighbouring mouzah of Thauraj, *viz.*, that the villagers should have a heritable but not transferable lease of mouzah Pindaria, the rent to be fixed at a sum which would leave the lessees twelve per cent. of the profits, provided that the jumma for the first ten years was to be Rs. 2,999. The amount of the lease on the twelve per cent. principle was open to be re-determined at the expiration of every ten years, and the Raja was to be responsible for payment of putwaris, chowkidari, and other village expenses. No fresh title was to accrue to the lessees owing to the concession, and the lease itself was to be liable to "cancellation for default by the decree of any competent Court, according to any law which might be from time to time [517] in force in Oudh with respect to persons holding an under-proprietary right in land."

On the 18th March 1879, the villagers being then in arrear, a written agreement, in which they described themselves as "thekadars" of village Pindaria, was made between them and the Raja as follows:—

"Whereas up to this date the arrears of rent, decreed and not decreed, on account of joint lease of village Pindaria, amounting to Rs. 3,757, are due from all co-sharers of the aforesaid village within the period of limitation, and in consequence thereof, we are liable to be dispossessed at once by the Court; but as the Raja Madho Singh Bahadur has, at our request, granted us time, hence we, of our own will and consent, do

execute this deed of agreement on our own behalf and on behalf of such of our under-co-sharers as live in commensality with us, or over whose share we hold possession, and hereby covenant that we shall repay the aforesaid money without interest in accordance with the instalments specified below. Should there be breach of promise on our part as regards the payment of any of the instalments, the Raja Saheb Bahadur shall be at liberty to annul the arrangement about payment by instalments and to recover the money out of our property of all description, charging us at the same time with interest at Rs. 2 per cent. per mensem from this date, and in return for this default to eject us and our co-sharers from the lease of the entire village through the Civil Court, or in any other way he may be able to do it, without following the rules (of procedure) laid down in the Rent Act, and after such ejectment it shall not be lawful and proper for us to cultivate any land, or take the fruits and flowers of any fruit-tree, without previously obtaining a fresh lease. Should we do so, then, according to the actual capability of the soil, rent at the rate of Rs. 7 per bigha for land producing two crops in a year, Rs. 3-8 per bigha for land yielding one crop in a year, and As. 8 for each Mahua tree may be recovered from us; and the Maharaja Saheb Bahadur shall in future be at liberty to dispossess us of that (land and tree) also, and in each year, untill the rent instalment for that year shall be paid up, the money paid by us shall not be credited on account of this agreement."

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PRIVY COUNCIL.

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[518] Afterwards on 20th April 1882 the Raja obtained a decree against the villagers for Rs. 2,534, arrears of rent; and again on 27th February 1883 a similar decree for Rs. 1,865. The plaint in the present suit prayed for possession of Pindaria under cl. 4, s. 83 of the Oudh Rent Act, for non-payment of rent, amounting to Rs. 10,241, with cancellation of the lease.

The defence was that the defendants were prepared to pay all the arrears really due, but were not liable to the extent alleged. At the hearing before the Deputy Commissioner of Sultanpur, an issue was fixed raising the question whether the defendants were liable to have the lease cancelled and to be dispossessed on proceedings under the Oudh Rent Act, 1868, either under the terms of the settlement decree of 1869, or of the agreement of 18th March 1879.

The Deputy Commissioner held that neither such cancellation nor dispossession could be decreed under the Oudh Rent Act (XIX of 1868), its terms not being applicable to such a lease.

The Commissioner of Rae Bareli, on appeal, first dealing with the agreement of 1879, decided that its breach was not matter for a Revenue Court. He then considered the question of the outstanding arrears of rent, whether they were a cause of suit under Act XIX of 1868, and concluded that they were not. On this point his judgment was as follows:—

" The question whether the respondents are liable to ejectment under the Oudh Rent Act on account of the outstanding arrears of rent under the two decrees of 1882 and 1883 still remains to be decided. Section 41 and cl. 4 of s. 83 refer to tenants only, and not to under-proprietors, and one of the stipulations of the decree under which the perpetual lease is held is 'that the lease is liable to cancellation for default by decree of any competent Court, according to any law which may be from time to time in force in Oudh with respect to persons holding an under-proprietary right in land.'

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"Now the Oudh Rent Act was in force when the lease was ratified, and it could hardly have been the intention of the Courts sanctioning such lease to allow ejectment under [519] s. 41* and cl. 4 of s. 83. Had the above-quoted stipulation been absent the lessees might be regarded in the position of tenants, and ejectment under cl. 4 of s. 83 for outstanding arrears might have been justified; but in the face of this stipulation they must be treated as under-proprietors are treated. Under-proprietors cannot be ejected under s. 41 and cl. 4, s. 83, hence the respondents cannot be so ejected either.

"It is contended that by such a decision all remedy on the part of the appellant against the respondents is practically barred, but s. 158 of Act XVII of 1876 provides, in my opinion, a very sufficient and effective remedy, and it is under that section that appellant should have proceeded instead of allowing hopeless arrears to accumulate as he has done. It is fortunate for the respondents that their lease is a non-transferable one under existing circumstances."

On an appeal to the Judicial Commissioner this judgment was upheld. The Additional Judicial Commissioner, Mr. T. B. Tracy, referred specially to an argument for the appeal based upon the language of s. 41 of the Oudh Rent Act (XIX of 1868); and held that the defendants were not placed on the footing, as regards liability to be sued under the Rent Act, of tenants with rights of occupancy. The decree of 1862 treated them as on the footing of under-proprietors. In regard to the words of the decree as to cancllation for default by the decree of any Court according to the law on the subject of persons holding under-proprietary rights, his judgment was as follows:—

"If it had been the intention of the Settlement Court that the respondents should be on the footing of tenants with rights of occupancy (as contended for the appeal), all this part of the decree would be mere surplusage, as the superior-proprietors [520] could, as a matter of course, sue for the ejectment of the lessees under the provisions of the Rent Act on the occurrence of any breach in the conditions of the lease. It was clearly the intention of the Settlement Court that the respondents should be treated in case of default as defaulting under-proprietors, and that the lease should be liable to be cancelled in the same way and under the same rules as sub-settlements might be annulled. I concur with the Commissioner that the appellant's proper remedy lay in proceeding under s. 158 of Act XVII of 1876. The respondents' tenure is precisely that which is described in that section. They hold 'under a heritable, non-transferable lease, the rent payable under which has been fixed by the Settlement Officer.'"

The appeal was accordingly dismissed, and the decree dismissing the suit upheld.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant.

The respondents did not appear.

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* Section 41 of Act XIX of 1868 is as follows: "No tenant having a right of occupancy, or holding under an unexpired lease, or special agreement, or decree of Court, shall be ejected otherwise than in execution of decree for ejectment: provided that, if the tenant have a right of occupancy in the land from which the landlord desires to eject him, the decree shall not be made unless at the date of the decree a decree against such tenant for an arrear of rent in respect of such land has remained unsatisfied for fifteen days or upwards."

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15 C. 515 (P.C.) 15 I.A. 77=12 Ind. Jur. 217=5 Sar. P.C. J. 165 = Rafique & Jackson's P.C. No. 101.

For the appellant it was argued that the respondents, not having obtained a decree for, or shown themselves entitled to, sub-settlement, and having admitted, both by the agreement of 1879 and in the course of the proceedings throughout, that they were liable to ejectment upon default in payment of arrears of rent, were in the position, as regards liability to be sued, of occupancy tenants. This was not altered by the words in the decree of 1862 referring to their liability as under-proprietors. Neither at the time of the decree nor afterwards was there any law, if not that which the plaintiff invoked, that was peculiar to the case of the latter. The Courts below should have held that the Oudh Rent Act (XIX of 1868) was applicable. The term "under-proprietor," as used in the decree of 1862 must be understood in a large sense, as comprehending all rights inferior to the proprietary right.

JUDGMENT.

Their Lordships' judgment, after counsel for the appellants had been heard, was delivered by SIR B. PEACOCK.

Their Lordships are of opinion that the three Courts below, who were unanimous in their judgments, are correct in the opinions which they have formed. It is clear that under the [**521**] decree, by way of compromise, the parties had not a right to cancel the lease under the terms of the Rent Act.

With regard to the agreement, their Lordships are of opinion that the Courts below were right in holding that the plaintiff could not seek to enforce that agreement by suing in the Rent Court. His only remedy would have been to have sued in the Civil Court upon that agreement.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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15 C. 521 (P.C.)=15 I.A. 123=5 Sar. P.C.J. 172=12 Ind. Jur. 210.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

SARDHARI LAL (*Plaintiff*) *v.* AMBIKA PERSHAD (*Defendant*).
[8th February, 1888.]

Limitation Act (XV of 1877), sch. II, art. 11—Code of Civil Procedure, ss. 278, 280, 283—Investigation of claim to attached property.

A decree-holder, against whom the release of property, attached in execution of his decree, has been ordered, after investigation under s. 280 of the Code of Civil Procedure, is limited by art. 11 of sch. II of Act XV of 1877, the Indian Limitation Act, to one year within which to institute a suit to establish that the property is that of his judgment-debtor.

The extent to which the "investigation" required by s. 280 should be carried depends upon the circumstances of the case.

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[F., 87 P.R. 1904=119 P.L.R. 1904; 1 C.L.J. 296; 29 M. 225 (227)=16 M.L.J. 136; **Expl.,** 1 C.W.N. 24 (28); 6 C.L.J. 362 (366); **R.,** 19 A. 253 **(F.B.)** 17 A.W.N. 60; 17 C. 260; 21 B. 58 (60); 27 C. 714; 22 B. 875; 25 M. 721 (723)=12 M. L.J. 411; 13 M.L.J. 367; 32 C. 537 (539); 11 O.C. 180 (181); 13 C.P.L.R. 69 (70); 16 C.P.L.R. 19 (21); 2 Bom.L.R. 476 (477); 34 C. 491=11 C.W.N. 487 (489); 34 M. 533=8 M.L.T. 417=8 Ind. Cas. 157; 28 P.R. 1910=19 P.W.R. 1910=63 P.L.R. 1910=5 Ind. Cas. 890; 21 M.L.J. 550; 34 A. 365 (370)=9 A.L. J. 474=14 Ind. Cas. 790 (792); 8 A.L.J. 626=10 Ind. Cas 401 (402); 11 C.L.J. 61=14 C.W.N. 298=5 Ind. Cas. 298 (300) **R. & Expl.,** 35 M. 35=8 M.L.T. 381 =21 M.L.J. 756=8 Ind. Cas. 11.]

APPEAL from a decree (16th December 1884) of the High Court, affirming a decree (28th December 1882) of the Subordinate Judge of Bhagulpore.

The principal question raised by this appeal was whether the suit was barred by limitation under Act XV of 1877, sch. II, art. 11; and this depended, according to the appellant's case, upon two others, *viz.*, first, whether or not a decree-holder, against whom an order under s. 280, Civil Procedure, has been passed, and who attempts to establish, in a suit under s. 283, that the attached property is, in fact, the property of the judgment-debtor, is bringing a suit to establish *his* right within **[522]** the meaning of art. 11; secondly, whether the required "investigation" had been made in this case, before the order had issued, under s. 280, releasing the property; for if none had been made, that order would have given no starting point to limitation.

Article 11 of the second schedule of the Limitation Act prescribes that a suit "by a person against whom an order is passed under ss. 280, 281,282, or 335 of the Code of Civil Procedure to establish his right to, or to the present possession of, the property comprised in the order" shall be brought within one year from the date of the order.

The sections of the Code of Civil Procedure referred to are the following:—

"278. If any claim be preferred to or any objection be made to the attachment of any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he was a party to the suit."

"280. If upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not when atached in the possession of the judgment-debtor, or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor, at such time it was so in his possession not on his own account or as his own property, but on account of, or in trust for, some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly or to such extent as it thinks fit from attachment."

"283. The party against whom an order under ss. 280,281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

The present suit arose out of the execution applied for in 1877 of a decree (14 May 1877) against Bishen Mohun Singh **[523]** and Ruder Mohun Singh upon a mortgage of their family estate executed in 1869 by their deceased father, Nandlal, for Rs. 24,021; they having, also,

stated accounts, since Nandlal's death, with the mortgagee, and paid part of the debt. The decree was that the mortgaged properties should be sold, and that if they should not realize enough to pay the debt, the balance should be realized out of the estate of Nandlal. The family estate having been attached, the sale was fixed for 1st October 1877, but postponed on objections made from time to time. On the 19th July 1880 the two sons and wife and minor grandson of the judgment-debtor Bishen Mohun Singh, and the wife and minor son of the other judgment-debtor, Ruder Mohun Singh, objected by petition to the sale, on the ground that they had not been made parties to the decree about to be executed, which was for a personal debt due by the judgment-debtors. They alleged that their interests in the ancestral property were not liable to be sold, and that at most "only the partitioned rights and interests of the judgment-debtors should be sold, the rights and interests of the objectors being exempt."

On this the order (31st July 1880) was that the property should be released on the ground of its being ancestral, and that only the judgment-debtor's right upon partition should be sold. The decree-holder, should he desire to bring that right to sale, was to file a new inventory within two days. This not having been done, an order was made in the following December, striking the suit off the file.

An application for a review was subsequently rejected by the Subordinate Judge. The decree-holder then applied to the High Court to call for the record under s. 622, Civil Procedure Code. This the High Court did, but having found no illegality, or material irregularity, in the proceedings, they dismissed the application.

The plaint in the present suit (20th May 1882) stated the facts, and claimed a declaration that the mortgage executed by Nandlal as head and manager of the family was binding on the defendants.

The defendants, other than Ruder Mohun Singh, set up limtiation, the suit not having been brought within one year from 31st July 1880, the date of the order upon the claim for release.

[**524**] The Subordinate Judge having fixed an issue on the point decided that the suit was barred by art. 11. He said: "The plaintiff's pleader has argued at very great length that the Court should have determined specifically what share the claimants were in possession of and what share the judgment-debtors had and which was liable to sale; and as it did not do so, the order was not one which it could make under s. 280, and therefore art. 11 is not applicable. A number of rulings have been cited in suport of the contentoin. It seems to me that had the contention been correct, the High Court would certainly have interfered under s. 622; but the High Court's order itself shows that the order made by the Subordinate Judge was within the exercise of his jurisdiction under s. 280."

The Subordniate Judge referred to *Deendyal Lal* v. *Jugdeepnarain Singh* (1); *Rainarain Das* v. *Nownit Lal* (2); *Ram Sahai* v. *Sheo Pershad Singh* (3). On appeal the High Court (TOTTENHAM and O'KINEALY, JJ.), holding that the order which led to this suit being instituted must be taken to have been passed under s. 280 of the Civil Procedure Code, affirmed the decree of the Subordinate Judge.

On this appeal—

(1) 3 C. 198=4 I.A. 247.
(2) 4 C. 809=4 C.L.R. 67.
(3) 5 C. 148=6 I.A. 88=4 C.L.R. 226.

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Mr. *R. V. Doyne* appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the present suit, not being one to establish the plaintiff's right to the property, or to the present possession of the property comprised in the order of the 31st July 1880, did not fall within the meaning of the provisions of art. 11 of the second schedule of the Limitation Act. Also there had been no investigation such as was required by s. 280. The order, therefore, purporting to have been made under that section should have been treated as a nullity, and not as an order from the date of which time could run. The case of *Venkapa* v. *Chenbasapa* (1) was referred to.

JUDGMENT.

Their Lordships' judgment was delivered by

[525] LORD HOBHOUSE.—The sole question in this suit is whether it is brought in time to staisfy the exigencies of the Law of Limitation. The plaintiff's case is, that he was aggrieved by an order passed on the 31st of July 1880, and he now seeks to get rid of it in this suit. The order was passed in execution proceedings under the provisions of s. 280 of the Code of 1877, and the effect of it was to allow certain objections that had been lodged to an attachment obtained by the plaintiff in another suit in which he was plaintiff and decree-holder, and to release from attachment the property which at his instance had been attached and put up to sale. The plaintiff was entitled, under s. 283 of the Code, notwithstanding the order in question, to institute a suit to establish the right which he claims to the property then attached and put up to sale. But then it is provided by the eleventh article of the Limitation Act, Act XV of 1877, that a suit by a person against whom an order is passed under s. 280 of the Code of Civil Procedure to establish his right to the property comprised in the order must be brought within one year from the date of the order. Now this suit was not brought until the 20th May 1882, that is to say, about 22nd months after the date of the order. It is clearly therefore out of time unless it can be shown that for some reason or other the case does not fall within the article of the Limitation Law.

Two reasons have been suggested why their Lordships should hold that the case does not so fall within the article. It is said that the article in question is aimed at orders passed against the persons who object to the attachment. But the answer is that it is aimed against persons who object to orders passed under s. 280; and it is not suggested that there can be any person against whom an order can be passed under s. 280 except the decree-holder himself. He therefore is the very person who by s. 283 is empowered to institute a suit to establish his claims, and who, by art. 11 of the Limitation Law, is confined to one year for the institution of that suit.

The other reason assigned is that s. 280 does not contemplate that any order shall be made until after an investigation which is directed by s. 278. The answer to that is that in [526] the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion off-hand. But

(1) 4 B. 21.

besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. However that may be (and their Lordships do not desire to pronounce any opinion as to the extent of the investigation which is required under the Code), in this case the order was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the Law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought.

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Their Lordships are clearly of opinion that this case falls within the scope of the eleventh article in question, and that the suit must fail upon that ground.

The result is that their Lordships agree with the Courts blow; they think that the appeal should be dismissed, and they will humbly advise Her Majesty in accordance with that opinion.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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15 C. 527.

[527] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF SARBANANDA BASU MOZUMDAR AND ANOTHER (*Petitioners*) v. PRAN SANKAR ROY CHOWDHURI AND OTHERS (*Opposite Party*).* [20th February, 1888.]

Criminal Procedure Code (Act X of 1882), *s.* 145—*Dispute as to right to collect rents —Tangible immoveable property.*

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code.

Harak Narain Singh v. *Luchmi Bux Roy* (1) and *Sutherland* v. *Crowdy* (2) referred to; *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhattacharji* (3) followed.

Where a dispute arose as to the right to collect the rents of certain land the ownership of which was claimed by both *A* and *B*, and the tenants who had been paying rent to *A* refused to pay rent to *A* and attorned to *B*, *held* that the conduct of the tenants in attorning to *B* was not an assertion of possession adverse to *A* such as to put an end to the relation of landlord and tenant between them and *A* and to *A*'s right to collect the rents. Such attornment therefore did not deprive *A* of his right to have recourse to s. 145 in case of a

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* Criminal Revision No. 322 of 1887 against the order passed by W. H. Thompson, Esq., Deputy Magistrate of Goalundo, dated the 27th of August 1887.

(1) 5 C.L.R. 287. (2) 18 W.R.Cr. 11=9 B.L.R. 229. (3) 11 C. 413.

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likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained, pending proceedings in a civil suit.

[F., 16 C. 513 (523); R., 12 C.W.N. 16 (22)=35 C. 120; D., 23 C. 80 (84).]

CRIMINAL REVISION.

15 C. 527.

This case arose out of a dispute concerning the right to collect the rents from the ryots of a piece of re-formed chur land in the district of Faridpore, called Shomaspur by the petitioners, and Dowlutdia by the opposite party.

In 1859 the river Padma flowed on the east of a group of temporary settled estates known as the Panchas Hazari Mehals. In midstream there was an island called Dowlutdia, which belonged to the Teota Rajahs (the opposite party to these proceedings). In this island there were a few small churs which did not belong to the Teota Rajahs; the chur on the extreme east [528] of the island was called Shomaspur, and belonged to Sarbananda Basu Mozumdar, one of the petitioners.

Between 1859 and 1875 the Padma had shifted its course, the island Dowlutdia had disappeared, and large accretions had formed contiguous to the Panchas Hazari Mehals. Beyond these accretions there was a narrow strip of land.

About 1877 the accretions, extending up to the main stream of the Padma, were at first settled to the Panchas Hazari Mehals; but subsequently all the lands on the east of the Western Boundary of the island of Dowlutdia were released to the Teota Rajahs with the exception of some portions, which were claimed by Sarbananda Baboo and a Mr. Renny.

All along a *suti* (a channel) ran through the relinquished tract from north to south. On the east of this *suti*, and a good way off from it, flowed the main stream of the Padma. Both these kept constantly shifting eastward until the *suti* occupied the position which the main stream of the Padma did in 1877. This *suti* was called Kootibaree *suti* in 1881, and is still known by that name. The main stream of the Padma at this time was about a mile on the east of the *suti*. The land in dispute lay between the Kootibaree *suti* and the river Padma, and began to re-form some time between 1877 and 1880.

The tenants on the disputed land paid rents to the Teota Rajahs, the opposite party, down to March or April 1886. Subsequently disputes arose between the tenants and the Rajahs, who tried to raise the rents. Being unable to obtain enhancement of rent from the tenants, the Rajahs declared the land to be their khas khamar, settled them with other tenants, and unsuccessfully endeavoured to oust the old and put the new tenants in possession. The tenants refused to pay any rents to the Rajahs and attorned to Sarbananda Basu and another, the petitioners, executing kabuliats, which were registered in the course of August 1886. In consequence of the threatening attitude of the parties, indicating a probability of a breach of the peace, proceedings under s. 144 of the Code of Criminal Procedure were instituted in October 1886.

Mr. W. H. Thomson, the Deputy Magistrate of Goalundo, found that on the 30th October 1886, the date the initial [529] proceedings were framed, the Teota Rajahs, the opposite party, were in possession by receipt of rent from the tenants as against the petitioners; and by his order of the 27th August 1887 passed under s. 145 ordered that the opposite party do remain in possession until evicted therefrom in due course of law, and forbade all disturbance of such possession until such eviction. He further ordered under s. 148 that the petitioners should pay the opposite party the sum of Rs. 1,500 as costs.

The Sessions Judge of Faridpore confirmed the order of 27th August 1887 on the 19th September.

The petitioners applied to the High Court under the revisional sections, and obtained a rule calling on the opposite party to show cause why the order of 27th August 1887 should not be set aside.

Mr. *Evans* and Mr. *M. P. Gasper*, Baboo *Guru Dass Bannerjee* and Baboo *Jogesh Chunder Dey*, for the petitioners.

The Advocate-General Mr. *Paul*, Mr. *Woodroffe*, Baboo *Ambica Churn Bose* and Baboo *Girija Sanker Mozumdar*, for the opposite party.

The judgment of the Court (PRINSEP and PIGOT, J.J.), was as follows:—

JUDGMENT.

This matter under s. 145, Code of Criminal Procedure, relates to nearly 10,000 bighas of chur land in the district of Faridpore. The parties are zemindars; and the question at issue is the right to receive rent from the cultivators. None of these ryots is a party to these proceedings. It has been found by the Magistrate, after a long and careful investigation, and in a well-considered judgment, that up to the end of the Bengali year, March or April 1886, the ryots on this chur paid rents to the Teota Rajahs, party No. 1; that subsequently disputes arose, and the Rajahs, being unable to obtain enhancement of rent from the tenants, declared the lands to be their khas khamar, and unsuccessfully endeavoured to make settlements with some other tenants for a portion, at least, of the lands. The tenants, on the other hand, told the Rajahs that they would not pay them any rents. The tenants probably finding themselves unable, unless supported by some [530] person of influence, to resist the Teota Rajahs, put themselves into the hands of Sarbananda Basu and another, the second party to these proceedings, and attorned to them, executing kabuliats, which were registered in the course of August. In consequence of the threatening attitude of the parties indicating probability of a breach of the peace, proceedings under s. 145 were instituted in October 1886. It is unnecessary to refer to the cause of those proceedings except to state that, on the 27th August 1887, the Sub-divisional Officer of Goalundo found that the first party, the Teota Rajahs, were in possession by receipt of rent from the tenants as against the second party.

The main objections taken before us as a Court of Revision are that this dispute between zemindars with respect to land occupied or held by tenants is not properly cognizable under s. 145, and that, if cognizable, on the findings of the Magistrate, the second party was entitled to be declared to be in possession.

The first contention is founded upon a construction of the section in the present Code similar to that adopted at one time by Phear, J., with respect to s. 530 of the old Code—that is, that the section is applicable only to cases of actual or manual possession, such as that of ryots.

That was not, however, the construction of the words of the section, which finally prevailed in this Court. Under s. 530 it was, as Jackson, J., said in *Harak Narain Singh* v. *Luchmi Bux Roy* (1), "settled law that the section contemplates disputes between owners as well as occupiers of land," following in this respect *Sutherland* v. *Crowdy* (2), and he pointed out in that case that this construction of the section is in conformity with the policy of the law as shown in previous legislation on this subject.

(1) 5 C.L.R. 287 (289). (2) 18 W.R. 11.

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It is argued that the introduction into the present s. 145 of the word "tangible" before the words "immoveable property" indicates that actual possession is alone contemplated by it. As to this, we can but adopt and follow the language of Field, J., in *Pramatha Bhusan Deb Roy* v. *Doorga Churn Bhuttcharji* (1). We think that a dispute as to the right to collect [**531**] rents is a dispute concerning tangible immoveable property under s. 145. There can be no question that disputes regarding the exercise of this right are most fruitful causes of disturbance, especially in newly formed alluvial lands, such as are the subject of the proceedings now before us. We have no doubt that it is the policy of the law that Magistrates should have summary jurisdiction to pass temporary orders in such matters so as to prevent the occurrence of serious breaches of the peace. We are so strongly impressed with this view that, had the decision of another Division Bench been to the contrary, we should have felt it our duty to refer the matter to a Full Bench.

As to the second objection, it is contended that, inasmuch as the tenants had attorned to the second party, the first party had ceased to be in possession, and that consequently the order of the Magistrate in their favour should be set aside; that the previous existing tenancy had been determined by the action of the Teota Rajahs in declaring the lands to be their khas khamar; and next that, even if this were not sufficient to determine the tenancy, the conduct of the tenants in attorning to the second party would be an assertion of possession adverse to the Teota Rajahs, such as to put an end to any previously existing relations between them and the Rajahs, and, with them to the existence of such a right to collect the rents as is within the section. We do not think so. No doubt a zemindar and his tenants might, by agreement, determine any relation of landlord and tenant existing between them. But the acts of the two parties, the Rajahs and the tenants in the matter before us certainly cannot be construed as constituting such an agreement between them. The attornment by the tenants to the second party is not shown to have been even known to the Rajahs until after the proceedings under s. 145 were instituted. We regard the acts done by the Teota Rajahs and the tenants in this way: The Rajahs endeavoured to terminate the tenancy in a manner which was wholly unlawful, and in this they were opposed by the tenants, and were unsuccessful in obtaining from them a surrender of their lands. Under such circumstances, the original tenancy still subsisted, and the tenants in possession of the lands remained liable to pay [**532**] rent as heretofore. The subsequent acts of the tenants in repudiating as their landlords the Teota Rajahs, and in attorning to the second party to these proceedings, could not by themselves alone operate so as to determine their tenancy. As has already been stated, no notice was given to the Rajahs that the tenants had put an end to their tenancy under them. We need not consider what the effect of such notice, if any, might have been.

It was argued that the decision of the Magistrate was wrong, as involving the acceptance of this proposition; that the right of a zemindar to come in under this section must exist, even though the payment of rent has been withheld from him for years, so long as his right to recover it by proceedings-at-law can be shown; and that such a proposition cannot be accepted, as it cannot be supposed that questions of title were intended to come before a Magistrate for decision under this section. There may be

(1) 11 C. 413 (416).

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great force in that argument, and the Magistrate, so far as he adopted this view, may have been wrong. The point need not be decided by us in this case, and we do not decide it. Here the rent was paid down to just before the dispute between the Rajahs and the ryots which led to the proceeding under s. 145, Code of Criminal Procedure; and upon the dispute taking place, they attorned by real or pretended payments of rent to a stranger. The question on the second branch of the case is, whether such a proceeding by the tenants of a zemindar can deprive him of recourse to this section in case of danger to the peace, to have his possession of the right to collect rents maintained, pending civil proceedings; and we must determine that question in the negative.

Having regard to the length and character of the proceedings before the Magistrate, we are of opinion that his order regarding costs should stand.

The rule must, therefore, be discharged.

C. D. P. *Rule discharged.*

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[533] PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

GANGA NARAIN GUPTA (*Plaintiff*) v. TILUCKRAM CHOWDHURY AND OTHERS (*Defendants*). [7th February, 1888.]

Plaint Form of—Civil Procedure Code, 1882, *ss.* 50 *and* 53, *sub-section* (*d*)—*Charges of fraud—Pleading—Amendment of plaint—rejection of plaint.*

A plaint charging fraud must set forth particulars; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice.

After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above.

Held, that dismissal was not the proper mode of disposal of the suit; but the plaint should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint.

[**F.**, 18 B. 144 (146); 19 B. 593 (601); 13 C.W.N. 87=36 C. 134 (140)=1 Ind. Cas. 784; 2 L.B.R. 4 (9); **R.**, 91 P.R. 1893; 1 O.C. 262 (267); 5 C.W.N. 91 (103); 3 L.B.R. 100 (105) (**F.B.**); 2 N.L.R. 49 (52); 13 C.W.N. 167=8 C.L.J. 135 (142)=4 Ind. Cas. 495; 5 Ind. Cas. 179 (180); 7 Ind. Cas. 255 (257).]

APPEAL from a decree (1st June 1885) of the High Court, affirming a decree (15th April 1884) of the Subordinate Judge of Goalpara.

The question raised in the proceedings which gave rise to the suit in which this appeal was brought was as to the validity of an auction-sale in execution of a decree (25th April 1882), of which the first and second of the five respondents were the holders, the other respondents being the purchasers at the sale. The property sold (18th April 1883) was the plaintiff's interest in two separate shares in two zemindaries in the district, and they realized Rs. 21,500.

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A petition by the present plaintiff to have this sale set aside under s. 311, on the ground that it had not been duly proclaimed, and that the execution purchasers had deterred others from bidding, was rejected (29th December 1882), and the High Court, McDONELL and TOTTENHAM, J.J., confirmed the order. The Judges said: "With regard to the point that the execution-purchasers had improperly deterred others from bidding for the [534] property, it may be that they did deter others, but even if they did so, this would not, we think, be an irregularity in conducting the sale within the meaning of s. 311. Certain rulings have been pointed out to us, in which the decree-holder, having obtained permission from the Court to bid at the sale, in one case, openly within hearing of the Court made disparaging remarks to deter others from bidding for the property; and in the other case, a mokhtar, in the interests of the decree-holder, directly discouraged other bidders by his talk. Regard being had to the fact that they were the decree-holders at whose instance the sales were being held, and that the Court ought to have interfered, it was held that there had been material irregularity in conducting them. We are not, however, prepared to hold that acts done by bidders or by by-standers at a public sale without the knowledge of the Court, or private understandings between intending bidders, will amount to irregularities in conducting it, such as will render it liable to be set aside under s. 311."

The plaintiff brought the present suit (18th December 1883) against the decree-holders and the auction-purchasers to have the sale set aside, and the property restored to him, on the ground that the latter had fraudulently and in collusion with the two decree-holders, prevented other persons from bidding at the sale, and so purchased the property for Rs. 21,500, the market value being Rs. 75,000. In separate written statements the defendants denied the fraud, urging that the plaint did not state distinctly how the fraud had been effected, and alleging that the value of the property did not exceed Rs. 21,500.

From the statements of the plaintiff's pleader, who was examined by the Subordinate Judge, the plaintiff's case appeared generally to be that the auction-purchasers, whom he called the Gowripore zemindars, had induced the decree-holders to sue for the debt due from the judgment-debtor and had done hostile acts against him, in reference to the land, the subject of the auction-sale in dispute. According to him, persons on behalf of the auction-purchasers had induced others not to bid at the sale.

The Subordinate Judge's judgment was to the effect that, even if the plaintiff could prove the statements in the plaint and those of his pleader, there would be nothing to justify [535] the Court in finding that the sale had been brought about by fraud; that it was stated that certain people, on behalf of the Gowripore zemindars, went about inducing people not to bid; that that was exactly the ground the plaintiff took in his former application, and the High Court had then held that, even if they did deter others, it would not be an irregularity in conducting the sale within the meaning of s. 311. That if deterring others from bidding is not such an irregularity as to warrant the sale being set aside on that ground, it was not possible to obtain the same end merely by changing the name of the transaction and calling it a fraud instead of an irregularity. "It may be improper to induce people to abstain from bidding at a sale, but it is hardly a fraudulent proceeding." The suit was, therefore, dismissed with costs.

Against this decision the plaintiff appealed.

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The judgment of the High Court (FIELD and O'KINEALY, J.J.,) was as follows: "What the fraud on the part of the defendants, the decree-holders, was is not stated in the plaint, and was not stated when the plaintiff's vakil was examined on his behalf." The appeal was accordingly dismissed.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *J. Graham, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents.

For the appellant it was argued that the Subordinate Judge's judgment, based on the former decision of the High Court which only had reference to irregularity within the meaning of s. 311, did not cover the whole ground. The statements in the plaint were not so vague as to preclude the settlement of issues for the purpose of a hearing on the merits, the question being a wider one than the petition under s. 311 had raised. It was whether the property had been wrongfully disparaged by interested parties, with fraudulent intent, before the sale, with injury and loss resulting to the judgment-debtor. The High Court, instead of affirming the dismissal of the suit, should have remanded it. The dismissal in any view of the case was wrong, [**536**] and the Court, even on its own showing, should have done no more than reject the plaint. The appellant now relied upon this, that, even if, of itself, the deterring others from bidding at a sale did not amount to a material irregularity within the meaning of s. 311, it might, when coupled with allegations of the property having been sold much below its market value, and coupled with charges of acts showing fraud and collusion, amount to a cause of action.

Reference was made to *Rukhinee Bullub* v. *Brojonath Sircar* (1); *Subbaji Rau* v. *Srinivasa Rau* (2); *Fuller* v. *Abraham* (3); *Watson* v. *Birch* (4); Sugden's Vendors and Purchasers, 14th edition, Chap. 1, s. 5; Benjamin on Sales, Bk. III, Chap. 2.

For the respondents it was argued that no distinct act, constituting fraud, had been charged, and the case rested where it was, when the application under s. 311 had been rightly rejected.

Reference was made to *In re Carew's estate* (5); *Mason* v. *Armitage* (6); Dart's Vendors and Purchasers, 6th edition, Chap. III, s. 4 and cases collated at p. 121.

Mr. *R. V. Doyne* replied.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD WATSON.—This is an action brought by a judgment-debtor for the purpose of setting aside a judicial sale; and there are two sets of defendants, the one being the judgment-creditors and the other the auction-purchasers. The ground upon which the action is laid is said to be fraud.

The 50th section of the Civil Procedure Code (Act XIV of 1882) provides that every plaint must contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose. By s. 3, sub-s. (*d*), the Judge before whom the plaint depends is authorised, if it does not disclose a sufficient cause of action,

(1) 5 C. 308. (2) 2 M. 264. (3) 3 Brod. and Bing. 116.
(4) 3 Ves. Jun. 51. (5) 26 Beav. 187. (6) 13 Ves. 38.

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to adopt one or other of two courses: he may at or before the first hearing either reject the plaint, or allow an amendment to be made upon the spot or within a limited time, upon such condition as to payment of [537] costs as he may think proper. When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said, in *Wallingford* v. *The Mutual Society* (1): "With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." There can be no objection to the use of such general words as "fraud" or "collusion," but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been committed.

In the present case it is unnecessary to criticise the plaint minutely. Strike out the words "fraud," "deceit," "illegal and fraudulent acts," "machinations," and so forth, of which there is great superfluity, and what remains? Nothing, except an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character. In these circumstances, the Subordinate Judge, being of opinion that no cause of action was stated in the plaint, allowed an examination of the pleader for the plaintiff. He did so, not with the view of taking evidence, or of ascertaining what was to be the evidence in the case, but with the very proper object of ascertaining whether the pleader was in a position to make, on behalf of the plaintiff, an amendment of the plaint, which would introduce a specific and relevant cause of action. Counsel for the plaintiff—who is appellant here—admitted that the effect of the declaration of the pleader was to make matters worse instead of better; and in that observation by the learned counsel their Lordships are quite ready to concur.

Their Lordships are accordingly of opinion that the judgment of the High Court is well-founded, and must be affirmed. They are however, of opinion that in disposing of this case upon the defects of the plaint as not setting forth a good cause of action, the Subordinate Judge ought not to have taken [538] the course of dismissing the suit. If he did not allow an amendment as authorised by s. 53 of the Procedure Code, he ought, in terms of the same section, to have rejected the plaint. That, according to s. 56 of the Code, would have enabled the plaintiff to present a fresh plaint in respect of the same cause of action if he found himself in a position at any future time to make averments which would give relevancy to his action. However, no objection seems to have been taken in the Court below to the form of the judgment, which was the same in both Courts, dismissing the action. No objection was stated in the appellant's case or raised by his Counsel; and in these circumstances, and seeing that the time limited for bringing an action to set aside the judgment has already elapsed, their Lordships are of opinion that the ends of justice will be served by permitting the judgment of the Court below to stand in its present form.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from, and to dismiss the appeal. The appellant must pay to the respondents, Surjeswari Baruani, Anundmoyi

(1) 5 App. Ca. 697.

Baruani, and Kanchunpria Baruani, who appeared at their Lordships' bar, the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, the auction-purchasers: Messrs. *Watkins & Lattey.*

C. B.

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15 C. 538.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SATCOURI PYNE (*Plaintiff*) *v.* LUCKEY NARAIN KHETTRY (*Defendant*).* [15th June, 1888.]

Registration Act (III of 1877), ss. 34, 77—Presentation for registration—Limitation for registration after acceptance by Registrar—Acceptance for Registration.

Although under Act III of 1877 it is imperative to present an instrument for registration within a prescribed time from its execution, there is no time fixed within which an instrument presented and accepted for registration must be registered.

[539] *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (1) and *Shama Charan Das* v. *Joyenoolah* (2) followed; *In re Buttobehary Banerjee* (3) not followed.

[R., 5 M.L.J. 29 (31); 18 M. 255 (256).]

SUIT under s. 77 of the Registration Act.

The defendant on the 18th September 1886, executed in favour of the plaintiff a mortgage of his family dwelling house, situated in the town of Calcutta, to secure an advance of Rs. 3,000. The defendant having refused to register the deed, the plaintiff, on the 12th January 1887, presented it for registration, and applied for a summons calling upon the defendant to appear before the Registrar for the purpose of registration; the whereabouts of the defendant being unknown, this summons was affixed to the outer door of the defendant's family dwelling house, in which house he had ordinarily resided. The Registrar further issued a warrant for the arrest of the defendant, which, however, remained unexecuted, it being found impossible to discover the defendant's whereabouts. On the 30th August 1887, the Registrar refused to register the deed in the absence of the defendant, or proof of personal service of the summons, more than eight months having elapsed since the execution of the mortgage deed.

On the 28th October 1887 (the High Court having been closed for the vacation from 22nd August to the 27th October 1887) the plaintiff brought this suit, praying that the defendant might be compelled to register the deed, or that the Registrar should do so on his behalf. The defendant pleaded limitation.

Mr. *Allen*, Mr. *Sale* and Mr. *Casperz*, for the plaintiff.

Mr. *L. Ghose*, for the defendant.

Mr. *Sale*.—A wilful refusal or neglect to attend and admit execution is a denial of execution within the meaning of the Registration Act, and a

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* Original Civil Suit No. 455 of 1887.

(1) 15 B.L.R. 228. (2) 11 C. 750. (3) 11 B.L.R. 20.

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suit lies to compel registration. Section 34 is subject to s. 77—*Radha Kissen Rowra Dakna* v. *Chooneloll Dutt* (1). The document was presented within the time allowed by the Act, and there is no law of limitation for the actual fact of registration; *Shoma Charan Das* v. *Joyenoolah* (2), which [**540**] case follows *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (3): the former case expressly lays down that s. 34 is subject to s. 77.

Mr. *L. Ghose*.—The decision of *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (3) was one under Act XX of 1866; that Act did not contain a section fixing a limitation of time in regard to appearance of executants or their representatives as did the Acts of 1871 and 1877; the only limitation provided for in Act XX of 1866 was in regard to *presentation*. The case of *Shama Charan Das* v. *Joyenoolah* (2), decided by WILSON, J., follows the Privy Council case, but the difference between the Act of 1867 and the Acts of 1871 and 1877 was not therein pointed out; nor was the case of *In re Buttobehary Banerjee* (4), cited or considered. This latter case was a decision under Act VIII of 1871, which Act contained a limitation as to the appearance of executants, and is directly in point; it was there held that an order refusing registration should be obtained from the Registrar *before* the time fixed for appearance of the executant has expired, and if once the time fixed has expired, and no order of refusal to register has been made by the Registrar, no further proceedings can be taken to enforce registration. I submit that case should be followed.

JUDGMENT.

TREVELYAN, J.—This is a suit brought under the provisions of s. 77 of the Registration Act.

The deed was executed on the 18th of September 1886. It was presented for registration on the 12th of January 1887 by the claimant, who applied for a summons against the executant. He was unable to serve the summons, and on the 30th of August 1887, the Registrar refused registration on the ground that more than eight months had elapsed.

The only question argued before me is whether the Registrar must not be taken to have refused registration at some period within the eight months, and whether this suit is not consequently barred by limitation. There is express authority in favour of the defendant's contention, and there is also, I think, express authority against it.

[**541**] I was much pressed with Mr. Justice Macpherson's decision, *In the matter of Buttobehary Benerjee* (4), and there is no doubt that that case is undistinguishable from the present one.

I think, however, that the decision of the Privy Council in the case of *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (5) is a distinct authority for the contrary proposition. In the case Sir Barnes Peacock, referring to the Registration Act of 1866, says: "Though the statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for the registration must be registered, and indeed from the nature of the requirements of the Act the period within which the registration must be completed could not have been fixed." Mr. *Ghose*, who appeared for the defendant, pointed out to me that there was a difference between the Act of 1866, with which the Privy Council were dealing, and

(1) 5 C. 445. (2) 11 C. 750. (3) 15 B.R. 228. (4) 11 B.L.R. 20.
(5) 15 B.L.R. 228=2 I.A. 210=24 W.R. 75.

the Act now in force, and that the Act which Mr. Justice Macpherson considered in the case I have mentioned fixed, as in the Act of 1877, a limitation for the time within which executants can appear. I do not agree with Mr. Justice Macpherson in considering that, from the fact that there is a limitation as to the time within which executants can appear, it follows that the refusal to register must be taken to have been made within the same period.

There being no express limitation I do not see why limitation by implication should be imported into the Act. As the Privy Council said, from the nature of the requirements of the Act, the period within which the registration must be completed could not have been fixed.

The Privy Council case is, I think, an express authority, and that this is so is clear from the case of *Shama Charan Das* v. *Joyenoolah* (1) decided by a Division Bench of this Court.

I must order the defendant to register the document, and I direct that he pay the costs of this suit.

[**542**] Mr. *Sale* then applied for a direction in the decree that the Registrar might register the deed in the event of the defendant not attending to do so.

TREVELYAN, J.—The decree will be in the usual form; either it will contain a direction of the kind asked for, or in case the defendant cannot be found, you will have liberty to apply.

Attorney for plaintiff: Baboo *D. N. Dutt.*

Attorney for defendant: Messrs. *Sen & Co.*

T. A. P.

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15 C. 542.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

KHUB LAL SAHU AND OTHERS (*Defendants*) *v.* PUDMANUND SINGH AND OTHERS (*Plaintiffs*).* [10th April, 1888.]

Limitation Act (XV of 1887), sch. II, arts 99 and 132—Government revenue, Suit to recover money paid on account of—Charge—Co-sharer, Payment of arrears of revenue by.

The plaintiffs and defendants were the proprietors of two separate plots of land, separately assessed with Government revenue, but covered by the same towzi number. Plaintiffs paid the Government revenue due from the defendants in respect of their plot from Setember 1873 to June 1885, in order to prevent the two plots being brought to sale, and on the 28th September 1885 instituted a suit to recover the amount. It was contended on behalf of the plaintiff that art. 132 of sch. II of Act XV of 1877 applied to the facts of the case, and that the plaintiffs were therefore entitled to recover all amounts so paid within twelve years of date of suit.

Held, that as on the authority of *Kinu Ram Doss* v. *Muzaffer Hosain Shaha* (2) the plaintiffs had no charge upon the property in respect of which the payment had been made, and as on the authority of *Ramdin* v. *Kalka Pershad* (3) art. 132 only applied to cases where the money sought to be recovered is a charge upon the property, the limitation applicable to the case was that provided by art 99, and the plaintiff's claim in respect of all payments made more than three years before suit was barred.

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*Appeal from Appellate Decree No. 1860 of 1887, against the decree of C. A. Wilkins, Esq., Judge of Bhaugulpore, dated the 2nd of June 1887, affirming the decree of Baboo Bolai Chand, Subordinate Judge of that district, dated the 23rd of February 1886.

(1) 11 C. 750. (2) 14 C. 809. (3) 12 I.A. 12=7 A. 502.

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[543] In this case the plaintiffs and the defendants owned two separate plots of land, separately assessed with Government revenue, but entered in the Collectorate register as one estate covered by the same towzi number. The plaintiffs alleged that, as both plots of land were thus jointly liable for the total amount of Government revenue, and as the defendants had neglected to pay their shares of the same from September 1873 to June 1885, they had been compelled to pay it for them, in order to save their own plot from sale, and they accordingly instituted this suit on the 28th September 1885 to recover the amount so paid, which they assessed at Rs. 701-2-0 principal and Rs. 495-0-6 interest, or the sum of Rs. 1,196-2-6 in all. They also prayed that that amount might be declared a charge and realized in the first instance by the sale of the defendants' plot of land in respect of which it had been paid.

The only material question raised in the suit was one of limitation, the defendants contending that in any event the plaintiffs' claim in so far as it arose more than three years before suit, was barred by limitation. On the other hand, it was urged on behalf of the plaintiffs that twelve years' limitation applied, and that the whole amount claimed was therefore recoverable.

The first Court gave the plaintiffs a decree for the amount claimed, less a sum of Rs. 5, which was not proved, holding that art. 132 of sch. II of the Limitation Act XV of 1877 applied to the case, and that therefore the whole claim was within time. On appeal that decree was upheld by the District Judge.

The material portion of that officer's judgment was as follows:

"Article 99 of the Limitation Act does not apply for two reasons: first, because this is not a suit for contribution by a sharer in a joint estate; and, secondly, because, even if it were such a suit, yet it is a suit in which the plaintiff seeks to recover by the sale of the property, that is, to enforce payment of money charged upon immoveable property.

"Plaintiffs paid the money neither under a decree nor as joint proprietors of the estate, consequently art. 99 cannot apply—*Ram Dutt Singh* v. *Horakh Narain Singh* (1). They are undoubtedly entitled to recover under s. 69, Act IX of 1872, for if they had not paid, their own property would have been put up for sale. [544] In fact this point is not disputed in appeal. The liability of the appellant to pay the revenue was a liability upon his estate, and not merely a personal liability—*Mothooranath Chattopadhya* v. *Kristo Kumar Ghose* (2). A suit brought to enforce payment of the money by sale of the property on which it is a charge comes under art. 132 of the Limitation Act—*Lallubhai* v. *Naran* (3); *Ramdin* v. *Kalka Pershad* (4); *Miller* v. *Ranga Nath Moulick* (5); *Juneswar Dass* v. *Mahabeer Singh* (6). Had the plaintiffs sought only to make the defendants personally liable, then probably art. 147 would have applied; but as they seek to recover their money by sale of the immoveable property (on which it is a charge), art. 132 must necessarily apply. Plaintiffs' claim is not therefore, even in part, barred by limitation."

The appeal was accordingly dismissed with costs, and the defendants now preferred this second appeal to the High Court.

Baboo *Nilkant Sahai*, for the appellants.

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(1) 6 C. 549=8 C.L.R. 209. (2) 4 C. 369. (3) 6 B. 719.
(4) 12 I.A. 12=7 A. 502. (5) 12 C. 389. (6) 1 C. 163.

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Appellate Civil.

15 C. 542.

Mr. *R. E. Twidale* and Munshi *Mahomed Yusuf*, for the respondents.

The judgment of the High Court (Norris and Beverley, JJ.) was as follows:—

JUDGMENT.

We are of opinion that this appeal must be allowed. The facts of the case appear to be these. There are two separate pieces of land, having separate jumma, with one towzi number. The plaintiff is the owner of one of these pieces of land, and the defendant is the owner of the other piece. The defendant did not pay the Government revenue in respect of his land from September 1873 to June 1885. The towzi number of both pieces being the same, there was danger of the plaintiff's portion being sold along with the defendant's holding for arrears of Government revenue in respect of the defendant's holding. Plaintiff, to save his own estate, paid the Government revenue in respect of the defendant's from September 1873 to June 1885, and brings this suit to recover the amount he paid, namely, Rs. 700 principal and Rs. 485 interest.

Both the lower Courts have given him a decree for the whole amount claimed, holding that art. 132, sch. II of the Limitation [**546**] Act applies to this suit; and that the period of limitation is twelve years. In both the lower Courts it was contended that art. 99, sch. II of the Limitation Act applies, and that argument is again advanced in second appeal before us. We are of opinion that that argument ought to prevail, and that the plaintiff can only recover moneys advanced within three years before the institution of the suit. The Full Bench decision in *Kinu Ram Dass* v. *Mozaffer Hosain Shaha* (1) is a conclusive authority for holding that the plaintiff had no lien upon the defendant's holding in respect of payments that he had made, and the case of *Ramdin* v. *Kalka Pershad* (2) is a conclusive authority to show that art. 132 is only applicable to cases where the money sought to be recoverd is a charge upon the property. Their Lordships say at the bottom of page 14: "But the Counsel for the appellant relied upon the language of the 132nd article of the second schedule," 'for money charged upon immoveable property twelve years.' His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property.

"Looking at the previous language with reference to personal suits, and at the language of art. 132, their Lordships think great inconveniences and inconsistencies would arise if they did not read the latter as having reference only to suits for money charged on immoveable property to raise it out of that property."

Therefore holding as we do that the plaintiff had no charge upon the property, it is clear that upon the authority of this case, art. 132 of the Limitation Act will not apply. Article 99 would be the only Article that would apply. The appeal will, therefore, be allowed, with full costs in this Court and proportionate costs in the Courts below. The decree of the lower Appellate Court will be modified by giving the plaintiff a personal decree against the defendant in respect of so much of the money as he had paid within three years next before the institution of the suit.

H. T. H. *Appeal allowed and decree modified.*

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(1) 14 C. 809. (2) 12 I.A. 12=7 A. 502.

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[546] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

PREM CHAND PAL (*Auction-purchaser*) *v.* PURNIMA DASI (*Plaintiff*) AND ROMA NATH SHI (*Judgment-debtor*).* [20th April, 1888.]

Mortgage—Sale in execution of mortgage decree—Sale certificate—Confirmation of —sale—Sale for arrears of Government revenue—Civil Procedue Code (Act XIV of 1882) *s.* 316—*Act XI of* 1859, *ss.* 13, 14, 54—*Transfer of Property Act (Act IV of* 1882), s. 73.

D. having obtained a decree on a mortgage of a 5½-anna share of an estate paying revenue to Government caused the share to be put up for sale in execution of that decree on the 17th August 1883 and purchased it herself. The sale was not confirmed till the 18th September 1883. In the meantime a 14-anna share of the estate, including the 5½-anna share, which was separately liable for its own share of Government revenue, was on the 26th September 1883 sold for arrears of the June kist of Government Revenue under s. 13, Act XI of 1859, and purchased by one *G.*, who sold it again to *P.*, who obtained possession on the 6th August 1884.

In a suit by *D*, against *P.* and the judgment-debtor to obtain possession of the 5½-anna share so purchased by her—*Held*, that the mortgage debt was not extinguished, and the mortgage merged in the decree on the 17th August 1883; but having regard to the provisions of s. 316 of the Code of Civil Procedure, the mortgagee's rights were kept alive and remained in existence until the property vested in her by virtue of the granting of the sale certificate, and that between the date of the sale, 17th August 1883, and the date of its confirmation, 18th December 1883, the mortgage lien was fully preserved; that *P.*'s purchase being governed by s. 54 of Act XI of 1859, he acquired the share subject to all encumbrances, including the mortgage lien of *D.*; that s. 73 of the Transfer of Property Act does not in such a case deprive a mortgagee of his lien over the property and confine him to proceeding against the surplus sale-proceeds; that as the judgment-debtor had the right, at any time between the 17th August 1883 and the 18th December 1883, to redeem the property upon payment of principal, interest and costs to *D. P.* having acquired the rights of the judgment-debtor by virtue of his purchase on the 26th September 1883 was equally entitled to redeem between that date and the 18th December 1883, but not having availed himself of that right, the property became absolutely vested in *D* on the 18th December 1883, and that consequently *D.* was entitled to the relief claimed.

[**F.**, 24 A. 475 (477)=22 A.W.N. 145; 7 Ind. Cas. 65=33 A. 63; 10 C.L.J. 590=4 Ind. Cas 731; **Expl.**, 3 C.L.J. 52 (54); **Cons.**, 17 B. 375 (381, 383); **Rel. on**, 11 C.W.N. 828 (831); **R.**, 27 B. 334 (340); 8 Ind. Cas. 657=15 C.W.N. 312, 7 C.L.J. 1; 24 C. 746 (749); 9 C.W.N. 117 (119); 9 C.L.J. 96 (103)= 13 C.W.N. 226=3 Ind. Cas. 696; **Commented upon**, 24 C. 682 (685).]

[**547**] THE facts of this case were as follows: On the 23rd Joyst 1287 the father of the defendant No. 2, Roma Nath Shi, borrowed from the husband of the plaintiff the sum of Rs. 1,151, and to secure the repayment thereof executed a mortgage in his favour of a 5½ anna share out of 14 annas of a taluk named Jardai Junghsha. The 14 annas share of the taluk was separately liable for its own portion of the Government revenue assessed on the entire estate. On the 30th June 1882 the plaintiff's husband obtained a decree on the mortgage against Roma Nath Shi, which declared the mortgage lien, and directed a sale in the event of the non-payment of the amount due. In 1883, her husband having in the meantime died, the plaintiff proceeded to execute the decree, and on the

* Appeal from Appellate Decree No. 1927 of 1887, against the decree of F. Cowley, Esq., Judge of Midnapur, dated the 28th of June 1887, reversing the decree of Baboo Kedar Nath Mozumdar, Subordinate Judge of Midnapur, dated the 8th of May 1886.

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15 C. 546.

17th August the property comprised in the mortgage was sold and purchased by the plaintiff herself for Rs. 800. That sale was confirmed on the 18th December 1883. In the meantime the 14 annas share of the estate was sold on the 26th September 1883 under s. 13, Act XI of 1859, for arrears of Government revenue, which had accrued due in the month of June, and was purchased by one Gopi Nath Maitra, by whom it was sold to the defendant No. 1, Prem Chand Pal, and he obtained possession of it on the 6th August 1884.

In December 1884 the plaintiff endeavoured to obtain possession of the share she had purchased, but she was resisted by Prem Chand Pal, who in March 1885 obtained an order in his own favour under s. 335 of the Code of Civil Procedure. The plaintiff accordingly instituted this suit either to recover possession of the 5½ annas share or to bring it to sale in satisfaction of the mortgage decree. The plaintiff alleged that the sale for arrears of revenue had been caused by collusion between the defendants, and she submitted that the first defendant's purchase only gave him the property subject to the charge declared by the mortgage decree; that after the sale on the 17th August 1883, at which she had purchased, the defendant No. 2 had no right or interest in the property whatsoever, and, therefore, the defendant No. 1 had acquired nothing by his purchase.

Defendant No. 1 disputed the genuineness of the mortgage and denied all collusion between himself and the other [548] defendant, and contended that the revenue sale nullified the plaintiff's purchase, and that she had no right to the property.

The first Court found the mortgage to be genuine, and that there had been no collusion between the defendants. It considered that the plaintiff might and ought to have paid the revenue, which was a first charge on the property, and that she had no right to the property, but only under the provisions of s. 73 of the Transfer of Property Act a right to the surplus sale-proceeds. As she had not proceeded against them that Court dismissed the plaintiff's suit with costs.

On appeal that decree was reversed by the District Judge in a judgment, of which the following is the material portion:—

" The main questions to be decided between the plaintiff and Prem Chand Pal are—

" *1st.*—What rights did Prem Chand acquire by his purchase?

" *2nd.*—What rights thereafter remained to the plaintiff in the share of the estate bought by her?

" The answer to the first question is given in s. 54, Act XI of 1859—' the purchaser shall acquire the share subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners.' Section 28 and sch. A of Act XI of 1859 vested his title in Gopi Nath Maitra from the 29th June 1883, as the certificate filed shows.

" The written statement urges that Prem Chand's rights date back to the sale on the 26th September, and that plaintiff's mortgage lien had then been extinguished by plaintiff's prior purchase of the proprietary right; and that as plaintiff was thus the owner of the estate at the time it was sold for the realization of the Government revenue, such sale is binding on the plaintiff. The Subordinate Judge has referred to the case of *Chatraput Singh* v. *Grindra Chunder Roy* (1), which is undoubtedly in

(1) 6 C. 389.

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favour of the defendant, if the defendant's contention as to the position of the parties be correct.

"But on the 9th December 1878 the Civil Procedure Code in force was Act X of 1877, and under that law a purchaser at a sale in execution of a decree had an inchoate right in the property purchased even before the confirmation of the sale, and on the [549] confirmation his right went back to the date of sale. But Act XII of 1879 amended s. 316 of the former Code by providing that the sale certificate was to bear the date of the confirmation of the sale, and that the title to the porperty sold as between the parties was to vest in the purchaser from the date of the certificate, 'and not before.'

"This is also the law under s. 316 of the present Code.

"I have been referred to the case of *Prangour Mozoomdar* v. *Himanta Kumari Debya* (1) in regard to sales effected in July and September 1881; but that also would appear to have been decided under the law as it originally stood, as on page 601 occurs the passage 'the title to the property is no doubt incomplete until the sale is confirmed, but on confirmation it dates back from the time of sale.' The case quoted of *Saroda Prosaud Mullick* v. *Lutchmeeput Sing Doogur* (2) was under the former law; and there the sale to Mooktakashee Dabee had formally confirmed more than a month before the second sale.

"Further, I think that the mortgage lien could not be extinguished until the sale to the plaintiff had become final and complete. I am of opinion that on the 26th September 1883 plaintiff's mortgage lien was not extinguished, and plaintiff had not succeeded to the ownership of the property in suit. The Subordinate Judge has referred to s. 73 of the Transfer of Property Act, but I do not understand the law to limit the mortgagee's right. The sections would seem to refer mainly to sales of entire estates for arrears of revenue where the mortgagee might be in danger of entirely losing his lien on the property.

"Further, in this particular instance, as plaintiff was not on the 26th September 1883 the owner of the property in dispute, I do not think blame attaches to her for not paying the balance of Government revenue then due, and from another point of view, the defence again fails; for, as Gopi Nath's certificate shows, Gopi Nath's title dates from the 29th June 1883, and Gopi Nath bought the share of the estate in dispute subject to all its encumbrances, amongst those being the plaintiff's lien. The subsequent sale and the purchase by the plaintiff are valid as against the defendants.

[550] "The plaintiff will accordingly obtain a decree for possession of the 5½ annas share purchased by her, with costs in both Courts."

Against this decree Prem Chand Pal preferred this second appeal to the High Court.

Baboo *Srinath Das* and Baboo *Boidyo Nath Dutt*, for the appellant.

Baboo *Hem Chunder Bannerjee*, Baboo *Uma Kali Mukerjee* and Baboo *Latoo Behari;* for the respondent.

Baboo *Srinath Das*, for the appellant.—The purchase of the plaintiff respondent was of an earlier date than that of the appellant, and therefore the respondent was the owner of the estate at the time it was sold for arrears of revenue, and hence the appellant acquired the right of the "previous owner" by his subsequent purchase under s. 54 of Act XI of 1859. It cannot be said that at the time of the revenue sale there was

(1) 12 C. 597. (2) 10 B.L.R. 214.

any encumbrance on the property, as the mortgage lien of the respondent had come to an end by her purchase in August 1883. 1888 April 20.

Supposing that the purchase of the appellant was subject to encumbrances, the respondent cannot recover khas possession in this suit. All that she would be entitled to is to have her mortgage lien enforced and to get a decree for money subject to the appellant's right of redemption. Appellate Civil.

Baboo *Hem Chunder Banerjee*, for the respondent.—Under ss. 6, 7, 13, 28 and sch. A of Act XI of 1859, the title of the appellant as purchaser accrued from 29th June 1883, *i.e.*, the day after that fixed for the payment of the June instalment of Government revenue. Under s. 316 of the Code of Civil Procedure, the title of the respondent accrued from the date of the confirmation of sale, *i.e.*, 18th December 1883. Hence the title of the appellant accrued prior to that of the respondent, and therefore the purchase of the former was subject to the right of the latter to have the property sold in execution of her decree. The appellant is consequently barred by *lis pendens*—see *Gobind Chunder Roy* v. *Guru Churn Kurmoker* (1), *Jharoo* [551] v. *Raj Chunder Dass* (2) and *Raj Kishen Mookerjee* v. *Radha Madhub Holdar* (3). Supposing the purchase of the respondent was anterior to that of the appellant, the former cannot be said to be the "previous owner" within the meaning of s. 54, Act XI of 1859. 15 C. 546.

Baboo *Srinath Das* in reply.

The judgments of the High Court (Norris and Beverley, JJ.) were as follows:—

JUDGMENTS.

Norris, J.—This case comes before us upon an appeal from the decision of the District Judge of Midnapore, who has reversed the decision of the First Subordinate Judge.

The questions we have to determine are not free from difficulty; but upon the best consideration I have been able to give to the arguments which have been adduced on either side, the cases cited, and the judgment under appeal, I am of opinion that the decision of the lower Appellate Court is correct and should be affirmed. The facts of the case are as follows. His Lordship after stating the facts as above continued:—

The District Judge has given her a decree for this 5½-anna share, and against this decree the auction-purchaser, at the sale held on the 26th of September 1883, for arrears of Government revenue, has appealed; and it has been urged before us by the learned pleader for the appellant that this judgment is wrong and should be reversed. His principal ground of appeal is that the District Judge was wrong in holding that the plaintiff's title to the 5½-anna share, which was put up for sale, was not perfected and completed until the date of the sale certificate, the 18th December 1883. He contends that the sale was perfect and complete on the 17th August 1883; and that on that day the mortgage debt was extinguished, and the mortgage merged in the decree.

I think, having regard to the provisions of s. 316, Code of Civil Procedure, that this contention is not sustainable. It has been urged that, although the section says that "the certificate shall bear the date of the confirmation of the sale, and so far as regards the parties to the suit, and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such

(1) 15 C. 94. (2) 12 C. 299. (3) 21 W.R. 349.

1888 APRIL 20. certificate, and [552] not before," yet as regards third parties the property vests in the purchaser from the date of sale. No doubt the Legislature does not introduce the words "third parties," but if, as regards the parties to the suit and persons claiming through or under them, the title of the purchaser is not to be considered complete, nor the property to vest in him until the confirmation, we see no reason for holding that, as regards third parties, the title of the auction-purchaser is complete, and the property vested in him before the date of the confirmation of sale. If this view is correct, it seems to us that the plaintiff's husband's rights as mortgagee were kept alive and remained in existence until the property vested in him by virtue of the granting of the sale certificate, and that between the 17th August (the date of the sale) and the 18th December (the date of the confirmation of sale) his rights as mortgagee were all in existence, and the mortgage lien fully preserved in him. It may be that in addition to those rights he had other rights which it is not necessary to discuss.

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15 C. 546.

What, then, is the position of the appellant, the auction-purchaser, at the sale for arrears of Government revenue? His position is regulated by the provisions of s. 54, Act XI of 1859, which says, "when a share or shares of an estate may be sold under the provisions of s. XIII or s. XIV, the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners,"—he takes the property subject to the encumbrances, and it is sufficient, in my opinion, for the purposes of determining this case, to say that he takes it subject, among other encumbrances, to the mortgage lien, which, I am of opinion, was still subsisting in favour of the mortgagee. I do not think it necessary to go into the question of the encumbrance which may have existed upon the 5½-anna share by reason of the decree of the 30th June 1882. In my opinion this ground of appeal fails.

Then, it has been further urged that, by virtue of s. 73 of the Transfer of Property Act, the plaintiff has no lien upon the mortgage premises, but has a lien only upon the surplus sale proceeds in the hands of the Collector, after the payment of the [553] Government revenue. I am of opinion that s. 73 does not operate to deprive the mortgagee of his lien. It is to be noted that this is a sale under the provisions of s. 13, Act XI of 1857, to which, as I have already pointed out, the provisions of s. 54 are applicable. If it had been a sale under the provisions of s. 37, a purchaser in the position of the present appellant would have taken the property free from all encumbrances, the mortgage lien would have been extinguished, the mortgagee would have been free to avail himself of the provisions of s. 73, although his lien on the mortgaged premises had gone, he would have had a lien on the surplus proceeds in the hands of the Collector, after paying the Government revenue.

There remains now only one other further point to be considered. It has been urged by Baboo Srinath Das that at any rate the plaintiff in this case cannot be entitled to a decree for possession. I confess I have some hesitation with regard to what I am now going to say, but after giving the best consideration I can to what has been urged, I think the position of the parties is, that between the 17th August 1883 and the 18th December 1883 the judgment-debtor, the defendant No. 2, would have had a right upon payment of principal, interest and costs to redeem the property. There was an equity of redemption existing in the judgment-debtor, defendant No. 2, up to the 18th December 1883.

On the 26th September 1883 I think the present appellant stood in the shoes of the judgment-debtor, and he had a right to redeem at any time up to the 18th December. I think he purchased on the 26th September, with the knowledge of the previous decree obtained against the judgment-debtor, the mortgagor, and I think that if he wished to exercise the right which I think he possessed, he should have come forward and claimed between the 26th September 1883 and the 18th December 1883, to exercise the right to redeem. I think the right to redeem was completely gone on the 18th December, when the sale certificate was given, and the property absolutely vested in the mortgagee. In my opinion both these grounds urged, and urged, if I may be allowed to say so, with great ability, have failed.

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15 C. 546.

I, therefore, think that this appeal should be dismissed with costs.

[554] Beverley, J.—I may very briefly say I am also of opinion that this appeal must be dismissed with costs. It seems to me that the broad principle which is laid down in s. 54 is that the purchaser under that section acquires the share he purchases subject to all encumbrances existing at the time of the sale. It is admitted that if the mortgage in this case had been existing at the time, it would certainly have been encumbrance under that section, and the appellant, purchaser, would have taken the share subject to the mortgage. It appears to me to make very little or no difference that that mortgage had passed into a mortgage decree, and that in execution of that decree the property had been put up to sale, although the sale had not been confirmed. I think that, in accordance with the broad principle laid down in s. 54, the purchaser took the property subject (if one may say so) to the unconfirmed sale. If the purchaser had deposited the amount of the decree between the date of his purchase and the date of the confirmation of the sale, it is possible that the sale might have been set aside. He did not do so, however; and accordingly on the 18th December, when the sale was confirmed, the plaintiff became entitled to the possession of the property, and, therefore, the decree for possession was properly made by the lower Court.

In the view we take of the matter it becomes unnecessary to decide whether the words "the previous owner or owners" in s. 54 of Act XI of 1859 are to be understood as meaning the owners who made the default or the owners at the time of the sale. Neither is it necessary to determine whether or not the sale of August 1883 was complete as regards the purchaser before it was confirmed in December following. But as one of the Judges who decided the case of *Prangour Mozoomdar* v. *Himanta Kumari Debya* (1), I wish to say that that case appears to have been argued and decided on the supposition that it was governed by s. 310 of Act X of 1877 before that section was amended by Act XII of 1879

I concur in dismissing the appeal with costs.

H. T. H. *Appeal dismissed.*

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(1) 12 C. 597.

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15 C. 555.

15 C. 555.

[555] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

RASH BEARI BOSU (*Plaintiff*) *v.* HARA MONI DEBYA AND OTHERS (*Defendants*).* [23rd March, 1888.]

Onus of proof—Revenue Sale Law—Act XI of 1859, *s.* 37—*Purchaser of estate sold at auction, Rights of.*

The onus of proving that under-tenures in a taluk sold at a revenue sale under Act XI of 1859 fall under any of the exceptions to s. 37 of that Act is on the person alleging the under-tenures to be within such exceptions.

[R., 27 C. 290 (292); 13 C.W.N. 720=9 C.L.J. 490 (492)=1 Ind. Cas. 596; 12 C.L.J. 336 (344)=7 Ind. Cas. 21 (26); 16 C.W.N. 779=15 Ind. Cas 30 (31).]

THE plaintiff, who had obtained a lease of the property from a purchaser at a revenue sale held under Act XI of 1859, sued the defendants to set aside an under-tenure created by the defaulting proprietors of the taluk sold. The defendants alleged that the plaintiff was the benamidar of one of the defaulting proprietors, and that the under-tenure was a long standing one, and was not voidable at the instance of the plaintiff.

The Munsif dismissed the suit, finding that the plaintiff was a benamidar for one of the defaulting proprietors, holding that the defendant had failed to make out that the under-tenure was protected by s. 37 of Act XI of 1859.

The Subordinate Judge on appeal held, on the authority of *Gobind Nath Shaha Chowdhuri* v. *Reily* (1), that the onus of proving that the under-tenure was voidable was upon the plaintiff, and dismissed the appeal, considering it unnecessary to decide the question of benami.

The plaintiff appealed to the High Court.

Baboo *Dwarkanath Chuckerbutty*, for the appellant, contended that the case of *Gobind Nath Shaha Chowdhuri* v. *Reily* (1) was not applicable; that the onus of proof lay upon the defendant.

Baboo *Chander Kant Sen*, for the respondents, relied on *Gobind Nath Shaha Chowdhuri* v. *Reily* (1) as throwing the onus of proof on the plaintiff.

JUDGMENT.

[556] The judgment of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

TOTTENHAM, J.—We think this case must go back to the lower appellate Court for a fresh trial of the appeal.

The plaintiff sued to eject the defendants from an under-tenure held within a taluk which had been sold for arrears of revenue and had been leased by the auction-purchaser to the plaintiff.

The substantial pleas raised for the defence were that the plaintiff was only a benamidar for one of the original defaulters, and therefore had no right to take advantage of s. 37 of the Revenue Sale Law (Act XI of 1859):

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* Appeal from Appellate Decree, No. 1272 of 1887, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Khoolnah, dated the 14th of March 1887, affirming the decree of Baboo Purno Chunder Roy, Munsif of Khoolnah, dated the 25th of August 1886.

(1) 13 C. 1.

that the tenure in question was one of those expressly protected under that section; and that neither the plaintiff nor any other auction-purchaser could set it aside under its provisions.

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The Court of first instance dismissed the suit, finding that the plaintiff was a benamidar for one of the defaulters. The Munsif also found that the defendants had failed to make out that the tenure in question was one protected by s. 37.

The plaintiff having appealed to the Subordinate Judge of Khoolnah, his appeal was dismissed upon the question which the first Court had found in his favour, namely, the Subordinate Judge was of opinion that the plaintiff was bound to prove that the under-tenure in question was one of a kind which he was entitled to avoid; and, finding that the plaintiff had not adduced any evidence on this point, he dismissed his suit, considering it unnecessary to determine the question of benami.

We think that the Subordinate Judge was mistaken in dismissing the suit merely upon the ground that the plaintiff had failed to prove that the tenure was voidable. The suit is governed by s. 37 of Act XI of 1859, and that section, dealing separately with encumbrances and under-tenures, lays down that the auction-purchaser shall be entitled to avoid all under-tenures and to eject the holders of them with certain exceptions, and then goes on to set out the exceptions. In the present case the defendants plead that they come under one of the exceptions. It appears to us that the presumption is in favour of the general proposition of law laying down that [**557**] all under-tenures are voidable, and that the person pleading a certain exception is bound to bring himself within it. That being so, it will be for the defendant in this case to bring himself within the exception which he pleads.

The pleader for the respondent relies greatly upon the case of *Gobind Nath Shaha Chowdhuri* v. *Reily* (1) as showing that the plaintiff would be bound to prove that the tenure was voidable. That case, however, was decided under a totally different law, namely, Bengal Act VIII of 1869. Section 66 of that Act is not in the same terms as s. 37 of Act XI of 1859, and the case of *Gobind Nath Shaha Chowdhuri* v. *Reily* (1) is upon the words of s. 66. We cannot assent to the proposition of the learned pleader for the respondent that these two sections are substantially identical.

We think, therefore, that the decision of the lower appellate Court is clearly based upon an error in law, and that his judgment and decree must be set aside and the case go back to him for a fresh trial upon all the points raised. If necessary, the Subordinate Judge will be at liberty to allow the parties to adduce fresh evidence. The costs will abide and follow the result.

T. A. P. *Case remanded.*

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(1) 13 C. 1.

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APPELLATE CIVIL.

15 C. 557.

15 C. 557.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

MOTHURA MOHUN GHOSE MONDUL (*Plaintiff*) *v.* AKHOY KUMAR MITTER (*Defendant*).* [8th May, 1888.]

Sale in execution of decree—Suit to set aside sale—Fraud—Auction-purchaser acting bona fide—Fraudulent execution of decree after adjustment—Execution of decree adjusted, but of which satisfaction has not been entered, Effect of, on rights of innocent purchaser—Adjustment of decree without certifying.

In 1881 *R.* obtained a decree against *M.* for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between *R.* and *M.* one of the terms of which was that *R.* gave up his claim to costs. Satisfaction of the decree was not entered up [558] in Court. In 1884 *K.*, purporting to be acting on behalf of *R.*, but without his knowledge or sanction, applied for execution of the decree for costs, and in the execution proceedings which followed a share of *M.* in a tank was sold and purchased by *A. M.* thereupon brought a suit against *A.*, *R.*, *K.*, and others to set aside the sale, alleging that the whole of the execution proceedings had been taken without notice to him, and had been fraudulently taken by the defendants in collusion with one another in order to deprive him of his share in the tank. It was found that *A.*'s purchase was an innocent one and untainted with fraud.

Held, upon the authority of *Rewa Mahton* v. *Ram Kishen Singh* (1), that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not having been certified to the Court, the Court had jurisdiction to execute it.

Held, further, that the execution proceedings could not be held to be void, as, although instituted by a person who had no authority to institute them, they were instituted in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made *bona fide* on his behalf.

Pat Dasi v. *Sharup Chand Mala* (2) commented on.

[**F.**, 21 B. 463 (464); **R.**, 17 M. 58 (60)=3 M.L.J. 211; 9 Ind. Cas. 472 (474); 19 M. 219 (222); 13 C.W.N. 710 (714, 716)=37 C. 107 (113)=11 C.L.J. 254=1 Ind. Cas. 871; **D.**, 20 Ind. Cas. 337 (340).]

THIS suit was brought to set aside a sale held in execution of a decree on the ground of fraud, and the circumstances which gave rise to it were as follow:—

In the year 1880 defendant No 2, Ram Churn Pal, brought a suit against the plaintiff to obtain possession of an 8-anna share in certain *jamai* lands in the village of Panchsakhi, and in that suit, on the 31st January 1881, obtained a decree against the plaintiff for a 4-anna share in the lands with costs, which amounted to about Rs. 8.

Subsequent to the decree a compromise was come to between the plaintiff and Ram Churn Pal, by which the plaintiff agreed to give Ram Churn Pal possession of the whole 8-anna share claimed by him, and the latter agreed to give up his claim for costs. The compromise, however, was not reported to the Court, and satisfaction of the decree was not entered up. On the 23rd January 1884 an application was made to the Court on behalf of Ram Churn Pal to execute the decree for costs, and after the issue of the usual notice, and in pursuance of that application,

* Appeal from Appellate Decree, No. 1998 of 1887, against the decree of F. B. Taylor, Esq., Judge of Burdwan, dated the 9th of August 1887, reversing the decree of Baboo Krishna Nath Roy, Munsif of Culna, dated the 7th of February 1887.

(1) 13 I.A. 106=14 C. 18. (2) 14 C. 376.

[559] the plaintiff's one-third share in a tank was sold by public auction on the 19th May 1884, and purchased by Akhoy Kumar Mitter (defendant No. 1 in this suit) for Rs. 27. Possession of the share in the tank was, however, not then applied for, and was only given on the 12th June 1886. The plaintiff filed this suit on the 9th July 1886, making the following persons defendants: No. 1 Akhoy Kumar Mitter, No. 2 Ram Churn Pal, No. 3 Chunder Nauth Mullick, No. 4 Khetter Mohun Ghose, No. 5 Koylash Chunder Ghose, and No. 6 Sreemutty Proffulla Kumari Dasi, and praying to have the execution proceedings set aside on the ground of fraud, and to recover possession of his share in the tank. The defendants Nos. 5 and 6 were sued as *pro forma* defendants, they being the plaintiff's co-sharers in the tank. The plaintiff charged that the whole of the execution proceedings had been fraudulently taken by the first four defendants in collusion with each other, and that the purchase by defendant No. 1 was a purchase on behalf of himself and the other three; that the defendant No. 3 was the prime mover in instigating the execution proceedings which had been actually taken by defendant No. 4.

Defendant No. 1, amongst other things, pleaded that he had purchased at auction in good faith with his own money, and that the other defendants had no right or title to the share in the tank or any interest therein; he denied that any fraud or collusion existed between him and the other defendants with regard to the execution proceedings, and contended that, so far as he was concerned, the sale could not be set aside, and that he was entitled to the benefit of his purchase.

Defendant No. 2 filed a written statement denying all knowledge of the execution proceedings, and stating that he had been no party thereto, and had not authorized such proceedings to be taken, and he further denied that he had been any party to the fraud alleged by the plaintiff. Defendant No. 3, Chunder Nauth Mullick, did not enter appearance in the suit. Defendant No. 4, Khetter Mohun Ghose, filed a written statement admitting that he had caused the execution to be taken out, but pleaded that he did so *bona fide* and at the instance of Ram Churn Pal.

It appeared on the evidence that defendant No. 2 was an illiterate person, and that all the proceedings in the suit brought [560] by him against the plaintiff had been conducted by defendant No. 4 on his behalf.

The Munsif came to the conclusion, that defendant No. 2, Ram Churn Pal, had nothing to do with the execution proceedings, and had no knowledge of them; that all those proceedings were taken by defendant No. 4, Khetter Mohun Ghose; that the plaintiff was studiously kept in the dark, and that none of the notices issued in the execution proceedings reached him or his friends, and that he had no knowledge of such proceedings; that the attachment and sale proclamation were not advertised in the way alleged; that defendant No. 3, Chunder Nauth Mullick, was anxious to get possession of the tank, and at the sale only his men attended to bid, and that all the bidding was on his behalf, and that the price obtained was far below the value of the property; that defendant No. 1 was merely a tool in the hands of Chunder Nauth Mullick, and that Khetter Mohun Ghose was responsible for what had taken place and the prime-mover in the transaction. The Munsif accordingly found the fraud alleged by the plaintiff proved, and gave him a decree setting aside the sale with costs against the principal defendants other than Ram Churn Pal.

Against that decree Akhoy Kumar Mitter appealed upon this amongst other grounds that, even supposing any fraud had been committed, his

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connection therewith had not been proved; that he was not a benamidar for Chunder Nauth Mullick, but an innocent purchaser; and that, therefore, the sale to him at public auction could not be set aside. The District Judge reversed the decree of the Munsif upon grounds which sufficiently appear in the judgment of the High Court, and directed that each party should bear his own costs.

Against that decision the plaintiff preferred this second appeal to the High Court.

Baboo *Uma Kali Mookerji*, for the appellant.

Baboo *Bussunt Coomar Bose* (for Dr. *Rash Behari Ghose*), for the respondent.

Baboo *Uma Kali Mookerji*, for the appellant.—A sale made at the instance of a person who is not the decree-holder cannot be considered a valid sale. If the Court had [**561**] known that the person seeking to have the sale made was not the decree-holder, and allowed the sale to proceed notwithstanding, it would have acted without jurisdiction. The mere fact that the respondent is a *bona fide* purchaser would not give him any title to the property sold, if it did not validly pass to him. Supposing a decree-holder had died before execution issued, the sale would pass nothing to the purchaser, notwithstanding that he purchased *bona fide*, and in the present case the respondent is in no better position than such a purchaser would be. The case of *Rewa Mahton* v. *Ram Kishen Singh* (1) is not in point, as here the sale was made without jurisdiction. The case of *Pat Dasi* v. *Sharup Chund Mala* (2) supports my contention.

Baboo *Bussunt Coomar Bose*, for the respondent, contended that the sale could not be set aside, and relied on the case of *Rewa Mahton* v. *Ram Kishen Singh* (1).

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows: —

JUDGMENT.

This was a suit to set aside a sale in execution on the ground of fraud. The facts are that in 1880 defendant No. 2 brought a suit against the plaintiff for a half share of a certain jumma, and on the 31st January 1881 he obtained a decree for a four annas share with costs. Subsequently an amicable settlement was come to between the parties, by which the plaintiff gave up the half share of the jumma which was claimed, and defendant No. 2 relinquished his decree for costs. This arrangement, however, was not certified to the Court.

On the 23rd January 1884 an application was made to the Court to execute the decree for costs, and in pursuance of that application a one-third share in a certain tank belonging to the plaintiff was brought to sale and purchased by defendant No. 1 on the 19th May 1884. Possession was not taken, however, till 12th June 1886, and on the 9th July 1886 plaintiff filed this suit to have the whole of the execution proceedings set aside on the ground of fraud, and to recover possession of the tank. The fraud in question is alleged to have been perpetrated at [**562**] the instance of defendant No. 3 (to whom the tank in question formerly belonged) through the instrumentality of defendant No. 4. The *pro forma* defendants Nos. 5 and 6 are the plaintiff's co-sharers in the tank.

The first Court found the fraud established, and set aside the sale.

On appeal, the District Judge reversed this decision. He considered that the evidence did not justify the finding that the execution proceedings

(1) 13 I.A. 106=14 C. 18. (2) 14 C. 376.

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were fraudulently instituted and carried through. He was of opinion that the matter was capable of a more simple explanation. He found apparently that the execution of the decree was taken out by defendant No. 4 without the knowledge of defendant No. 2, but that the notices, &c., were duly served, and that the property was not sold for an inadequate price. He seems to have been of opinion that the suit of 1880 having been managed for defendant No. 2 (who is an illiterate person) by defendant No. 4, execution was taken out by the latter in good faith, as the decree was about to become barred by limitation. "The only conclusion really justified by the evidence," he says, "is that Khetter Mohun's (defendant No. 4) action was unauthorized and illegal, and that there is every ground for a criminal action against him. But there is no proof that the purchase by Akhoy (defendant No. 1) was in any way tainted with fraud. The sale appears to have been duly held, and there is no evidence to show satisfactorily that the notices were not legally served. * * * * * * * I find that Akhoy Kumar Mitter's purchase was an innocent one, and untainted with fraud, and that, therefore, the purchase by him in open Court cannot be set aside."

Against this decision the plaintiff has preferred this second appeal; and it is contended before us that, accepting the facts as found by the Judge, the sale was void and should be set aside—first, because the decree had already been satisfied by compromise; and, secondly, because the execution proceedings were not taken as the instance of the real decree-holder. In support of the first argument, the appellant relies on the case of *Pat Dasi* v. *Sarup Chand Malla* (1). In that case it was found [563] that the decree had been satisfied, though satisfaction had not been certified to the Court, and a Division Bench of this Court held that the sale under this satisfied decree was void and of no effect. There is no finding whether the auction-purchaser was a party to the fraud; if he was, that in itself would have been a good ground for decreeing the plaintiff's suit. But if he was not, we are compelled to say that, having regard to the judgment of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (2), we are unable to agree in the view taken by the learned Judges who decided that case. In the case just referred to, their Lordships of the Privy Council held that where a person purchased *bona fide*, and for value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment, "the sale is a good one and cannot be set aside." If the Court has jurisdiction, they say, "a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues."

We are of opinion that the sale could only be set aside in the present case if it were shown that the Court had no jurisdiction. But it does not follow that the Court had no jurisdiction, because the decree had been compromised out of Court. The compromise not having been certified to the Court, the decree remained, so far as the Court was concerned, an unsatisfied decree, capable of being executed, and the Court had jurisdiction to execute it. Neither can it be held that the execution proceedings were void, because they were instituted by a person who had no authority to institute them. They were instituted in the name of the decree-holder, and we are of opinion that neither the Court nor the auction-purchaser was bound to enquire whether the application was made by the real judgment-creditor. The Court having jurisdiction to sell the property,

(1) 14 C. 376.
(2) 13 I.A. 106=14 C. 18.

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and the respondent's purchase being untainted with fraud, we are of opinion that the appellant cannot have the sale set aside, and recover back that property. At the same time we are not prepared to say that he may not have some other remedy open to him.

The appeal must be dismissed with costs.

H. T. H. *Appeal dismissed.*

15 C. 564.

[564] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

LUCKHEE NARAIN BANERJEE AND OTHERS (*Petitioners*) *v.* RAM KUMAR MUKERJEE (*Opposite party*).* [24th March, 1888.]

Criminal Procedure Code (Act X of 1882), *ss.* 133—137, *Course to be followed in the administration of—Obstruction to highway—Claim of title—*Bona fides *of claim of title, Right of Magistrate to enquire into—Jurisdiction.*

The mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss. 133—137 of the Criminal Procedure Code.

In proceedings under s. 133 of the Criminal Procedure Code with reference to obstructions to public ways it is open to the Magistrate to enquire into the *bona fides* of the claim; and where he decides against its *bona fides* he must state reasons for his decision which will be subject to revision by the High Court.

Such a claim must be set up at or before the hearing and not afterwards. *In re Chunder Nath Sen* (1); *Chunni Lall* v. *Ram Kishen Sahoo* (2); *Mutty Ram Sahoo* v. *Mohi Lall Roy* (3); and *R.* v. *Saudford* (4) referred to.

[**F.**, 17 C. 562; 23 C. 499 (501); 25 C. 278 (281); 3 C.W.N. 345 (347); 7 C.W.N. 117; 8 C.W.N. 143 (144); 10 C.W.N. 845=4 Cr. L. J. 42; L.B.R. (1872—1892) 530; **Appl.**, 22 B. 988 (995); **R.**, 15 B. 344 (349); 2 C.W.N. 554 (556); 12 C.W.N. 267=7 Cr L.J. 105; 2 Weir 61; 2 P.R. 1903 (Crl.); 10 Bom. L.R. 563=8 Cr. L.J. 33 (35); **D.**, 6 C.W.N. 886.]

THIS was a reference by the Sessions Judge of Midnapur under the provisions of s. 438 of the Criminal Procedure Code. The terms of the reference were as follows:—

"In this case the present petitioner was called on by an order from the Magistrate of the district to remove a fence from an alleged public way, or to show cause (s. 133 of the Criminal Procedure Code) before the Assistant Magistrate why the order should be set aside or modified. Before that the opposite party had made another petition under ss. 133 and 144, which was dealt with by a Deputy [565] Magistrate, Baboo Bankim Chunder Chatterjee, under s. 144 only, he not being empowered to act under s. 133. The order passed by him (dated 13th August) after a local investigation dealt with a different obstruction (to the same road) from that now under consideration. From the language used by him in the order in question he does not appear to have thought that the way in question was one coming within the second para. of s. 133. He says: 'The other obstruction (the one now under consideration) is at a spot the connection of

* Criminal Reference No. 296 of 1887 made by R. M. Towers, Esq., Sessions Judge of Midnapur, dated the 29th of October 1887, against the order passed by E. Grake, Esq., Assistant Magistrate of Midnapur, dated the 12th of September 1887.

(1) 5 C. 875=6 C.L.R. 379
(2) 15 C. 460.
(3) 7 C.L.R. 433=6 C. 291.
(4) 30 L.T. 601.

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which with any public thoroughfare was not clear to me. It is quite possible it may be so connected, but a portion was under water and another portion cut up, so that the traces of a footpath, if any existed, were not visible to me. An embankment was pointed out as being a continuation of the road, but it is overgrown with jungle, and bore no traces of having been used as a thoroughfare for some time past.'

"The Assistant Magistrate, after taking evidence on both sides, passed an order on the 12th September under s. 137 that the order of the Magistrate directing the removal of the obstruction be made absolute. The Magistrate of the district directed, on the 14th September, notice to issue under s. 140, allowing three days from the date of its receipt for carrying out his original order. Against these proceedings the present application for reference has been made, and both parties have been heard through pleaders.

"For the present petitioner the rulings in *Basaruddin Bhuiah* v. *Bahar Ali* (1), *Askar Mea* v. *Sabdar Mea* (2), and *Lal Miah* v. *Nazir Khalashi* (3), are relied on; by the other side *Angelo* v. *Cargill* (4). There was no essential difference in the wording of the sections of the Criminal Procedure Code which were in force when the above decisions were respectively passed. It is difficult to reconcile them. But I think it is clear that the High Court have now for some time maintained the view of the law which is favourable to the present petitioner.

"The Assistant Magistrate, while acknowledging the authority of these decisions, considered himself at liberty to go into the [**566**] *bona fides* of the question of title, *i.e.*, of the claim set up by petitioner to hold the land free of any public right of way over it.

"He took evidence on both sides, and decided that the petitioner had not satisfied him of the *bona fides* of his claim. As far as the materials before him went, I should not say he was wrong in deciding that petitioner had not made out his title, but it is a difficult matter to conclude that he did not make a *bona fide* claim to it. In *Askar Mea* v. *Sabdar Mea* (2) the High Court observe that the enquiry contemplated is an enquiry into the existence or non-existence of the obstruction complained of, and not one as to disputed question of title. In *Basuruddin Bhuiah* v. *Bahar Ali* (1) it is said: 'In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt; no order can therefore be made under the sections referred to until the public right has been established by proper legal proceedings, civil or criminal.'

"There is no doubt that the right of way is really in dispute. Besides the oral evidence, there are on the record some documents which are certainly in favour of the contention of the petitioner. Besides that alluded to in the Assistant Magistrate's order, there is a registered lease of the tank, over the south bank of which the alleged road lies, from the Manager of the Court of Wards, and a bill of sale, a document over thirty years old, from a former proprietor to the uncle of petitioner. These documents give the boundary of the tank, but are silent as to any road. Had there been a public one over the south bank—*vide* the map, it is contended that it would have been specified in these documents.

"On the facts, then, I think that the Assistant Magistrate, though probably right on the materials before him in deciding in favour of the right of way, was not right in holding that petitioner had no *bona fide*

(1) 11 C. 8. (2) 12 C. 137. (3) 12 C. 696. (4) 9 B.L.R. 417.

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claim of title. That being so, his decision is opposed to the later rulings of the High Court already quoted.

"But there is a further difficulty. The allegation of the opposite party (who initiated the proceedings) is that the road is a [567] public one. If there is a *bona fide* contest about this, the Magistrate is, by the rulings in question, ousted of jurisdiction. Then what redress is open to the public? It has been frequently held that no suit will lie in a Civil Court for obstructing a public thoroughfare without proof of special injury to the plaintiff. In all such cases, if the complainant is met with the allegation of a *bona fide* claim of title in the Criminal Court, and the Magistrate, therefore, refuses to interfere, there seems to be no remedy. The Civil Court will throw out a suit for obstruction, and under the present Code of Criminal Procedure the complainant is also without redress. In the Code of 1872 it was not so. Section 532 of that Code, for which s. 147 of the present one has been substituted, provided that, *if a dispute arose* concerning any right of way, the Magistrate might enquire into the matter, and if he found that the subject of dispute were open to the use of the public, might order that possession might not be retained to the exclusion of the public until the person claiming exclusive possession established his right in the Civil Court.

"By s. 147 of the present Code the Magistrate can only interfere where he considers the dispute is likely to cause a breach of the peace.

"Such being the circumstances of this case, I think it my duty to refer it for the decision of the High Court. It is desirable to have an authoritative decision on a matter which seriously affects public rights, and on which there is a conflict of rulings. I do not think any injustice has been done in this particular case by the orders of the Assistant Magistrate, but it appears incorrect as not being in accordance with the view of the law at present adopted by the High Court. His explanation accompanies the record."

Mr. *K. B Dutt* and Baboo *Jogesh Chunder Dey*, for the petitioners.

Mr. *P. L. Roy* and Baboo *Ramesh Chunder Bose*, for the opposite party.

Mr. *Dutt*.—The Magistrate has no jurisdiction in this case, as there is a claim of title—*Basaruddin Bhuiah* v. [568] *Bahar Ali* (1); *Askar Mea* v. *Sabdar Mea* (2). Sections 133 to 137 of the Criminal Procedure Code only entitle the Magistrate to hold an enquiry into the existence or non-existence of an obstruction, but nothing more. The English cases bear out my contention—see *R.* v. *Barnaby* (3); *Charter* v. *Greame* (4); R. v. *Cridland* (5); *R.* v. *Nunneley* (6).

It has even been held that, upon a mere suggestion of title, the jurisdiction of the Magistrate is ousted (*per* HOLT, C. J., in 2 Ld. Ray, 901, referred to in Paley on Summary Convictions, 5th Ed., p. 144, note). I do not contend that the Magistrate has no jurisdiction to enquire into the *bona fides* of the claim set up. The test of a *bona fide* claim is whether there is any evidence to go to a jury (Stone's Justices of the Peace, p. 340).

Mr. *Roy. contra.*—The two cases of *Basaruddin Bhuiah* v. *Bahar Ali* (1) and *Askar Mea* v. *Sabdar Mea* (2), cited by the other side, merely lay down that when a person raises *bona fide* a question of title the Criminal Courts have no jurisdiction; but these cases do not lay down that

(1) 11 C. 8. (2) 12 C. 137. (3) 1 Salk. 181=2 Ld. Ray. 900.
(4) 13 Q.B. 216. (5) 7 El. & Bl. 853=27 L.J.M.C. 28.
(6) 1 El. Bl. & El. 852.

the Magistrate has no jurisdiction to enquire into the *bona fides* of the claim set up. That point, moreover, has been conceded by the other side; and the Magistrate was, therefore, within his jurisdiction in deciding upon the facts of this case that the claim set up was a mere pretence to oust his jurisdiction and not a *bona fide* one.

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Sections 133 to 139 of the Criminal Procedure Code clearly show that the intention of the Legislature was to vest the Magistrate with very large discretionary powers; and in this view of the matter, the contention that the Magistrate is merely entitled to hold an enquiry into the existence or non-existence of an obstruction and nothing more is untenable.

The English cases do not support the contention of the other side. Although under the English decisions the summary jurisdiction of the Justices of the Peace is ousted where the title [**569**] to property is in question [*R.* v. *Barnaby* (1)], yet it is always a necessary condition "that there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfy the Justices that there is some reasonable ground for the assertion of title"—*Cornwell* v. *Sanders* (2); *Hunt* v. *Andrews* (3); *Legg* v. *Pardoe* (4); *Calcraft* v. *Gibbs* (5). *R.* v. *Nunneley* lays down that the claim must be *bona fide* and not a mere pretence to oust jurisdiction. And it is for the Justices to say whether the claim be *bona fide* or a mere pretence—see also *R.* v. *Huntsworth* (6); *Pease* v. *Claytor* (7).

In *R. v. Cridland* (8) the decision was based upon the ground that the assertion of title was a *bona fide* one, and therefore is not against me. *R.* v. *Barnaby* (1) lays down the well-known maxim of English law that where the title to property is in question, the exercise of summary jurisdiction by Justices is ousted. This decision does not interfere with my contention.

The case of *Charter* v. *Greame* (9) is under "The Malicious Trespass Act," and has no reference to the present matter. *Playter's case* referred to by HOLT, C. J., in 2 Ld. Ray, 901, clearly shows that the Justices acted from undue motives. See also *R.* v. *Harpur* (10).

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

JUDGMENT.

It is a rule of English law that a *bona fide* claim of title ousts the jurisdiction of Justices proceeding in a summary way; this does not depend on enactment, but is a qualification which the law itself raises in the execution of penal statutes, save when the terms of the statute, under which the Justices proceed, show that the Justices are not to hold their hands even if a right be set up.

[**570**] Under the Criminal Procedure Code of 1872 it was held by this Court, in revision, that in proceedings under s. 521 of that Code, which is similar to s. 133 of the present Code, if a claim of private right were set up in respect of what was alleged to be a thoroughfare or public place, the Magistrate should not make any order under s. 521 and the following sections, but should proceed under s. 532, so that the person claiming such private right should have an opportunity of having the question raised by him duly enquired into and determined; it being no part of the duty either of the Magistrate or of a jury, acting under s. 526

(1) 1 Salk. 181; 2 Ld. Ray. 900. (2) 3 B. & S. 206. (3) 3 B. & Ald. 341, 346.
(4) 9 C.B.N.S. 289. (5) 4 T.R. 681. (6) 33 L.J.M.C. 131.
(7) 3 B. & S. 620. (8) 7 El. & Bl. 853=27 L.J.M.C. 28.
(9) 13 Q.B. 216. (10) 1 D. & R. 222.

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of that Code, to determine the rights of parties in property—*In re Chundernath Sen* (1) and other cases.

Section 147 of the present Code, which corresponds to s. 532, is more limited in its operation, being confined to cases in which a dispute likely to cause a breach of the peace exists. But no such alteration has been made in the terms of s. 133 *et seq.* which corresponds to s. 521 *et seq.* of the old Code as would make the decisions upon these sections of the old Code inapplicable to those of the present; and in accordance with those decisions, it has been held by this Court that a Magistrate proceeding under the sections of the present Code ought not, when a *bona fide* claim of title is set up, to proceed to make an order, but should allow the party setting up such a claim to substantiate it, if he can do so, by civil proceedings. The ground upon which these decisions have proceeded is that there is no provision made in Chapter X of the Code for an enquiry into a disputed question of title; and that it cannot be held to have been the intention of the Legislature that questions of this nature raised *bona fide* should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. These decisions go, not actually to the jurisdiction of the Magistrates, as the English rule referred to does, but rather to the mode in which, in revision, this Court has held that the Magistrates should exercise their powers, following the principle of the English rule so far as may be. A decision of a Full Bench of this Court —*Chuni Lall* v. *Ram Kishen Sahoo* (2)—soon to be delivered—will lay down the manner in which the question of title, [**571**] such as appears to have arisen in this case, can be brought before a Civil Court. We have deferred judgment in these cases until the question in that case should have been decided. In this case the defendant appears to have asserted his right to the land in question, free from any right of way over it, in the public, or any part of the public.

When such a question is *bona fide* raised, the Magistrate ought not to make an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court.

The claim of title must, however, in order that it should be allowed to have this effect, be *bona fide*, and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bona fide* or a mere pretence. The Magistrate cannot, of course, in determining this, decide contrary to the facts that the claim is not made *bona fide*, but must have reasonable and probable cause for his decision, which will be subject to revision by this Court. The rule, however, that a *bona fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself.

A fortiori, if the defendant expressly consents that the question of the propriety of the order shall be considered, and with it the question of right, he cannot object, before the Magistrate or afterwards, in this Court, in revision, to the Magistrate's order. We say nothing here as to the effect of an order so made upon any civil proceedings in which he might afterwards seek to establish his right—see per FIELD, J., *Mutty Ram Sahoo* v. *Mohi Lall Roy* (3). As to the considerations which should guide the Magistrate in determining whether a claim of title is *bona fide* made, it

(1) 5 C. 875=6 C.L.R. 379. (2) 15 C. 460. (3) 7 C.L.R. 443 (444)=6 C. 291.

would not be safe to attempt to lay down any general rule, save that there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfy the Magistrate that there is some reasonable ground for his assertion of title. The claim must be one that can legally exist, and consequently [to mention [**572**] two English cases, from Pelay (1)] defendant was not allowed to oust the jurisdiction of the Justices by claiming a right as one of the public to fish in a non-navigable river, though, if he had made such a claim with respect to one where the tide ebbs and flows, it might have been sufficient. And so a claim by a defendant as one of the public to shoot over certain land when in fact the public had hitherto shot without interruption was held insufficient, as no such right is known to the law. And in another case it was held that the mere assertion of a right made by the defendant's attorney, in writing, but without stating any grounds for it, was not enough.

In a recent case this Court was asked to interfere, in revision, with a Magistrate's order for the removal of an obstruction from a public road, on the ground that the defendant had made a *bona fide* claim of right. It appeared that the piece of land in question had been recently fenced in by the defendant, that before that it had been used as a road, and had been repaired at the cost of the Road Cess Committee. No ground of title to the land was shown on the part of the defendant, save his attempt recently made to appropriate the land, and this Court refused him a rule.

These cases are referred to here, because it is desirable to point out that the action of the Magistrate under these sections is not to be trammelled by a mere assertion of right made without fair ground, or honest belief in it, or honest intention to support it.

The course which we hold that the Magistrate should follow in administering these sections where a claim of right is set up is as follows:—

He should consider, having regard to what has been said above, whether the claim is made *bona fide;* and if on a fair consideration of the matter, and remembering how scrupulously private rights should be respected, he thinks, the claim not *bona fide*, he should record his reasons for thinking so, and decide the case without further reference to the claim. It is for the defendant to set it up, and unless he does so the Magistrate has nothing to do with it, and the defendant must set it up at or before the hearing.

[**573**] Of course, if the Magistrate, on hearing the defendant, thinks his claim of right well founded, he will take no further proceedings; for in that case it will have been shown to him that s. 133 does not apply to the case.

If the Magistrate does not think this claim well founded, so far as he can judge, but considers that it is made *bona fide*, he should allow the defendant an opportunity of asserting it by civil proceedings. The existence of an intention or desire to do this is one test of *bona fides—Reg* v. *Sandford* (2). If the defendant does not within a reasonable time assert his right, the Magistrate may proceed. If the defendant does so, with success, the public right, which is the foundation of proceedings under s. 133, is either negatived or shown to be so doubtful that the Magistrate ought not to proceed further. If the defendant does not go into a Civil Court within a reasonable time or fails there, the Magistrate may proceed.

(1) Paley on Summary Convictions, 5th Ed., pp. 138, 139. (2) 30 L.T. 601.

1888 MARCH 24. — CRIMINAL REFERENCE. — 15 C. 564.

Our observations in this judgment are of course directed to that part of s. 133 which relates to the case now before us and deals with obstructions to public ways.

We may observe that in cases in which danger to public health or safety is involved, we by no means suggest that the Magistrate is fettered, in the exercise of the powers given to him under these sections, by the considerations to which we have adverted.

Having referred to these general considerations, we proceed to express our judgment upon the case now before us. As will be seen from what we have said, the view expressed by the Magistrate in his excellent judgment in this case as to the propriety of a Magistrate's forming an opinion upon the *bona fides* of a claim of title when set up is, we think, correct. That is, we think, a necessary part of his duty in such cases, and in the present case we are of opinion that the Magistrate's decision that the claim of title set up here was not such a *bona fide* claim of title as ought to prevent his proceeding to make an order is one which we cannot dissent from. Taking all the circumstances before the Magistrate into consideration, the length of the occupation by the defendants, the absence of proof of title (for the mowrosi deed was not, and [574] could not be, put in), the proof of user up to a recent time, the existence of disputes between the rival parties in the village throwing some light on defendant's present acts, are all matters to be weighed in determining this question, and we think that under the circumstances what the Magistrate had before him was enough to justify him in coming to the conclusion that the claim of right was not *bona fide* raised, and we, therefore, let the order which is the subject-matter of this reference stand. We may add, however, that, if it be the case, notwithstanding the absence of proof of it, that the defendants really had a *bona fide* claim of right, although they had not made it appear that they had, they are not, as will be seen when the Full Bench judgment in *Chuni Lall* v. *Ram Kishen Sahoo* (1) is delivered next week, without the means of resorting to the Civil Court should they desire to do so. When the judgment of the Full Bench has been delivered and printed, a copy of that judgment will be put up with these papers when they are returned to the District Judge.

C. D. P. *Order upheld.*

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Beverley.

ASGAR REZA AND ANOTHER (*Opposite Party*) *v.* ABDUL HOSSEIN AND ANOTHER (*Petitioners*).* [14th April, 1888.]

Certificate of administration—Act XXVII of 1860—Rival claimants for certificate—Procedure—Trial of questions of title.

In a case of rival claimants to a certificate under Act XXVII of 1860 to the estate of a deceased Mahomedan lady, *A* based his claim on the ground that the deceased was a Sunni, and that he being a Sunni was her nearest heir. *B*'s claim was founded on the allegation that the deceased was a Shiah, and that

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* Appeal from Order No. 25 of 1888, against the order of F. Peterson, Esq., District Judge of Purneah, dated the 9th of January, 1888.

(1) 15 C. 460.

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15 C. 574=13 Ind. Jur. 21.

he being a Shiah had the preferential title. The Judge declined to receive the whole of the evidence tendered, and to go into the question of title. On appeal the case was remanded to the Judge for determination of the question whether the deceased was a Sunni or a Shiah, and which of the parties had the preferential title to the certificate, upon the entire evidence.

[575] *Per* Ghose, J.—Where the question as to right to a certificate is between two parties, one of whom according to certain given facts would be the heir and the other a total stranger, those facts must be gone into and determined, although such procedure involves to a certain extent the trial of a question of title.

Cases distinguished where the question of the title to obtain a certificate is raised between one who is undoubtedly a natural heir and another who sets up a special title, or between two persons equally entitled to the succession, but one of whom claims exclusive title upon some special grounds.

The scope and object of Act XXVII of 1860 discussed.

[R., 23 C. 431 (436).]

This was an appeal from an order made on an application for a certificate under Act XXVII of 1860 in respect of the estate of Mussamut Khubunnissa, who died, leaving a considerable property, both moveable and immoveable. The application was made by her brothers Abdul Hossein and Ahmed Hossein, and was opposed by Syed Asgar Reza and Syed Dilewar Reza, her grandsons.

The following was the material portion of the judgment appealed from:—

"The brothers, who are Sunnis, apply for a certificate under Act XXVII of 1860, whilst the grandsons, who are Shiahs, allege that they are entitled to the certificate because their grandmother died in the Shiah faith. Both parties had ready a very great amount of evidence, but without going fully into this I have come to the conclusion that I ought to grant the certificate to the brothers, and for the following reasons:—

"Abdul Hossein and Ahmed Hossein have produced sufficient evidence to show that up to a certain time of life Khubunissa was a Sunni; the opposite parties admit that they have no evidence to prove whether Khubunnissa was born a Sunni or a Shiah. Here there is one clear fact on which, if a certificate be granted, the Court avoids giving any opinion at all as to the merits of the rival claims to the deceased's property. An opinion if given of course would not be final; still in many cases of this kind evidence as to title is gone into. Where, however, this procedure can by any possibility be avoided, it appears to me that it should be avoided in the interests of all the parties concerned. It is obviously inadvisable to decide in a summary case a very intricate question of fact which would be a certainty have to be re-tried in a regular suit. This Court could not in fairness, on the petition of the grandsons, stop the case at any particular point, and without taking the whole of the evidence on both sides find that Mussamut Khubunnissa was or was not a Shiah. To fully enter into the question it would be necessary to hold a lengthened trial, the only result of which would be a heavy loss to the estate and no practical gain to any one.

[576] "Ordinarily no doubt the Court should look to the position of the deceased's relations at the time of the death of the person, for whose estate a certificate is to be granted, but when this position is such that it cannot be determined except on the determination, after a full hearing, of an intricate issue of fact, which again practically decides a dispute as to title, the question is whether it is not best for the parties that in a summary case the Court should take action on a proved—it may be said admitted—

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fact which in no way whatever touches the respective claims of the parties to the property of the deceased.

"I admit I have been in considerable doubt as to the proper course to take in these cases; but looking to the remarks of the learned Judges in the cases of *Prankristo Biswas* v. *Nobodip Chunder Biswas* (1) and *Sarfoji* v. *Kamakshiamba* (2), I am inclined to hold that in giving the certificate to the brothers of the deceased I am adopting the course which is fairest to both claimants, as no expression of opinion at all is necessary as to the title to the property. On the score of fitness something may be said in favour of the brothers; they are elderly men, have their home in the village in which the deceased lived, and have a lease of some of the deceased's immoveable property. On the other hand, of the grandsons, one is a minor and the other only twenty-three or twenty-four years old. I direct that a certificate under Act XXVII of 1860 issue to the petitioners Abdul Hossein and Ahmed Hossein on their furnishing security to the extent of Rs. 10,000 with two sureties."

From this order the opposite parties appealed to the High Court mainly on the following grounds (*a*) that the Court ought to have held that the applicants had failed to make out any right to the certificate, and that the appellants were entitled to it, as nearest of kin to the deceased; (*b*) that the Court ought to have gone into the question as to the religion which the deceased professed at the time of her death, or at any rate should not have decided the case against the appellants without giving them the benefit of her allegation in that respect; (*c*) that the Court ought to have gone fully into the evidence, and, it not having done so, there had been a mistrial of the case; (*d*) that the fact (denied however, by the appellants) that the deceased was a Sunni at one period of her life, and that the appellants had no evidence to prove in what faith she was born, was wholly insufficient for the proper disposal of the case; the question was in what faith she died of which the appellants had evidence, and the Court was wrong in deciding the case simply on the above fact, and without going into the appellants' case and the evidence produced by [**577**] them; (*e*) that the Court was not justified in assuming that the applicants were entitled to a certificate by reason of deceased having been a Sunni, or in assuming that she was born a Sunni—a fact which was not admitted by the appellants and not proved; (*f*) that the Court was not justified in not trying the point on which alone the Court admits the case could be properly decided, merely because it involved intricate questions of fact; (*g*) that the right to the certificate, which the Court was bound to determine, could only be decided by determining whether the deceased died a Sunni or a Shiah; (*h*) that the rulings relied on by the Court were not applicable to the facts of this case; (*i*) that the Court had granted the certificate without putting the applicants to strict proof of their right (*j*) that the grounds as to fitness were invalid, the appellant Asgar Reza had been managing his estate for some years, whereas the applicants for the certificate had never had experience in zemindari affairs; (*k*) that inadequate security had been taken.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Nil Kant Sahai*, for the appellants.

The Advocate-General (Mr. *Paul*) Mr. *Pugh* and Mr. *C. Gregory*, for the respondents.

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(1) 8 C. 868. (2) 7 M. 452.

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The following cases were referred to; *Prankisto Biswas* v. *Nobodip Chunder Biswas* (1); *Surfoji* v. *Kamakshiamba* (2); *Sheetanath Mookerjee* v. *Promothanath Mookerjee* (3); *Koonj Behary Chowdhry* v. *Gocul Chunder Chowdhry* (4); *Taylor* v. *Nundee Jan* (5); *Anundee Kooer* v. *Bachoo Singh* (6); *Nunkoo Singh* v. *Purm Dhun Singh* (7); *Juggut Chunder Roy* v. *Chunder Monee Shaha* (8), *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee* (9); appeal from orders 195 and 196 of 1887 decided by MITTER and BEVERLEY, JJ.) on the 8th November 1887 (10).

The following Judgments were delivered by the Court (GHOSE and BEVERLEY, JJ.): —

JUDGMENTS.

[578] GHOSE, J.—The parties before us are rival claimants to a certificate under Act XXVII of 1860 to collect the debts due to the estate of a Mahomedan lady Khubunnissa Begum, who died in October last. They are, first, Abdul Hossein and Ahmed Hossein, who are brothers of Khubunnissa; and, second, Syed Asgar Reza and Dilawar Reza, her grandsons (daughter's sons).

The claim of the brothers was founded upon the ground that the lady belonged to the Sunni sect of Mahomedans, and that therefore they being themselves Sunnis were her next heirs and as such entitled to the certificate; whereas the claim of the grandsons was upon the ground that she was a Shiah, and that they being Shiahs were her heirs, and therefore had the preferential title to the certificate in question.

It appears that the case of the brothers was opened with the examination of five witnesses, who were called to prove that the deceased lady was born in a Sunni family, and that she was herself a Sunni up to the time of her death. At the end of the examination of the said five witnesses, the District Judge, on the 7th January, stopped their (the brother's) case, and called upon the opposite party (the grandsons) to produce their evidence on the 9th idem. On that date, after one witness on the side of the grandsons was examined, who was called to prove that for the last twenty-five or thirty years before her death the lady was a Shiah and not a Sunni, and that she died a Shiah, the Caurt, put certain questions to the Counsel on either side. Mr. Gregory for the brothers stated that on behalf of his clients he would not admit that the lady died a Shiah. Mr. Forbes for the grandsons said that he would not adduce any evidence as to whether the lady was born a Shiah or a Sunni. And the District Judge upon these statements, and without allowing the grandsons to call any other witnesses, or adduce any other evidence, proceeded to give judgment in the case.

In this judgment the learned Judge observes in the first instance that the brothers "have produced sufficient evidence to show that up to a certain time of life Khubunnissa was a Sunni. The opposite parties admit that they have no evidence to prove whether Khubunnissa was born a Sunni or a Shiah." He then proceeds to say: "Here there is one clear fact on which, if [579] a certificate be granted, the Court avoids giving any opinion at all as to the merits of the rival claimants to the deceased's property; an opinion if given of course would not be final, still in many cases of this kind evidence as to title is gone into. Where, however, this procedure can by any possibility be avoided, it

(1) 8 C. 868. (2) 7 M. 452. (3) 6 C. 303. (4) 3 C. 616.
(5) W.R. (1864) Mis. 25. (6) 20 W.R. 476. (7) 12 W.R. 356.
(8) 17 W.R. 277. (9) 5 C.L.R. 517. (10) Unreported.

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appears to me that it should be avoided in the interests of all the parties concerned. It is obviously inadvisable to decide in a summary case a very intricate question of fact which would, to a certainty, have to be re-tried in a regular suit." Later on he says: "To fully enter into the question it will be necessary to hold a lengthened trial, the only result of which would be a heavy loss to the estate and no practical gain to any one."

Having made these observations, the District Judge observes as follows: "The question is whether it is not best for the parties that in a summary case the Court should take action upon a proved—it may be said admitted—fact which in no way whatever touches the respective claims of the parties to the property of the deceased." He then proceeds upon what he conceives to be the proved or admitted fact of the case; and being also of opinion that on the score of fitness something may be said in favour of the brothers, he determines that a certificate should be granted to the brothers upon the condition that they furnish security to the extent of ten thousand rupees with two sureties.

In taking the course that he did, the Judge admits that he has been in considerable doubt as to the proper course to be adopted; but that, regard being had to the remarks of certain learned Judges in two cases, one *Prankisto Biswas* v. *Nobodip Chunder Biswas* (1), and the other *Surfoji* v. *Kamakshiamba* (2) he says he is inclined to think that the course he has adopted is fairest to both claimants.

It was conceded by the learned Counsel on either side before us that, if the lady was governed by the Shiah law, the preferential heirs would be her grandsons; whereas, if she was governed by the Sunni law, the brothers would be her heirs.

Now, what is the proved or admitted fact upon which the Judge proceeds in holding that the certificate ought to be granted to the brothers? It is indeed true that in an early part of [580] the judgment the Judge states that the brothers have produced "sufficient evidence to show that up to a certain time of life the lady was a Sunni;" but it must be borne in mind that the Judge was not in a position to say that up to a certain time of life the lady was a Sunni without taking the evidence which the opposite party (the grandsons) were prepared to produce; and indeed the Judge in a subsequent part of the judgment observes: "This Court could not in fairness on the petition of the grandsons stop the case at any particular point, and without taking the whole of the evidence on both sides find that Mussamut Khubunnissa was or was not a Shiah."

Mr. Pugh on behalf of the brothers very candidly admitted that all that the Judge meant to find in his judgment was, not that Kubunnissa was a Sunni, but that she was born in a Sunni family, and that this was what the Judge meant to say was the "proved fact" in the case. Then as to the fact which the Judge considers to be "admitted," I do not exactly understand what he means to refer to; for there was no fact admitted on the side of the grandsons. All that their Counsel said in answer to a question by the Court was that he would not adduce any evidence upon the question whether the lady was *born* a Sunni or a Shiah; and it seems to me that the Judge infers from this that the grandsons admit that the lady was born a Sunni. This is perhaps the "admitted" fact to which the Judge alludes. It may indeed be gathered from the evidence that has been adduced on the side of the brothers that the lady was born

(1) 3 C. 868. (2) 7 M. 452.

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in a Sunni family. But this was, it must be remembered, about seventy or eighty years ago; and that many years before her death she was married, as it would appear upon the evidence on behalf of the brothers, to a gentleman who was a Shiah, and with whom she lived for several years. And therefore one cannot legitimately infer from the mere fact of her birth in a Sunni family that she was, during the whole of her lifetime, a Sunni and died a Sunni. However that may be, the question that arises in this appeal is whether, supposing that the lady was born in a Sunni family, the Judge was justified in stopping the case at the point he did, and in excluding the evidence which the grandsons were prepared to adduce, and in holding that, for the purposes of a certificate [581] under Act XXVII of 1860, the brothers must be taken to have a better title to it, and that no enquiry ought to be made upon the question as to whether she was a Shiah or a Sunni.

The Judge, as already noticed, in adopting the course he did, has been guided by two decisions. Upon examination of the case of *Prankisto Biswas* v. *Nobodip Chunder Biswas* (1), it will be observed that the two claimants were related to the deceased in the same degree of affinity, and as such both of them were *prima facie* entitled to the certificate. One of them, however (Prankisto), contended that he was exclusively entitled to the property of the deceased on certain special grounds. The Judge of the Court below examined only one witness on behalf of Prankisto, and disposed of the case without examining the rest of the witnesses. He however entered into the title set up by that individual, and expressed an adverse view against him. A divisional Bench of this Court (McDonnell and Field, JJ.) in the first place explained what the real object of Act XXVII of 1860 was, as to be gathered from the preamble itself; and then observed that the Judge was wrong in expressing any opinion upon the special title set up by Prankisto, he having not heard all the evidence which that person was prepared to adduce; and "that, if the Judge, having pointed out that both parties were *prima facie* equally entitled, had stopped there and declined to enter into the question of title raised by Prankisto Biswas, referring him to a civil Court for the decision of that question, and saying that the object of the Act would be sufficiently attained by granting a general certificate to the parties, there would have been no ground of objection against the proceeding of the District Judgoe." In this view of the matter they struck out, and set aside, that portion of the Judge's judgment which dealt with the question of the exclusive title set up by Prankisto. It does not clearly appear from the judgment whether a certificate was granted by the Judge to both the claimants or one of them; it would rather appear that it was granted to both, and it would seem that all that Prankisto really pressed upon this Court was though his appeal no doubt was upon the ground that he was exclusively entitled to a certificate, that the adverse [582] remarks made against his exclusive title by the District Judge were uncalled for.

I do not think that either the observations of the learned Judges in that case, or the course adopted by them, support the course taken by the District Judge in this case; and so far as the remarks made by them in explaining the object of the Act that "in effect the holder of the certificate was a trustee liable to account for the money received by him to the legal heir or representative of the deceased" are concerned, they refer to the legal heir or representative who may be ultimately determined to be such

(1) 8 C. 868.

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by a civil Court; but they never meant to hold, as it seems to me, that the holder of the certificate might be, as it was contended for by Mr. Pugh before us, a stranger altogether. And this would seem to be plain enough by reference to the observations of FIELD, J., one of the Judges who decided that case, in another case—*Sheetanath Mookerjee* v. *Promothonath Mookerjee* (1).

As regards the other case referred to by the District Judge, *viz.*, *Surfoji* v. *Kamakshiamba* (2), it would appear that of the two claimants for the certificate one was the natural heir, and the other a person who set up a title as a son adopted by one of the widows of the last full owner. The lower Court granted a certificate to the natural heir. It does not appear that the Judge excluded any evidence; and in fact it does appear that some evidence was gone into as to the title of the adopted son. TURNER, C.J., in the first place, observes "that the title of the appellant has sometimes been asserted and sometimes been ignored by the senior Ranee (the alleged adoptive mother), according as it suited the efforts she made to recover the restoration of the dignity and possession of the Tanjore Raj." And then he observes as follows: "In administering the provisions of Act XXVII of 1860 it has not been the practice of the Court to enter upon the determination of intricate questions of law or of fact. It has been the practice to issue a certificate to the person who has *prima facie* the clearest title to the succession, such as the natural heir, and to leave a person whose claim to a superior title is on reasonable grounds disputed to [583] establish that title by regular suit." He then refers to the questions which were raised in the case, and which he says are of such intricacy that they cannot be satisfactorily determined in the proceeding; and he alludes to various circumstances which indicated that the title of adoption set up was of a questionable character, and he concludes by saying that in this view the District Judge was right in refusing to enter into an exhaustive enquiry into the said title.

So far as this decision is concerned, it seems to me that it does not support the course adopted by the Judge; it rather shows that the question of the title to the succession to the estate of the deceased should, to some extent at least, be gone into in a proceeding under Act XXVII of 1860.

Now, on turning to the facts of the present case, the question as to the title to obtain a certificate is one that is raised, not between one who is undoubtedly the natural heir, and another who sets up a special title of his own; nor is it between two persons who are equally entitled to the succession, but one of whom claims exclusive title upon some special grounds. It is a question between two parties, one of whom, according to certain given facts, would be the heir, and the other a total stranger; and therefore it follows that, unless and until those facts are proved and found, the Court cannot possibly determine who has the better title to the certificate.

It has, however, been contended before us by the learned Counsel for the brothers that, regard being had to the object of Act XXVII of 1860, as explained in the preamble and in the Act itself, no enquiry as to whether the lady was a Sunni or a Shiah, and as to who according to the law of succession is the preferential heir, ought to be gone into in this proceeding. This contention brings us to the consideration of the object and scope of Act XXVII of 1860.

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(1) 6 C. 303 (2) 7 M. 452.

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The preamble of the Act says: "Where it is expedient to consolidate and amend certain Acts now in force which provide greater security for persons paying to the representatives of deceased Hindus, Mahomedans and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which [584] facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same, it is enacted as follows."

The first observation that arises upon this preamble is that it indicates that the person, to whom the debts payable in respect to the estate of a deceased person should be paid, is the *representative* of the deceased having a *legal title* to demand and receive the same. Now, who is this representative having a legal title to demand and receive the debts? This is answered by ss. 2 and 3 of the Act.

Section 2 provides: "No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned, or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

It would appear from this section that the person entitled to demand the payment of the debts should be a person, who claims to be entitled to the effects of the deceased person, with this proviso, that nobody can be compelled to pay him such debts unless a certificate under the Act be produced.

Section 3, after laying down which would be the Court that should have authority to grant the certificate, says as follows:—

"The applicant in his petition shall set forth his title. The Court shall issue notice of application, inviting claimants and fixing a day for hearing the petition, and upon the appointed day, or as soon after as may be convenient, shall determine the right to the certificate, and grant the same according."

Now what is the title that is to be set forth in the application? This title, I apprehend, must be that of a representative claiming to be entitled to the effects of the deceased person; and in order to indicate that he is entitled to the effects of the deceased person, he must, I think, state that he is so entitled, either under the law of inheritance, under a will, or such other title. Such a title which entitles him to the effects [585] of the deceased person being set forth in his application, the Court shall determine after notice, inviting other claimants, the right to the certificate.

We then find that s. 4 provides that the certificate shall be conclusive of the representative title against all debtors to the deceased, and shall afford full indemnity to all debtors paying their debts to the certificate-holder. And s. 5 lays down that the Court may take such security as it shall think necessary from the certificate-holder for rendering an account of the debts received by him, and for indemnity of persons who may be declared in a regular suit to be entitled to the whole or any part of the money received by virtue of such certificate.

Then s. 6 of the Act provides as follows: "The granting of such certificate may be suspended by an appeal to the Sudder Court, which Court may declare the party to whom the certificate should be granted, or

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may direct such further proceedings for the investigation of the title as it shall think fit," &c., &c.

Now what is the title to be investigated as comtemplated in this section? The title, I take it, is that set forth in the application of the applicant, *viz.*, that he is entitled to the effects of the deceased person; and this title must be gone into before a certificate can be granted. No doubt the title which the Court under Act XXVII of 1860 really determines is not the title to the estate of the deceased person, but the title to the certificate; but I do not understand how, in a case where there are rival claimants, each claiming the effects of the deceased person, such a title can be determined unless the question of title to the estate itself is to some extent at least gone into. And when this title depends upon a question of fact, that question must be gone into before it can be held who has the preferential claim to be the representative of the deceased, and entitled as such to a certificate to collect the debts due to the deceased. This. I think, has been the view which has almost uniformly been taken by this Court—see *Nunkoo Singh v. Purm Dhun Singh* (1) *Juggut Chunder Roy* v. *Chunder Monee Shaha* (2) *Taylor* v. *Nundee Jan* (3); *Anundee Kooer* v. *Bachoo* [586] *Singh* (4); *Sheetanath Mookerjee* v. *Promothonath Mookerjee* (5); *Koonj Behary Chowdry* v. *Gocool Chunder Chowdhry* (6); and a recent decision by Mitter and Beverley, JJ., dated 8th November 1887.

There are, however, one or two cases which, it would seem, have taken a somewhat different view, *e.g.*, the case of *Kali Coomar Chatterji* v. *Tara Prosunno Mookerjee* (7). But I think it is opposed to the whole current of rulings of this Court, and the correctness of this ruling seems to have been doubted in the case of *Sheetanath Mookerji* v. *Promothonath Mookerjee* (5). A recent decision passed by Macpherson and Ghose, JJ., was also cited before us; but I do not think that that decision lays down the proposition of law which the learned Counsel for the brothers contends for. It will be found on a reference to the decision of the District Judge in that case that he was of opinion that the deed of *wakf* which was relied upon by one of the claimants was of a very suspicious character and a sham transaction. The learned vakeel who appeared for the appellant did not, if I remember right, ask us to come to a different conclusion than what was arrived at by the Judge. All that he really asked for was that we should strike out that portion of the judgment which dealt with the question of the genuineness and validity of the deed of *wakf;* and we thought we might well do so in the circumstances of the case. But, however that may be, it will be observed, with regard to both of these cases, that the question raised was between a natural heir, a person who was *prima facie* entitled to the certificate, and another who would have no title whatever if he did not prove the special title set up by him; and there may be some reason in such a case for declining to enter, as in one or two cases this Court did decline to enter, into an enquiry into such a special title in a proceeding under Act XXVII of 1860. But the case is very different, indeed, where neither of the parties is an admitted heir, but whose title to the certificate depends entirely upon the proof of a question of fact. In the present case the brothers cannot be entitled unless the lady be proved to be a Sunni, and the [587] grandsons cannot succeed unless the lady were a Shiah. And it

(1) 12 W.R. 356. (2) 17 W.R. 277. (3) W.R. (1864) Mis. 25.
(4) 20 W.R. 476. ((5) 6 C. 303. (6) 3. C. 616.
(7) 5 C.L.R. 517.

seems to me that it stands to reason that the question of fact thus raised between them must be determined before the certificate could be granted to either of them.

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It was however contended before us that the lady having been *born* in a Sunni family, it ought to be *prima facie* presumed that she was a Sunni all her life, and that the brothers were therefore *prima facie* entitled to the certificate, and that the opposite party should be left to establish their title in a regular suit. But it seems to me that in the first place such a presumption cannot be drawn, it being admitted that the lady was married into a Shiah family; and, in the second place, a Court cannot act upon a bare presumption like this, even in a proceeding under Act XXVII of 1860, when as it is alleged, there is evidence forthcoming on the other side rebutting that presumption and tending to show that she was not a Sunni, at any rate for many years previous to her death. It seems to me that the question of fact raised between the parties must be determined upon evidence and not upon mere presumption.

Some discussion was raised before us upon the question whether any change in the religious faith of the lady would alter the law of succession —that is to say, she being *born* a Sunni, whether the succession to her estate would be governed by the Sunni law or by the Shiah law; or, in other words, whether the matter is to be determined by the rule of law governing the *family* in which she has born, or by that governing the *sect* whose religion the lady embraced subsequent to her birth and before death. But it seems to me unnecessary at the present stage to express any opinion upon this point.

Then as to what the Judge says of the fitness of the brothers, it seems to me in the first place that what the Judge relies upon does not show that they are more fit than one of the two grandsons; but on the contrary it would seem that the fact of the brothers holding a lease on the estate is rather a disqualification than a recommendation in their favour; and, in the second place, such a question of fitness may properly arise between claimants who are equally entitled, but it hardly arises between parties who set up antagonistic titles.

[**588**] With these observations I would remand the case to the lower Court, with the direction that the District Judge should receive such further evidence as the parties might desire to adduce, and determine upon the whole evidence which of the two parties has the preferential right to obtain the certificate.

Having determined which is the party to whom the certificate should be granted, the Judge will determine the amount of security that ought to be taken from the party to whom the certificate is to be granted. I think it right to call the attention of the Judge to the matter of the security, for it seems that, it being conceded on both sides that the amount of debts to be recovered is at least one and a half lakh of rupees, if not more, the security which the District Judge has ordered to be given, *viz.*, Rs. 10,000, is very small indeed.

Beverley, J.—In this case I should have been content to dismiss the appeal (subject to a modification of the order regarding the amount of the security to be taken) were it not for the strong view the other way expressed by my learned colleague. Looking at the facts of the case, the litigious character of the parties and the many nice legal points involved, I think the Judge was justified in stopping where he did, and, on finding it proved or admitted that the deceased lady was born a Sunni in a Sunni family, and that the fact of her subsequent conversion to the Shiah sect

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was disputed, in granting a certificate to her heirs according to the Sunni law, leaving it to the other side to establish in a regular suit the fact of the lady's conversion and the legal effect thereof as regards the succession to her property.

I agree with the District Judge that such a course would probably have avoided much inconvenience hereafter and saved the parties unnecessary expense. But as my learned colleague is of opinion that the whole case should be gone into in the present proceedings, and as it is a matter in respect of which there has undoubtedly been a diversity of practice in this Court, I think it better to defer to that opinion than to put the parties to the expense of a further appeal. The case will therefore go back to the District Judge as suggested by my learned colleague, and the costs of this appeal will abide the result.

[589] I will only add one word as regards the case cited by my learned colleague to which I was a party. In that case the District Judge had granted a certificate in preference to the next-of-kin to a person who, it was alleged, was the adopted son of the deceased. But the alleged adoption was disputed, and the Judge had refused to go into evidence on the point; and what we said was that the Judge was not justified in putting aside the claim of the next-of-kin without going into evidence and finding in favour of the adoption. But that case would not be an authority for the proposition that the Judge could not have granted the certificate to the next-of-kin without going into the question of the alleged adoption. And there appear to be several cases the other way.

J. V. W. *Case remanded.*

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15 C. 589.

ORIGINAL CRIMINAL.

Before Mr. Justice Wilson.

QUEEN-EMPRESS *v.* MEHER ALI MULLICK AND TWO OTHERS.*
[11th May, 1888.]

Evidence—Statement of accused to Police officer during investigation—Admissions—Confessions—Experts, Evidence of—Medical witnesses. Evidence of—Opinion of experts how elicited—Evidence Act (I *of* 1872), *ss.* 25, 26, 27, 45.

Instances of statements made by an accused person to a Police officer held to be admissible and inadmissible in evidence against such accused person.

A medical man who has not seen a corpse which has been subjected to a *post mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post mortem* to the witness and to ask what in his opinion was the cause of death on the hypothesis that those signs were really present and observed.

[**F.**, 5 L.B.R. 131=11 Cr.L.J. 153=4 Ind. Cas. 1028; **R.**, L.B.R. (1893-1900) 42 (45); **Disc., & D.**, 37 C. 467=14 C.W.N. 1114=7 Ind. Cas. 359=11 Cr.L.J. 453.]

In this case the three prisoners Meher Ali Mullick, Butto and Torab were charged with the murder of one Huree in a godown at the Doveton Young Ladies' Institution, in Park Street, on the 4th April 1888. The three accused were all servants [590] employed in the Institution, being respectively the khansama and two of the kitmatghars. The evidence for the prosecution was purely circumstantial. The body of the deceased was

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found in a box at Juggarnauth Ghat on the evening of that day tied up with cords, and on the neck was found a piece of cloth, alleged to have been torn from a dhotee, twisted and four ply, and it was a portion of the case for the prosecution that death had been caused by strangulation, and that such strangulation was caused by this cloth cord. During the course of the enquiry, to ascertain how the murdered man came by his death, the Police on the morning of the 5th April proceeded to the Deveton Institution and during the course of investigating the case certain statements were alleged to have been made by Torab and the clothes worn by the deceased was produced to the Police, together with an umbrella he had with him and a bill written in the Bengalee character which it was alleged Hurree had taken with him to the Doveton on the 4th for the purpose of obtaining payment of moneys due to him from Meher Ali. At the time these statements were made Meher Ali was under arrest, but neither of the other two accused was suspected of having had any hand in the murder, and they were not then under arrest.

During the trial it was sought to give evidence for the prosecution of these statements. The statements were the following and made under the following circumstances: A Superintendent of Police, during the course of his evidence, stated that on going to the godown where the murder was alleged to have been committed he saw Torab there, and he asked him if he had seen Hurree the previous day. Upon his being asked what Torab said counsel for the defence objected. The objection was overruled, and the witness stated: "Torab remained silent, and on my repeating the question he said Hurree had come the previous day at noon to the premises, but that he did not know when he left."

The witness then proceeded to state that he went with others into a godown, and on telling Torab to empty his box Torab produced the Bengalee bill referred to above and made a statement. Counsel for the defence again objected to evidence of this statement being given. The statement sought to be proved was to the following effect:—

[591] "Sir, I have something to give you. Meher Ali gave me this paper yesterday evening to keep for him."

Upon the objection being taken, the question was not allowed, and the question of the admissibility of the evidence was reserved by his Lordship.

At a later stage of his examination the witness stated that after producing the bill Torab made another statement, and he was asked what that statement was.

The statement as recorded in the deposition of this witness taken before the Magistrate, upon which he was being examined, was as follows:—

"Torab said: 'Hurree came here yesterday at 1 P.M. Hurree and I and Bhutto and Meher Ali were seated in this room looking over his account, when Hurree took sick with cholera; he went out of the room three times to ease himself and came back and sat down, when angry words passed between him and Meher Ali.' He also made a further statement."

Counsel for the defence again objected to this question and stated that it was clear, that the whole of Torab's statement was not there given, and referred to the deposition of this witness before the coroner, where the same statement was more fully recorded, and contended that if a portion of the statement was to be admitted the whole must be admitted. In the deposition of this witness before the coroner the statement was

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recorded as follows: "Torab said that the deceased Hurree had called the previous day, was taken ill with cholera, was purged three times, after which a dispute arose regarding accounts in Exhibit F (the Bengalee bill); that Hurree had abused Meher Ali's wife, on which Meher Ali had given Hurree a push in the throat, when Hurree fell backwards and became insensible; that they tried to get a box from the second shelf from the west of the room; that they tried to put the corpse into the box; it was too big; that they had to tie the body to make it fit into the box; that they then put the lid on after placing a sheet on the body; that they covered the box with a gunny and then tied it up with a rope; that they left the box till evening; and that at 6 P.M. Meher Ali got a cooly and had the box removed through the small door of the Institution opening into Free School Street."

[**592**] The argument as to whether evidence of these statements was admissible was reserved till the jury had withdrawn.

Mr. *Pugh* (*Officiating Standing Counsel*), for the prosecution.

Mr. *Gasper*, for Meher Ali.

Mr. *Lal Mohan Ghose*, for Torab and Bhutto.

Mr. *Pugh*.—The statements made by Torab are admissible in evidence, as he was not then under arrest; besides, the evidence has a material bearing on the case against him. The sections of the Evidence Act bearing on the subject are ss. 25, 26 and 27, but these statements are not "confessions," within the meaning of that term as used in those sections. "Admissions" are not "confessions," and are treated in the Evidence Act as distinct. *The Queen* v. *Macdonald* (1) is an authority in my favour, and that case was followed in *Empress* v. *Dabee Pershad* (2). It is only a confession made to Police officers that is inadmissible in evidence, and if a statement does not amount to a confession, it is otherwise admissible. In England it has always been the practice to admit such statements as these—*Rex* v. *Greenacre* (3). They are put forward as statements made by the accused as their defence, and the prosecution use them for the purpose of showing that they are inconsistent with the truth. They are not put forward as confessions at all. It is in that connection that I propose to use these statements.

Mr. *Gasper*.—The statement by Torab—"Sir, I have something to give you. Meher Ali gave me this paper yesterday to keep for him"—is perfectly innocuous. I shall not take up your Lordship's time about it.

I do not dispute the law obtaining in England on this subject as referred to by Mr. *Pugh*, but here we are governed by the Evidence Act, which has in this respect made a very great departure from the English law. I do not object to the statement made by Torab on his producing the Bengalee account paper, but the other statements are to all intents and purposes, confessions, and it is impossible to distinguish them from a confession even [**593**] in its ordinary and accepted sense. I am prepared to contend that the Evidence Act does not make any difference between admissions and confessions. Sections 17 to 31 deal with admissions, and in s. 24 you come to the first of those sections which deal exclusively with admissions in criminal cases.

[WILSON, J.—Is there any authority for saying that admissions and confessions are one and the same?]

Mr. *Gasper*.—There is the case of *Empress* v. *Pandharinath* (4), which lays down that a statement made to a Police officer, although made in self

(1) 10 B.L.R. App. 2. (2) 6 C. 530. (3) 8 C. & P. 35. (4) 6 B. 34.

exculpation, may still be an admission of a criminating circumstance, and thus a confession and inadmissible under ss. 25 and 26. 1888 May 11.

[Wilson, J.—That case falls far short of holding that admissions and confessions are the same thing.] Original Criminal.

Mr. *Gasper*.—Another case bearing on the question is that of *The Queen* v. *Hurribole Chunder Ghose* (1), and the precise nature of the statement in that case is to be found in Hume's Criminal Digest, page 310. There is also the case of *Queen* v. *Macdonald* (2) referred to in that case. The real question here is, does the statement contain an admission of a material fact necessary for the prosecution to prove or material for them to prove? If it does then it amounts to a confession and is inadmissible, and I contend that the statements I object to fall within that category, and should not therefore be admitted. 15 C. 589.

Mr. *Pugh* in reply.—There is no authority for Mr. *Gasper's* proposition; a confession is an admission of guilt and not a statement made with the sole object of exculpating the maker, or, to use the words of Mr. Justice Stephen, "a confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime." See *Queen-Empress* v. *Babu Lal* (3).

Wilson, J. (having taken time till the following morning to consider the question).—I have come to the conclusion that [**594**] evidence can be given as to what Torab said when he made over the paper to the Police, but that evidence of the other statements sought to be proved cannot be given.

During the trial Dr. Mackenzie, the Police Surgeon, was called, to give evidence as to the cause of death, and in the course of his evidence he stated the various marks and indications he found when making the *post mortem* examination, and gave it as his opinion that death was due to asphyxia caused by strangulation. This opinion was challenged by counsel for the defence, and Dr. Mackenzie was cross-examined to show that death had not been caused as alleged. Subsequently the prosecution called another witness, Dr. Macleod, who had not been present at the *post mortem* and had not been called before the Magistrate, nor had he had anything to do with the case, the defence having been previously furnished with a statement of what Dr. Macleod was called to prove.

Upon Dr. Macleod being put in the box, the appearance of the body as spoken to by Dr. Mackenzie, together with the signs spoken to by him as having been noticed by him when making the *post mortem* examination, were put to him, and he was asked "upon these facts what in your opinion would be the cause of death."

Mr. *Gasper* objected to the question.

Mr. *Gasper*.—This question cannot be put. Such a question is only admissible when the facts are admitted, and the question is one relating purely to medical science. Here the facts are not admitted—*R.* v. *Wright* (4); *M'Naghten's case* (5).

[Wilson, J.—In both those cases the question put to the witness involved the truth of the evidence. Those cases don't raise the precise point that arises here. The only case that I know of in this Court is *Roghuni Singh* v. *The Empress* (6), and the point raised there is the precise point raised in this case.]

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(1) 1 C. 207. (2) Unreported. (See 10 B.L.R. Appx. 2)
(3) 6 A. 509 (539). (4) R. & R. Cr. Cas. 456.
(5) 10 Cl. & F. 200 (211). (6) 9 C. 455.

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If the judgment in that case is carefully read it is in my favour, and besides this Dr. Shaw was called by the Court, and under the Evidence Act the Court may put any question to a witness. [595] There is no case in which a question of this sort has been put, and there is no instance of a medical officer being called who has not been present at a *post mortem* and who is asked his opinion upon a disputed state of facts. Here we are governed by s. 45 of the Evidence Act and in this case the only evidence Dr. Macleod can give is that of an expert, and he can only give his opinion on a pure question of science. The only question this witness can be asked is, what are the usual indications of death by strangulation, and not the question put.

Wilson, J. (after rising to consult one of his colleagues and without calling on Mr. *Pugh*).—I think the question can be put.

Attorney for the Crown: The *Government Solicitor*, Mr. *R. L. Upton*.

Attorney for the prisoner: Mr. *E. J. Fink*.

H. T. H.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Ghose.

Queen-Empress *v.* Nilmadhub Mitter. [7th June, 1888.]

Confession—Criminal Procedure Code (Act X of 1882), *ss.* 1, 164, 364, 533—*Defect in confession—Evidence Act (I of* 1872), *ss.* 22, 26, 80—*Presidency Towns. Investigations in.*

An accused, in custody at the time, made to a Magistrate in Calcutta, in the course of a police investigation held in Calcutta, a statement confessing that he had murdered his father. The accused spoke and understood English, and the Magistrate questioned him in English, and was answered sometimes in English and sometimes in Bengali; whenever the answers were given in English they were so taken down, when in Bengali they were written down in English and read over to the accused in that language, who accepted the English as being the meaning of that which he had stated, and signed the document in the presence of the Magistrate who affixed the usual certificate thereto. In taking this confession, the Magistrate purported to have acted under ss. 164 and 364 of the Criminal Procedure Code. At the trial, subsequently to the admission of the confession in evidence under s. 80 of the Evidence Act, the Magistrate was called as a witness and deposed to the above facts, with reference to the language in which the confession was taken and the mode in which it was recorded; *held* [596] on a reference to a Full Bench as to whether the confession was inadmissible in evidence by reason of some of the answers having been given in Bengali but recorded in English, that the provisions of s. 164 of the Code had no application to statements taken in the course of a police investigation made in the town of Calcutta, and that consequently ss. 364 and 533 had no application; *held, nevertheless,* that the document was properly admitted upon the evidence of the Magistrate under the provisions of s. 26 of the Evidence Act.

Semble.—That the provisions of s. 164, as read with s. 364, would not be complied with where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given; and further that there would be grave doubt if such a defect could be cured by s. 533.

[**Diss.**, 8 C.P.L.R. 21 (22) Cr.; 16 C.P.L.R. 122 (127); **F.**, 21 B. 495 (499); **R.**, L.B.R. (1893—1900) 70 (71); 17 C. 862 (870); 9 C.L.J. 55 (67).]

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JUNE 7.

FULL BENCH.

15 C. 595 (F.B.)

REFERENCE made by Mr. Justice Wilson under cl. 25 of the Letters Patent.

One Nilmadhub Mitter was tried before Mr. Justice Wilson and a special Jury upon a charge of murdering his father, Khetter Mohun Mitter. He was said to have shot his father at the house of the latter, No. 86, Cornwalis Street, at about 1 A.M. on Monday, the 26th March last. The father died on the 28th.

The police investigation began early in the morning of the 26th and continued throughout the day. Soon after 6 o'clock P.M., Baboo Kalinath Mitter, a Presidency Magistrate, who had been sent for, arrived at the house, 86, Cornwallis Street, where the prisoner was in the custody of the police. The prisoner then made the following confession in the presence of Baboo Kalinath Mitter:—

" *Q.*—What is your name?

" *A.*—My name is Nilmadhub Mitter.

" *Q.*—Do you wish to make any statement regarding the wounds inflicted on your father, Baboo Khetter Mohun Mitter?

" *A.*—Yes, I do.

" *Q.*—You must know that there is no obligation on your part in making any statement, and should it be against your interest it will be used against you. Are you, having heard this, still willing to make the statement?

" *A.*—Yes, having heard this, I am still willing to make the statement.

[**597**] " *Q.*—Has any inducement been made by any one to persuade you to make this statement, or are you making it of your own free will?

"*A.*—No inducement has been used, and I am making the statement of my own free will.

"*Q.*—Who shot your father?

" *A.*—I shot my father, Baboo Khetter Mohun Mitter.

" *Q.*—When did you do it and under what circumstances?

" B 1. *A.*—Last night I shot him when he was asleep in his bed at about 1-30 A.M. I shot him with this pistol. I shot only once. My father was then lying in a room to the south of other house (*sic*). That is the room in which he generally sleeps. I also shot my youngest brother at the same time by firing another shot. He was asleep in the next room.

"[The Bengali words used by Nilmadhub Mitter are:

আমি আমার পিতাকে গুলি মারিয়াছি যে পিস্তলের দ্বারায় মারিয়াছি তাহা এই আর তারপরে আমার ভ্রাতাকে ঐ পিস্তলের দ্বারায় মারিয়াছি*।]

" *Q.*—Where did you get this pistol?

" *A.*—I purchased it from Messrs. Walter, Locke & Co. about a fortnight ago. I purchased it myself.

" *Q.*—Why did you shoot your father and brother?

" B 2. *A.*—I shot my father because he did not behave properly with me, and lately I asked him for Rs. 10,000 for giving deposit to Messrs. Barry & Co. for obtaining the post of cashier. My father refused to pay the money. This is nearly 20 or 22 days ago. I then purchased the pistol

* [NOTE.—I shot my father with bullet. The pistol with which I shot is this one, and after that I shot my brother with the same pistol.—Translated by the Court interpreter.]

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with the object of shooting my father. I shot my brother Raj Kristo Mitter because he used to create ill-feeling between myself and my father.

"After purchasing the pistol I kept it, with the case, behind the book-shelf in the room in which I am now making the statement.

"*Q.*—When did you purchase the bullets?

"*A.*—I purchased them at the same time that I purchased the pistol.

[598] "*Q.*—Where did the pistol remain?

"*A.*—It remained behind the book-shelf until I took it out this morning at 1-30 A.M.

"*Q.*—Where did you leave the pistol after shooting your father and brother?

"*A.*—I left it at the room in which my brother was sleeping.

NILMADHUB MITTER.

"NOTE.—I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

KALINATH MITTER,

Presidency Magistrate."

The facts with reference to the language in which the Magistrate and the prisoner spoke to one another, and with reference to the mode in which the confession was recorded, appeared from the evidence of Baboo Kalinath Mitter, which, so far as it bore upon this matter, was as follows. In examination-in-chief he said:—

"I knew the late Khetter Mohun Mitter. I had once, so far as I remember, seen the prisoner before the time I took down his statement. I remember going to 86, Cornwallis Street, on the 26th of March. This statement 'B' is in my writing. It is the deposition made by Nilmadhub. The signature is his. I went in consequence of having received a letter. Before I began writing, I had a conversation with Nilmadhub. No one else was in the room. Before taking his deposition I asked him questions. I asked him whether it was true that he wanted to make any statement. He said, 'yes,' he wanted to make a statement. I asked whether he wanted to do so voluntarily or whether any pressure had been brought to bear upon him. He said he wanted to make a statement; it was voluntary on his part; no pressure had been brought to bear on him. This first conversation was in Bengali. He understands English, and speaks English. In the deposition the questions were put in English one and all. He gave some answers in English and some in Bengali. When he gave an answer in Begali, I rendered it into English read it over to him, and asked him if that was his answer, and he said, 'yes.'"

In cross-examination the witness said:—

"I put no question in Bengali when taking down his statement. Before that I spoke to him in Bengali. Out of the answers I cannot give you [599] the exact number that were given in Bengali. The two answers marked B 1 and B 2 were given in Bengali."

The witness, also in his cross-examination, said:—

"In 'B 1' a part, not the whole, of the English is a translation of the Bengali that follows. I put no questions in both English and Bengali."

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June 7.

Full Bench.

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At the trial this confession was admitted in evidence, under s. 80 of the Evidence Act, previously to the examination of Khetter Nath Mitter. The learned Judge in charging the jury pointed out to them that, apart from the confession, the other evidence in the case was not sufficient to support a conviction against the prisoner.

A majority of six to three of the jury returned a verdict of guilty, in which verdict the learned Judge agreed, and the prisoner was convicted, subject to the opinion of the Court upon the question hereinafter stated. Sentence was deferred, and the prisoner remanded to jail.

The question reserved was " whether, having regard to the facts stated by Baboo Kalinath Mitter, and to the terms of the confession itself, that confession is rendered inadmissible in point of law, by reason of some of the answers of the prisoner having been given in Bengali but recorded in English?"—and in reserving this question the learned Judge stated that there was nothing to show that the irregularity, if any, in recording the confession, had injured the accused in any way as to his defence on the merits.

Mr. *Woodroffe* and Mr. *Henderson*, for the prisoner.

The Advocate-General (Mr. *Paul*) and the Officiating Standing Counsel (Mr. *Pugh*), for the Crown.

Mr. *Woodroffe*.—The confession was admitted in evidence under s. 80 of the Evidence Act previous to the evidence given by Kalinath; I objected to it on several grounds, *viz.*, that on the face of the document it did not purport to have been taken in accordance with the law, that there was no proof that it was signed by the accused, and that s. 80 did not apply to presumption as to the signature of the accused. Kalinath was not called as a witness for the purposes of s. 533 of the Criminal Code, but because he was a witness before the committing Magistrate. The mode in which the confession was taken down is not in accordance with s. 364 of [600] the Criminal Procedure Code. The Magistrate and the accused were both Bengalis, and it was practicable for the former to have recorded the answers in the language in which they were given. The Magistrate is certain that he put two questions in Bengali, and there may have been others. If it should be contended that the confession can be good as to part and bad as to the other parts, I submit that the answer to the question—who shot your father—might have been consistent with shooting by accident or in self-defence. In the part of the confession marked B 1 there are a number of the English words which find no place in the Bengali. Has not the prisoner been prejudiced by this mode of taking down his confession? I submit he has. The evidence in the case showed that his younger brother was found standing up in the room in which his father lay, and the doctor's evidence showed that the wound on the younger brother might possibly have been self-inflicted. It was therefore important to see whether, as stated by the accused in his confession, the younger brother was asleep at the time. The Bengali words in B 1 do not mention this point. Moreover, it does not appear that the Bengali words were read over to the prisoner at all.

The Magistrate appears to have done that which was held fatal to a confession in the case of *Queen* v. *Bheebeekee* (1). The confession in the part marked B 2 is not clear, the evidence at the trial showed that the pistol was bought on the 2nd March, and the refusal of the father to stand security for the prisoner for the appointment in Barry & Co.'s office was long

(1) 4 N.W.P.H.C.R. 16.

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after the purchase. Again, the sum mentioned as the security required was in the confession Rs. 10,000, but the evidence in the case disclosed that Rs. 20,000 had been asked for by Barry & Co. All these matters make it of the utmost importance to show that the confession was taken down correctly. Secondary evidence of this imperfect confession could not be accepted.—*Queen-Empress* v. *Viran* (1). Parker, J., there held that the provisions of s. 164 were inoperative, and that s. 533 would not render a confession admissible where no attempt had been made to conform with the provisions of s. 164. See also *Reg* v. *Bai Ratan* (2); *Queen* v. [**601**] *Omirto Govindo* (3); *Queen* v. *Daya Anand* (4); *R.* v. *Shivya* (5). Kalinath's evidence rebutted the presumption that the confession had been properly given, and therefore s. 533 had no application; the concluding portion of s. 533 shows that it is only when evidence is taken for the purposes of that section that the saving clause has any application. The confession having been wrongly admitted in the first instance, it ought to have been withdrawn after the evidence given by Kalinath. The moral effect of the confession on the jury would have been very different had they first heard the evidence of Kalinath as to how the confession, was taken—the case of *Reg* v. *Bai Ratan* (2). But in any case Kalinath's evidence only amounts to this, that he took down a certain statement in writing, and that the statement put before him was that statement; he was not asked what the accused said or answered. Assuming I am in error in saying that s. 533 does not apply, then what effect should be given to the words " duly made the statement recorded " in s. 533? I submit that the word " duly " has reference to the provisions of the law. [WILSON, J.—I think the meaning of s. 533 is that, if the Court finds that the Magistrate has not done all his duty, the Court may then take evidence to show that the prisoner has done all that was necessary for him on his part to do. It seems not to be necessary to take evidence under that section to prove that the Magistrate has done all that is necessary.] Further Kalinath did not inform the accused that he was a Magistrate; the accused was brought from the hands of the police to Kalinath, and during the confession the police, although not actually in the room, were just outside the door. [PIGOT, J.—The cases regarding statutory confessions set out in *Russell on Crimes*, 426, appear to be in your favour.]

The Advocate-General (Mr. *Paul*).—There is a great difference between a statement of law, as laid down in Russell on Crimes, and the actual law in this country. Under s. 364 the accused, after his statement is taken down, is at liberty to explain or add to his answers, and where the whole is conformable to that which he declares to be the truth, the Magistrate shall certify that the examination was taken in his presence and hearing, and that it [**602**] contains a full and true account of the statement made by the accused. That is what substantially took place in this case; the statement was read over to the accused and he did not object to it or add to it, and that being so it was admissible.

[Mr. *Woodroffe*.—The certificate of the Magistrate is under s. 364.] Be it so, it is also in compliance with s. 364, as s. 164 provides that it shall be signed in the manner prescribed by s. 364, but surely not without being read over to the accused. The evidence at the trial shows that the prisoner understood English; as to this there is the evidence of Kalinath, the evidence of Bradshaw who sold the pistol

(1) 9 M. 224. (2) 10 B.H.C. 166. (3) 10 B.H.C. 497.
(4) 11 B.H.C. 44. (5) 1 B. 119.

to him; and the cross-examination was not directed to rebut this fact. Then in what language was he examined? Undoubtedly all the questions were put in English and the anwsers also given in that language, although it appears that some of them may have been both in Bengali and English. It cannot, however, be said that the examination was conducted in Bengali, nor partly in Bengali and partly in English; then under those circumstances it was not practicable to take down the examination all in Bengali. The intention of s. 364 is that the questions and answers should be taken down in one language; it was not practicable to do this, as the answers were given in two languages, and then, if it is not possible so to do, they should be taken down in English; when an answer was given in Bengali, it was rendered into English and read over to the accused, and he acquiesced in it. This was sufficient. The words "duly made and recorded" in s. 533 mean "made in due course of things," and s. 533 cures any defect. The case of *Queen-Empress* v. *Viran* (1) merely decides that, when a statement taken is radically insufficient, then the Court would hold the statement to be inadmissible. Here in the present case the confession is not radically insufficient. The case of *Queen* v. *Ramanjiyya* (2) shows that ss. 122 and 346 of the old Code must be read together, and that evidence may be given to explain that a confession has been duly recorded. The case of *Titu Maya* v. *The Queen* (3) does not follow *Bai Ratan's* case.

[603] The Officiating Standing Counsel (Mr. *Pugh*).—There are no instances of confessions used on the Original side of the High Court having been taken down in any other language than English. In the case of *Biddi Churn Nurie*, decided by Prinsep, J., on the 4th September 1885, the Magistrate was examined and stated that the confession was made in Urdu, but was taken down in English; that confession was admitted. [O'KINEALY, J.—Does s. 164 of the Criminal Procedure Code apply at all having regard to s. 1?] Section 164 falls under Chapter XIV, which is headed "information to the police and their powers to investigate." Most of that chapter, if not all of it, appears to have no reference to the Presidency. If s. 164 does not apply, neither does s. 364, and those two sections are the only grounds for saying that the answer to the Magistrate ought to have been taken down in Bengali. An investigation of Chapter XIV clearly shows that it is only applicable to mofussil police reports and investigations. But assuming the chapter to apply, the requirements of ss. 164 and 364 have been complied with. Section 364 provides for the recording of a confession in three languages. It cannot be said that the prisoner has been examined in two languages, because he has given occasional answers in Bengali. But supposing the confession has not been properly recorded, is it a defect? I submit not. It is true that the case of *Queen-Empress* v. *Viran* (1) lays down that the provisions of s. 164 are imperative, yet the decisions in this Court do not go to that effect. See *Titu Maya's* case and those following it. Substantial compliance with the section is only necessary—*R.* v. *Kala Chand Pal* (4); *Behari Hajdi, In re* (5); *Krishno Monee* v. *Empress* (6). The other cases which show that any defect is cured by s. 533 are: *Empress of India* v. *Bhairon Singh* (7); *Empress of India* v. *Yakub Khan* (8); *Empress* v. *Sagambur* (9); *Empress* v. *Munshi Sheikh* (10); *Fekoo Mahto* v. *Empress* (11);

(1) 9 M. 224. (2) 2 M. 5. (3) 8 C. 618 (note). (4) 24 W.R. Cr. 29. (5) 5 C.L.R. 238. (6) 6 C.L.R. 289. (7) 3 A. 338. (8) 5 A. 253. (9) 12 C.L.R. 120. (10) 8 C. 616. (11) 14 C. 539.

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[604] Mr. *Woodroffe*, in reply.—It is said that s. 1 of the Code and Chapter XIV show that s. 164 does not apply to the Presidency. Supposing it to be so, then the matter is reduced to an absurdity, for the confession was admitted under s. 80 of the Evidence Act, and that section has no applicability if s. 164 does not apply. [PETHERAM, C.J.—Assuming that the confession was wrongfully admitted under s. 80, the defect is cured by Kalinath's evidence.] No, the document is not admissible in evidence at the time when it was put in evidence; it was admitted on the Monday, and Kalinath's evidence was taken on the Friday following. Supposing s. 164 does not apply, did Kalinath's evidence make the confession evidence? He did not pretend to say that he could tell which of the recorded answers were given in Bengali; the translation of the Bengali words does not fit in any one place in the confession; what the Magistrate did was not to make a translation of the Bengali words, for the English sentences are many more in number than the Bengali, and bear a further meaning. It has been assumed that the prisoner spoke English; there is no evidence to that effect. It is absolutely necessary that the Court should have the exact words of the confession; failing this the prisoner is prejudiced. Then supposing even that the Court would hold that, there being no proof that the Bengali words were read, nor that the whole of the English statement was read over, with or without the Bengali words before it was signed by the accused, can it be said that the mere fact of the signature of the accused makes it a statement that could be safely used as evidence against him? Suppose the Bengali words were taken into the confession, do they amount to a confession of the murder? No circumstances are given here at all; it may well be that it was not murder, but suicide or accident. Then as to whether the confession could be struck out after having once been received in evidence, there is direct authority of the English Courts that it can—*The Queen* v. *Garner* (1). Then can it be held that s. 164 does not apply? To hold so would be to hold that the police in Calcutta are under the control of no law, and that a Police Magistrate may take evidence of a confession [605] in Calcutta, but he may not do so outside Calcutta. The whole mode of taking the confession tends to show that it was taken under s. 164. Then, as to whether the defects in the confession can be remedied by s. 533 of the Code; the authorities show that they cannot. See *Empress* v. *Hari Kisto Biswas* (2) and *Empress* v. *Mannoo Tamoolee* (3), where the confession was defective as not being signed or marked by the prisoner, but the Court held that this defect could not be cured by s. 533 of the Criminal Procedure Code. The only case since the New Code of 1882 is the case of the *Queen-Empress* v. *Viran* (4), and that is in my favour. Section 553 of the Code does not apply, as I have already pointed out. Kalinath was not called under that section. I obliged them to call Kalinath Mitter. He was not called from day to day, but when it was necessary for them to show that there was no police interference. It was for the purposes of their case that he was called. Had it not been the case, and if the learned Judge had considered that there was some statutory defect in the confession itself, Kalinath Mitter would have been called much earlier. The case of the *Queen* v. *Ramanjiyya*, which I have before cited, shows that "duly made" is equivalent to "duly recorded."

(1) 1 Den. C.C. 329.
(2) 5 C.L.R. 209.
(3) 4 C. 696.
(4) 9 M. 224.

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OPINION.

The opinion of the Court (PETHERAM, C.J., WILSON, PIGOT, O'KINEALY and GHOSE, JJ.) was delivered by

PETHERAM, C.J.—The only fact which it is necessary to mention beyond that stated by the learned Judge is that the document, the admissibility of which is in question, was put in on Monday, May 21st, as being a document made under the provisions of s. 164 of the Criminal Procedure Code, and admissible in evidence without proof under the provisions of s. 80 of the Evidence Act, and that Baboo Kalinath Mitter was not called until the following Friday.

Several questions have been raised and argued before us as being necessary to the decision of the general question whether the document upon the facts proved at the trial was properly admitted as evidence against the prisoner. They were: *1st*, does [**606**] s. 164 apply to a statement made by a person in custody, to a Magistrate in Calcutta in the course of an investigation, made by the police in the town of Calcutta, into the circumstances of a crime committed in Calcutta? *Secondly*, if it does not, was the document in question properly admitted upon the evidence of Baboo Kalinath Mitter under the provisions of ss. 21 and 26 of the Evidence Act? *Thirdly*, if s. 164 does apply to this case, was the statement of the prisoner recorded in accordance with the provisions of that section coupled with s. 364? and, *fourthly*, if it was not so recorded, is the defect cured by s. 533 of the same Act?

The first question depends on the construction to be placed on s. 1 of the Criminal Procedure Code. That section, so far as it is material to the present question, is as follows: "In the absence of any specific provision to the contrary, nothing herein contained shall affect * * * * * the police in the town of Calcutta.

Section 164 deals with statements made to a Magistrate in the course of an investigation under Chapter XIV of the Act, and the point for consideration is whether the investigation, in the course of which the statement in question was made, was an investigation under that chapter.

The investigation was by the Calcutta Police in town of Calcutta, and unless there is some specific provision making Chapter XV applicable to the police in Calcutta, the section does not apply, as the statement was not made in the course of an investigation under the chapter.

The chapter is headed "Information to the police, and their powers to investigate." It is clear that many sections of the chapter cannot refer to Calcutta, and the only section which must apply to the police in Calcutta is s. 155. But we do not think that that section is sufficient to amount to a provision that the whole chapter is to apply to the police in Calcutta, or to give them any power to make investigations under it, and it follows that the present case is not in any way affected by s. 164 of the Code, or, as a necessary consequence, by s. 364 or s. 553.

The second question then arises, whether the document in question was properly admitted under the provisions of the Evidence Act?

[**607**] Baboo Kalinath Mitter was called, and he stated that he questioned the prisoner in English, that the prisoner understands and speaks English, and sometimes answered him in English and sometimes in Bengali; that when his answers were in English he wrote them down, when in Bengali he wrote them in English, and read over what he had written to the prisoner; that the whole document contains the prisoner's deposition, and that the prisioner signed it in his presence.

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If the contents of the document did not amount to a confession, the document itself would be relevant as an admission under s. 21 of the Evidence Act; and though it is a confession, it is relevant and may be proved, unless it is excluded by s. 26 of that Act. That section is as follows: "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

At the time when the prisoner made the statement he was in the custody of the police; but it was made to, and in the immediate presence of, Baboo Kalinath Mitter, who has stated what is undoubtedly the fact, that he is a Magistrate for Calcutta, and consequently it is obvious that the confession is not excluded by s. 26, and this being so, and it being proved that the whole of the statements contained in the document were either the actual words spoken by the prisoner, or were accepted by him as representing the true meaning of what he had said and as the whole document is signed by him with his own hand, the whole of the admissions contained in the document were strictly proved to have been made by him, and were admissible against him under the Indian Evidence Act.

In this view of the law, the third and fourth questions become immaterial in the present case, but we wish to guard ourselves from being supposed to hold that when answers are made by an accused person in one language and written down in another, unless it is shown that it was impracticable to write them in the language in which they were spoken, s. 164 would be complied with; on the contrary, we think that when such a proceeding is adopted the statement of the accused would not be recorded under that section, read with s. 364, and we [**608**] have very grave doubts whether the defect could be cured under the provisions of s. 533.

The question as to whether or not s. 164 has force in Calcutta was not raised at the trial. The document was put in by the prosecution, and admitted in accordance with the practice which has been followed since the passing of the Criminal Procedure Code of 1882 at Sessions held in Calcutta.

In this Court the point has for the first time been raised, and argued by the Crown.

On the whole, for the reasons given in our answers to the first and second questions, we think that the confession was in the present case admissible in point of law, and we answer the question reserved by the learned Judge in the negative (1).

T. A. P.

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(1) An application was subsequently made to Wilson, J., for leave to appeal from the conviction and sentence to the Privy Council. In refusing the application Mr. Justice Wilson said: "I have fully considered the matter, and have consulted the other Judges, before whom the question of law I referred was argued and decided, and I think it clear that I must refuse the application. The principles upon which Courts could act in such matters were fully considered in the Bombay High Court in the case of Reg. v. Pestonji Dinsha, 10 Bom., H. C., 75. I fully accept the explanation of law given in that case by Chief Justice Westropp in his judgment, and I think, accepting this, that I should go quite outside them and far beyond any of the authorities in any High Court in this country, or decision of Her Majesty in Council, if I were to make the order now asked for. The application is, therefore, refused."

15 C. 608 (F.B.)=13 Ind. Jur. 55.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

IN THE MATTER OF HARI DASS SANYAL AND OTHERS *v.* SARITULLA.*
[21st March, 1888.]

Further enquiry—Notice to accused—Discharge by Magistrate—Criminal Procedure Code Act X of 1882, s. 437.

No notice to an accused person is necessary in point of law before an order under s. 437 can be passed; but as a matter of discretion it is proper that such notice should be given.

[609] *Held* by the majority of the Full Bench (PRINSEP WILSON, TOTTENHAM, NORRIS, PIGOT and O'KINEALLY, JJ.)—After an enquiry by a Subordinate Magistrate and the discharge of an accused person a Sessions Judge or Magistrate has jurisdiction, under s. 437 of the Criminal Procedure Code, to order a "further enquiry" or a re-hearing upon the same materials which were before the Subordinate Magistrate, *i.e.*, when no further evidence is forthcoming. But (PRINSEP, J., dissenting), the words "further enquiry" in that section mean the enquiry preliminary to trial which regularly results in a charge or discharge, and do not include the trial. And if on the evidence taken the accused ought to be committed, then, in a case triable only at the Sessions, the proper course is to commit under s. 436; in other cases to refer to the High Court.

Per PRINSEP, J.—The word "enquiry" includes a trial, and the "further enquiry" would therefore allow of the framing of a charge, and the cross-examination of witnesses for the prosecution.

Per PETHERAM, C.J., and GHOSE, J.—The power given by s. 437 of the Criminal Procedure Code to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that with a more exhaustive enquiry further materials would be forthcoming. It was not intended that such an enquiry should be granted simply for the reconsideration of evidence.

[**Diss. in part,** 3 L.B.R. 97 (100) **(F.B.)**; **F.,** 21 C. 931 (935); 28 C. 652=5 C.W.N. 457 (452, 464, 468) **(F.B.)**; 5 C.P.L.R. 20 (23); 14 M. 334 (336)=2 Weir 557; 14 P.R. 1891. Cr.; 32 P.L.R. 1901; 2 P.R. 1901, Cr.; 1 L.B.R. 9 (10); 2 C.W.N. 196; 3 C.W.N. 249; 5 Bom.L.R. 877; 40 C. 477=14 Cr.L.J. 197 (203)=17 C.L.J. 245 (265)=17 C.W.N. 647 (659)=19 Ind. Cas. 197 (203); 36 C. 994=11 C.L.J. 50=13 C.W.N. 1221=3 Ind. Cas. 861=10 Cr.L.J. 385; 13 O.C. 289=11 Cr. L.J. 629=8 Ind. Cas. 371; 2 Bom.L.R. 586 (588); **Cons.,** 5 M.L.T. 233 **(F.B.)** =9 Cr.L.J. 192=19 M.L.J. 157=1 Ind. Cas. 228=32 M. 220; **Expl.,** 29 C. 457; **Rel. on.** (1913) M.W.N. 638=21 Ind. Cas. 172=14 Cr.L.J. 572; (1913) M.W.N. 728 (735)=14 M.L.T. 200 (209)=21 Ind. Cas. 129 (134); **R.,** 27 B. 84 (88); 13 B. 376 (384); 63 P.R. 1887, Cr.; 14 P.R. 1891, Cr.; (1900) P.L.R. 31, Cr.; 17 P.R. 1895; 6 C.P.L.R. 11 Cr., 14 C.P.L.R. 161; L.B.R. (1893—1900) 169 (174); 1 L.B.R. 100 (101); 1 L.B.R. 311 (312); U.B.R. (1897—1901) 100 (102) Cr.; 5 M.L.T. 356=32 M. 214=3 Ind. Cas. 488; 9 N.L.R. 42 (45)=14 Cr. L.J. 230 (231)=19 Ind. Cas. 326; **D.,** 2 C.L.J. 622.]

THIS reference arose out of a case and counter case of rioting; the two cases were heard separately by the Joint Magistrate of Attia, who, on the hearing of the case against Hari Dass Sanyal and others, discharged the accused. In the counter case the accused Saritulla and others were convicted, but on appeal to the Sessions Judge this conviction and sentence was reversed. Saritulla thereupon applied to the Sessions Judge to set aside the order of discharge passed in the case of Hari Dass

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* Full Bench on Criminal Motion No. 53 of 1887, against an order of R. F. Rampini, Esq., Sessions Judge of Mymensingh, dated the 23rd February 1887.

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Sanyal and others, urging that the Joint Magistrate had not examined all the witnesses forthcoming on behalf of the prosecution; it however did not appear that the " witnesses forthcoming " had been summoned when the case was before the Joint Magistrate. On this application the Sessions Judge passed the following order:—

" I am inclined to grant this application. I do not think that the discrepancies in the evidence which the Joint Magistrate has alluded to in his judgment are of such importance as he attaches to them. From his judgment in the [610] cross case, in which the present applicant was an accused, I am led to think that the Joint-Magistrate may have taken a wrong view of the facts of this case. The gunshot wound, from which the compainant's brother is proved by the medical evidence in this case to be suffering, is strong circumstantial evidence in support of the complainant's story. Under these circumstances I think this case should be re-enquired into particularly as it is urged on behalf of the applicant that the Joint-Magistrate did not examine all the witnesses that are forthcoming on his side.

* * * * * I am aware that in certain cases [see *Darsan Lall* v. *Jumuk Lall* (1)] the High Court of this Province has held that a Sessions Judge is not competent to order a re-hearing of a case, unless additional evidence is forthcoming. But in this case additional evidence is forthcoming. It is said that the Joint-Magistrate did not examine four witnesses named in a petition presented to him. Moreover, it would seem to me from the Bombay High Court ruling in the case of the *Queen-Empress* v. *Dorabji Harmasji* (2) and the very recent Full Bench ruling of the Allahabad High Court in the *Queen-Empress* v. *Chotu* (3) that a re-enquiry can be ordered even when no additional evidence is forthcoming. From the provisions of s. 437 of the Criminal Procedure Code and the Bombay High Court ruling, it is evident that no notice to the opposite party is necessary before ordering a re-enquiry under s. 437 of the Criminal Procedure Code. I have, therefore, not given any such notice. I therefore under s. 437 of the Criminal Procedure Code direct a further enquiry into this case."

Hari Dass and the other persons affected by this order applied to the High Court to have the order of the Sessions Judge set aside on the following grounds:—

1. That the Sessions Judge had nothing before him to indicate the nature of the additional evidence referred to by him, and that without being satisfied that such evidence would have been material, and without any satisfactory explanation of the reasons which induced the prosecution to withhold such additional evidence during the trial of the case, the Sessions Judge [611] ought not to have ordered what is practically a re-trial of the case.

2. That the law not allowing an appeal on the facts in cases of discharge, the Sessions Judge was wrong in dealing with the matter as an appeal on the facts.

3. That the Sessions Judge was unable to indicate any point for further enquiry; and had practically ordered a new trial.

4. That the Sessions Judge had no power to order a further enquiry when there was no error of law committed by the Joint Magistrate, and when no material evidence was forthcoming.

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(1) 12 C. 522. (2) 10 B. 131. (3) 9 A. 52.

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5. That the order ought not to have been made *ex parte*, or that at all events as a matter of sound discretion the Sessions Judge ought to have given notice.

6. That the Sessions Judge had erred in law in allowing his judgment to be influenced by the record of another case to which the petitioners were no parties.

7. That the Sessions Judge had been mainly influenced in the matter by the opinion he had formed in the counter case which he decided on appeal.

On the hearing of this application the Court (PETHERAM, C. J., and GHOSE, J) considering that the questions arising were of great importance, and that the rulings on the points were conflicting, referred the following questions to a Full Bench:—

1. Whether, after an enquiry by the Joint Magistrate and discharge of the accused, a Sessions Judge or the Magistrate, as the case may be, has jurisdiction under s. 437 of the Criminal Procedure Code to order a "further enquiry," or a re-hearing, upon the same materials which were before the said Joint Magistrate, *i.e.*, when no further evidence is forthcoming?

2. Whether in the circumstances of the case and the materials before him the Sessions Judge had authority under s. 437 to direct a fresh enquiry?

3. Whether he could do so without notice to the accused?

Mr. *Woodroffe* and Baboo *Grish Chunder Chowdhry*, for the petitioners.

The Deputy Legal Remembrancer (Mr. *Kilby*),on behalf of the Crown.

[612] Mr. *Woodroffe.*—I submit the order was bad, as no notice was given to my clients. I rely on the cases of *Chundi Churn Bhuttacharjea* v. *Hem Chunder Banerjea* (1); *Jeebunkisto Roy* v. *Shib Chunder Das* (2); *Queen-Empress* v. *Amir Khan* (3); *Queen-Empress* v. *Erramreddi* (4); *Darsun Lall* v. *Jumuk Lall* (5); *Queen-Empress* v. *Hasnu* (6); *Queen-Empress* v. *Chotu* (7). All the High Courts except the Bombay High Court in the case of *Queen-Empress* v. *Dorabji Hormasji* (8) have held that notice is necessary; and s. 439 of the Code is explicit on the point. Section 436 also lays down that the accused shall have an opportunity of showing cause. [PETHERAM, C.J.—We are all agreed on that point.] On the second question the Judge had no materials before him for a fresh enquiry; he merely found that the Joint Magistrate "did not examine all the witnesses forthcoming," but did not find that the evidence they could have given would have been material. On the first question referred, the matter depends on the consideration of the word "further" and the word "enquiry." Now "enquiry" is defined in s. 4 of the Code as including "every enquiry conducted under this Code by a Magistrate or Court. The word is used in many other sections of the Code, but there is one general line of thought made use of in its use. Throughout the whole of Chapter XV, and up to the end of the Code, save in the two sections mentioned in the Bombay cases, the word "enquiry" is contrasted with the word "trial," and seems to be distinctly referable to preliminary proceedings before a Magistrate as distinguished from a trial. In the old Code an "enquiry" is defined as "an enquiry conducted by a Magistrate," and in that Code there was also a definition of the words "enquired into" and "trial."

(1) 10 C. 207. (2) 10 C. 1027. (3) 4 M. 336. (4) 8 M. 296.
(5) 12 C. 522. (6) 6 A. 367. (7) 9 A. 52. (8) 10 B. 131.

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The new Code has dropped those definitions and has enlarged them under the term "investigation." There is a difference between an "investigation" and "trial," and an enquiry does not include an investigation. In Chapter XX the heading is "of trial of summons cases," and in Chapter XXII the heading is "of summary trials." In [613] s. 176 the word seems to be used in the sense of a local enquiry, and in another different sense in ss. 375 and 380, on which sections the Bombay Court have built up so much argument. Under s. 428 the taking of evidence is, for the purposes of Chapter XXV, to be deemed an enquiry, and what reason is there for reading ss. 375 and 380 in a different way? The above are all the places in which the word is used, until the referring sections. In s. 436 the words "fresh enquiry" are used, and in s. 437 "further enquiry." Section 537 governs the revisional sections. [PIGOT, J.—Is not s. 537 to be taken subject to any former provisions of the Code?] I understand the case of *Bachu Mullah* v. *Siva Ram Singh* (1) to show that s. 537 governs the revisional sections, and that an erroneous view of a judicial officer is not a failure of justice which would entitle another Court to deal with the matter except on appeal. Under s. 439, read with s. 423, the High Court has all the powers of an appellate Court; and has power under that section to set aside and order of discharge. In the Allahabad case of the *Queen-Empress* v. *Chotu* (2) the Chief Justice uses certain sections to limit the cases which may be brought up on revision; but is that so? Section 423 gives the appellate Court power to reverse an order on appeal, to direct a further enuiry or an accused to be re-tried, and to reverse or alter any other order. If in s. 439 the High Court as a Revisional Court is entitled to exercise powers under s. 423, there is nothing to support the conclusion of the Chief Justice.

The Bombay Court in the case of the *Queen-Empress* v. *Dorabji Hormasji* (3) eludes the force of the observations of MITTER and FIELD, J.J., in the case of *Chundi Churn Bhuttacharjee* v. *Hem Chunder Bannerjee* (4); and the case of *Jeebunkisto Roy* v. *Shib Chunder Das* (5) lays down that a further enquiry must be on additional evidence. This case was followed in *Darsun Lall* v. *Jumuk Lall* (6) and the cases of *Queen-Empress* v. *Hasnu* (7), *Queen-Empress* v. *Erramreddi* (8), and [614] *Queen-Empress* v. *Amir Khan* (9) are to the same effect. There is also an unreported case of *Abdul Nazir* v. *Gunga Singh*, decided by PETHERAM, C. J., and PRINSEP, J., on the 3rd March, 1887 (Cr. Motion 77 of 1887), similarly decided.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

The following opinions were delivered by the Full Bench:—

OPINIONS.

PETHERAM, C. J.—Section 435 of the Code of Criminal Procedure gives power of revision, and is in these terms:—

"The High Court, or any Court of Session, or District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction, for the purpose of satisfying itself or himself as to the

(1) 14 C. 358. (2) 9 A. 52. (3) 10 B. 131.
(4) 10 C. 207. (5) 10 C. 1027. (6) 12 C. 522.
(7) 6 A. 367. (8) 8 M. 296. (9) 8 M. 336.

correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceeding of such inferior Court. 1888 MARCH 21.

"If any Sub-divisional Magistrate acting under this section considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate. FULL BENCH.

"Orders made under ss. 143 and 144 and proceedings under s. 176 are not proceedings within the meaning of this section." 15 C. 608. (F.B.) =13 Ind. Jur. 55.

Section 436 gives power to Courts of Sessions or District Magistrates to order committal where a case is triable exclusively by the Court of Session.

"When, on examining the record of any case under s. 435 or otherwise, the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Court of Session or District Magistrate, improperly discharged.

"Provided as follows—

"(*a*) that the accused has had an opportunity of showing cause of such Court or Magistrate why the commitment should not be made.

"(*b*) that, if such Court or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to enquire into such offence."

Section 437 gives power to order further enquiry when a complaint has been dismissed or discharged:—

"On examining any record, under s. 435 or otherwise, the High Court [**615**] or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged."

The section which relates to dismissals is s. 203. This section is in the chapter headed "Complaints to Magistrates." Under this chapter the Magistrate is to examine the complainant on oath, and, if he thinks fit, to direct an investigation; and (s. 203) he may, if not satisfied with the statement of the complainant and the result of the investigation, if any, dismiss the complaint without issuing any process.

The sections which relate to discharges are ss. 209 and 253.

The first is in the chapter headed "Enquiry into cases triable by the Court of Session or High Court."

Section 208 provides that the Magistrate shall, when the accused is brought before him, hear the complainant and the evidence on both sides and (s. 209) if he is not satisfied that there are sufficient grounds for committing the accused, discharge him.

Section 253 is in the chapter headed "Trial of Warrant-cases by Magistrates."

Section 252 provides that when the accused is brought before him, the Magistrate shall hear the complainant, and shall hear the evidence for the prosecution and summon witnesses *for the prosecution*, if necessary,

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and (s. 253) shall, if he finds that no case has been made out which unrebutted would warrant a conviction, discharge the accused.

In cases under ss. 200-203 it would appear that if the Magistrate does not believe the complainant, and thereupon, without taking any further step, dismisses the complaint, the revising officer may, under s. 437, direct that, by way of further enquiry, he shall cause an investigation to be made, or, if one has been made which he considers insufficient or unsatisfactory, or if he considers that the camplainant has not been sufficiently examined, may order that the complainant be recalled and his examination be continued. But it is difficult to see how a further enquiry can be ordered in any but one of these three cases, as it is clear that the enquiry is preliminary to the issue of process, and next step to take, if the enquiry as far as the [**616**] collection of materials is complete, is the issue of process. In such a case the only Court which could deal with the matter must be the High Court, under s. 439, embodying sub-s. (*c*) of s. 423.

In cases under ss. 206-209 the Magistrate is, in the presence of the accused, to hear the evidence of the complainant or otherwise produced before him, and must, unless for some good reason he does not think it necessary, issue process and compel the attendance of other witnesses or the production of documents, and if he is not satisfied that there are grounds for putting the accused on his trial, may discharge him *at any time*. Here if in the opinion of the revising officer the Magistrate has not sufficiently examined the witnesses, or has not summoned witnesses who should have been summoned, or has not compelled the production of documents which were material for the prosecution, no doubt the revising officer may direct a further enquiry either by recalling witnesses who have been examined or by compelling the attendance of others, or the production of documents, so as to complete the enquiry which must be made before the charge is framed. But if the revising officer is satisfied that all the materials have been collected, I do not see how the revising officer can direct a further enquiry, because he does not agree with the conclusion at which his subordinate has arrived upon those materials. To do so is in effect to direct the Subordinate Magistrate, against his own view of the case, to frame a charge—a power which is given to the High Court alone under the section above cited.

The only other cases are those which arise under Chap. XXI, ss. 251-253. These are cases in which the accused is brought before a Magistrate on a warrant. In these cases the Magistrate is to take all such evidence as is produced before him; to ascertain if there are other witnesses likely to be acquainted with the facts of the case and *able to give evidence for the prosecution*, and to summon such of them *as he thinks necessary:* and if, upon hearing the witnesses produced, and, if he thinks it necessary to compel the production of other evidence, after hearing such other evidence, the Magistrate finds that no case has been made out against the accused which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

[**617**] Here also it is manifest that the revising officer may, if he thinks fit, direct the subordinate officer to compel the production of further witnesses, and also, as it seems to me, direct him to recall and further examine any witness who has been already examined. But if and when the revising officer is satisfied that all the materials which can be collected have been collected, I do not see how he can direct the Subordinate Magistrate to make further enquiry, the next step being to frame a

charge, which is a proceeding subsequent to the completion of the enquiry, the taking of which, as it seems to me, can only be compelled by the High Court.

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On the whole, then, in my opinion, the power given by s. 437 to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that, with a more exhaustive enquiry, further material would be forthcoming.

I think notice is not required by the law, but that, except in cases of dismissal under s. 203, notice should be given.

WILSON, J (TOTTENHAM NORRIS, PIGOT and O'KINEALY, JJ., concurring).—The main question which we have to answer on this reference seems to me to involve three distinct enquiries, which should, I think, be considered separately. And as to each of those three enquiries, the language of the present Code of Criminal Procedure is so entirely different from that used in the earlier Code that the decisions upon that earlier Code afford us no practical assistance. The three questions I propose to consider are:—

I. On what grounds is an order of discharge made under s. 209 or s. 253 liable to be set aside by a Court of Revision?

II. What Courts have jurisdiction to set it aside?

III. What orders are proper to be made if an order of discharge is to be set aside?

The series of ss. 435 to 439 must, as more than one learned Judge has pointed out, be read together. Of these, s. 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised. It says that—

[**618**] "The High Court, or any Court of Sessions, or District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its jurisdiction, for the purpose of satisfying itself or himself *as to the correctness, legality, or propriety of any finding, sentence* or order recorded or passed, and as *to the regularity of any proceedings* of such inferior Court."

This I read as an express enactment that every finding, sentence, or order is liable to review, not only on the ground of illegality or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule. I do not mean to say that an order of discharge may not, under the subsequent sections, be set aside on other grounds, such as the discovery of fresh evidence, but only that it is liable to be so dealt with on any of the grounds here mentioned.

The second point for enquiry is, what tribunals have jurisdiction to set aside an order of discharge? This Court has power under s. 439 to deal as a Court of Revision with any finding, sentence, or order which comes under its notice. Sessions Judges and District Magistrates in most cases have not this power; their course ordinarily is to refer the matter to this Court if they think there is ground for doing so. But in particular instances they themselves exercise revisional powers. And with regard to orders of discharge it is expressly enacted that they may do so, though to what extent and in what form is of course another question. Section 436 says that—

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"When on examining the record of any case under s. 435 or otherwise. the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial."

The words here used "instead of directing a fresh enquiry" must, I think, refer to the power given by the next section of ordering a "further enquiry," for, except in a single case spoken of in proviso (*b*), there is no other section giving power to order any enquiry at all. The next section, s. 437, says:—

"On examining any record under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any [**619**] of the Magistrates subordinate to him, to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged."

With regard to these sections, I think it clear, first, from the express reference to s. 435, that the Courts mentioned have power to interfere with an order of discharge on any of the grounds mentioned in s. 435, on the ground that it is incorrect, that is, wrong on the merits, no less than on the ground of illegality or irregularity. I think it clear, secondly, that the words "fresh enquiry" in s. 436 and "further enquiry" in s. 437 are used as meaning the same thing. Thirdly, though I am inclined to agree with the contention urged before us that the mention of the High Court in s. 437 was not strictly necessary, and that, if it had not been mentioned, it would have had, under ss. 435 and 439, the same powers which are here expressly given to it, still I think the mention of the three tribunals together, the High Court, the Court of Session, and the District Magistrate, tends to show that the Legislature intended them to have the same power with regard to the matter dealt with in the section.

The examination of the sections so far satisfies my mind that the High Court, the Court of Session, and the District Magistrate all have power, as Courts of Revision, to deal with an order of discharge, and to deal with it on the merits as well as on other grounds.

The third question is, what orders these Courts can make when the necessity arises for setting aside an order of discharge. The High Court, under s. 423, embodied in s. 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under s. 437 and probably also under s. 439, order a further enquiry instead of a committal. The Court of Session and the District Magistrate have, in cases triable exclusively by the Court of Sessions, the same alternative open to them under ss. 436 and 437. In other cases they can set aside the discharge and order a further enquiry under s. 437, or refer the matter to this Court.

[**620**] The meaning of "further enquiry" has still to be considered. The word "enquiry" is one of frequent occurrence in the Code. The definition in the interpretation clause is very wide, and in some sections of the Act it certainly includes trial. If that meaning were adopted here, it might be that s. 437 would authorise a Sessions Judge or District Magistrate, not only to order further enquiry preliminary to trial, but also to order a charge to be framed and the trial of that charge to proceed. The word is often, however, used in a more specific sense, to denote the enquiry before a Magistrate preliminary to trial, which regularly results in a

charge or a discharge. I am not prepared to adopt any but the narrower sense in the present section. My reasons are that, the order to be set aside being an order of discharge, the further enquiry would naturally be one of the same kind as that which has miscarried, an enquiry leading up to a charge or discharge. And upon the other view, s. 436, relating to committal in cases triable only by the Sessions Court, would seem to be superfluous. For if "further enquiry" would cover a charge and a trial in the one case, it would equally do so in a case of the other class. But in s. 436 committal and further enquiry are spoken of as distinct alternatives. Taking, however, this narrower sense, I think the enquiry includes not merely the taking of evidence, but the consideration of that evidence and the conclusion to charge or discharge the accused.

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I think it unnecessary to consider what "further" enquiry would mean if the words were not explained by the context. Those words might mean an additional enquiry supplemental to the first, they might cover not only this, but also, a new enquiry superseding the first. Here I think they are used in the wider sense, first, because the further enquiry may be ordered on the ground that the first finding was incorrect; secondly, because it may be by a different Magistrate from the first; thirdly, because the words "further enquiry" and "fresh enquiry" are used as meaning the same thing.

The result is that in my opinion this Court or the Court of Sessions or the District Magistrate has jurisdiction on any sufficient ground to set aside an order of discharge, and direct either an additional investigation of the facts, or a reconsideration of [621] the evidence, by the Magistrate whose order is set aside, or a new enquiry before another Magistrate; and among such sufficient grounds are the omission to take evidence which ought to have been taken, the discovery of fresh evidence mistakes of law, illegality or irregularity in the proceedings, and the incorrectness of the first finding. I agree with the view taken in the Bombay High Court in *Queen-Empress* v. *Dorabji Hormasji* (1), and to a great extent with that taken by the Full Bench of the Allahabad Court in *Queen-Empress* v. *Chotu* (2).

But although the jurisdiction of this Court and of the Court of Session and of the District Magistrate is upon this view a very wide one, the discretion thus conferred is a judicial discretion. No Court can properly set aside an order of discharge without having and assigning solid and sufficient reasons for doing so. And if there is reason to set aside an order of discharge, it is the duty of the Court which has to deal with the matter in each case to make such order as is appropriate to the facts of the case. In a case triable only by the Sessions Court, to which s. 436 applies, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for a committal, and there is no reason for desiring a further consideration by a Magistrate. I think it would ordinarily be his duty to direct a committal under s. 436, and not to order a further enquiry under s. 437. In the same way, in a case not triable only by the Court of Sessions, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason for desiring further magisterial examination, I think it is ordinarily his duty to refer the case

(1) 10 B. 131. (2) 9 A. 52.

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to this Court, which can make a suitable order, and not to direct a further enquiry by a Magistrate.

Any order, moreover, of a Sessions Judge or District Magistrate setting aside an order of discharge is of course liable to be reviewed, in its turn, by this Court as a Court of Revision. And in my opinion, if in any case this Court were to find that the lower Court had set aside an order of discharge on insufficient grounds, or that, while there was good ground for setting [622] it aside, the lower Court had made an order inappropriate to the facts of the case, it would be right in reversing the order.

The result is, that I should answer the first question referred to us in the affirmative.

As to the second question, I should say that, if it is to be understood as a mere question of law going to jurisdiction, it must be answered in the affirmative; but that if the question is whether in each case there are good grounds on which the order of the Court below can be supported, we have not sufficient materials in the order of reference to enable us to answer the question.

As to the third question, I agree with PRINSEP, J.

The cases must, therefore, in my opinion, go back to the referring bench to be dealt with on the whole of the materials before it.

PRINSEP, J.—I have had the advantage of seeing the judgments which the Chief Justice and Mr. Justice WILSON propose to deliver. So far as it goes, I agree with the opinion expressed by WILSON, J., as to the enlarged interpretation which is put on s. 437; but after very careful consideration, I am of opinion that the terms of that section should bear a still larger interpretation, and that it is competent to the High Court, Court of Session, or District Magistrate to set aside an order of discharge passed against the weight of evidence, and to order a further enquiry, within which I would include the framing of a charge, and thus to enable the accused to cross-examine the witnesses for the prosecution.

The term "enquiry" as defined in s. 4 (*c*) includes every enquiry conducted under the Code by a Magistrate or Court. The term is evidently used in contra distinction to "investigation," which it follows, and which may be described as including all proceedings conducted by the Police or any other person not a Magistrate, but authorized by a Magistrate in that behalf.

In my view an enquiry is not concluded by proceedings taken by a Magistrate up to the time that either a charge must be drawn or the accused should be discharged. If the offence be one exclusively triable by a Court of Session, the drawing up of a charge does not necessarily amount to a commitment, for ss. 211—213 show that other proceedings may intervene. If the [623] offence be a warrant case in which the Magistrate has jurisdiction, but which he may nevertheless commit, the drawing up of a charge in the latter case has the result just mentioned, and in the former enables the Magistrate to complete the evidence by requiring the accused to rebut the *prima facie* case made out by cross-examining the witnesses for the prosecution or otherwise. An enquiry, as defined seems to me to include a trial. It is not limited, as under the former Code, to the drawing up of a charge which, it was then expressly declared, was the commencement of a trial. I would also refer to s. 436 and especially to proviso (*b*). That section enables the Court of Session and District Magistrate to order a person improperly discharged of an offence exclusively triable by such Court to be arrested and forthwith to be committed for trial; but proviso (*b*) also provides that

if the Court of Session or District Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to enquire into such offence. What would be the nature of such enquiry? *Prima facie* a particular offence has been established. The enquiry would therefore be to ascertain how a charge of such an offence could be rebutted, to use the terms of ss. 209, 253. The rebuttal would be by requiring the accused to make his defence or displace the *prima facie* case by cross-examination of the witnesses after a charge, drawing his attention to the particular offence, has been framed.

So far, therefore, I regret to be obliged to disagree from my learned colleagues in the definition of "fresh enquiry," or "further enquiry" as used in ss. 436 and 437, though I agree with WILSON, J., that these terms are synonymous.

I am doubtful whether the power to order a further enquiry otherwise than under s. 437 is given to the High Court under s. 439.

I would further observe that it seems contrary to the system prescribed by the Code that in every warrant-case, *e.g.*, a case of petty theft, tried by an inexperienced Magistrate (it may be the first case he has ever tried) should, of necessity, be referred for the orders of the High Court that justice may be done, [**624**] because a perverse or ignorant finding on the evidence has been come to. Such a Magistrate cannot pass any sentence which is not subject to appeal to the District Magistrate; every Magistrate in the district is subordinate to the District Magistrate; and yet it is sought to make such an order of discharge of the same force as an order of acquittal; to declare that it can be set aside only by the High Court. It is needless to point out that in many cases this must operate as a denial of justice, for complainants will, very rarely, consent to the delay and expense of setting the High Court in motion to obtain redress. It is difficult to understand for what reason the Legislature should have conferred power in respect to cases exclusively triable by the Court of Session on certain local Courts, and yet have refused them similar powers in respect of cases of a less important character.

With respect to the third question submitted to us, I am of opinion that, under the law, no notice to the accused is necessary before an order under s. 437 may be passed. A notice certainly would not be necessary before an order to set aside an order of dismissal under s. 203 could be passed, since that order was not passed with a notice to the accused person or in his presence, and therefore is probably unknown to him. An order of discharge, which is coupled in this section with an order of dismissal, no doubt rests on a different footing, but still it is dealt with in the same terms. It may also be remarked that the new section 436 expressly provides for notice to an accused before an order for his commitment can be made for an offence triable exclusively by a Court of Session, and it would be difficult to assign any reason for any distinction between such a case and an order of discharge in a less heinous case in which the same order was passed. But it may also be noted that, as in the section preceding s. 437, so in a section following it (s. 439), provision is made for a notice before any order prejudicial to an accused person may be passed by the High Court as a Court of Revision. We have therefore the law expressly requiring notice to be given in two matters coming up in revision, while in another and cognate matter the law is silent. It is, no doubt, an

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ordinary rule of our Courts that no order shall be passed to a man's prejudice [**625**] without due notice to him, and as a principle the necessity is obvious. Still I find myself unable to say that, as the law stands, the fact that a man has not been served with a notice necessarily affects the legality of an order under s. 437. Section 440 makes it optional with any Court when exercising its powers of revision, (*e.g.*, under s. 437) to hear any party either personally or by pleader, and this again seems to favour the view that the Legislature did not intend that a notice should be indispensable. At the same time, I am of opinion that no Court would be exercising a proper discretion in such a matter if, before proceeding under s. 437 to order a further enquiry in a case in which the accused person may have been discharged, it did not first give him an opportunity, by service of a notice, to show cause against such an order being made. If such a matter were to come before me as a Court of Revision, I would certainly feel bound either to direct the lower Court to reconsider the matter or to hear the accused myself.

GHOSE, J.—I agree generally with the judgment that has been delivered by the Chief Justice. I desire, however, to make one or two observations upon the principal question before us, *viz.*, what is the meaning of the words " further enquiry " as used in s. 437 of the Criminal Procedure Code?

It is said that these words mean the same thing as the expression " fresh enquiry," which occurs in s. 436. But it seems to me somewhat improbable that, if the Legislature intended to convey the same sense, they should have used two different expressions in two sections which immediately follow each other.

It appears to me that in a case which is triable exclusively by the Sessions Court, and where the Sessions Judge is of opinion that the accused has been improperly discharged by an inferior Court, he may, under s. 436, either direct a " fresh enquiry," or order that the man be committed for trial. In the former case, the inferior Court will be bound to hold a fresh preliminary enquiry, and it is in this sense I am inclined to think that the words " fresh enquiry " have been used; while in the other case no such enquiry would be necessary.

In cases not covered by s. 436 the High Court, or the Sessions Judge, or the District Magistrate, may direct " further enquiry," [**626**] into any complaint which has been improperly dismissed, or where an accused has been improperly discharged.

I think that in using the expression " further enquiry," the Legislature meant it in the sense of an enquiry which has not already taken place, that is to say, an *additional* enquiry. The learned Chief Justice has pointed out instances where such a " further enquiry " may be directed. Those instances, I believe are not exhaustive, but illustrative; for there may be, I think, other cases where " further enquiry " may well be directed. For instance, in a case where a Magistrate, after recording the whole of the evidence, considers that the facts, even if true, do not constitute an offence, the Revisional Court may direct, if it be of opinion that the Magistrate is wrong in law, " further enquiry," that is to say, a consideration of the evidence with a view to determine whether an offence has been established or not.

But where the inferior Court has taken the whole of the evidence and pronounced a judicial opinion upon it—that is to say, where a full enquiry has been made—I fail to see what the " further enquiry " would be, unless it be simply a reconsideration of the evidence which has already

been considered. This I do not think was ever the intention of the Legislature.

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In cases where the Sessions Judge or Magistrate thinks that there has been a miscarriage of justice, but where no "further enquiry," can properly be directed, the only course, I think, is to refer the matter to the High Court under s. 438 of the Code; and the High Court may upon such reference make the right order in the case.

T. A. P. *Appeal dismissed.*

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15 C. 627.

[627] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

BHUPENDRO NARAYAN DUTT AND OTHERS (*Petitioners*) v. NEMYE CHAND MONDUL (*Opposite party*).* [17th April, 1888.]

Bengal Tenancy Act (Act VIII of 1885), s. 158—Incidents of Tenancy, Application to determine—Validity of Lease—Act XL of 1858, s. 18—Lease granted by guardian of minor's property for term exceeding five years (without sanction of Court, Effect of.

In a proceeding under s. 158 of the Bengal Tenancy Act (Act VIII of 1885) it is open to a petitioner, *if he acknowledges the opposite party to be a tenant,* to dispute the validity of the lease under which he alleges he is holding, and the Court is bound to go into and decide that question if raised.

A lease granted by a guardian of minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by s. 18 of that Act is invalid.

[**F.**, 20 B. 150 (153); **R.**, 20 C. 249 (252).]

THE facts of this case, together with the order against which the appeal was preferred, are fully stated in the judgment of the High Court.

Mr. *Evans*, Dr. *Rash Behari Ghose* and Baboo *Taruck Nath Paulit*, for the appellants.

Baboo *Nil Madhub Bose*, for the respondent.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—The facts of this case are as follows:—

The Sunderbun lot No. 44 was the mourasi tenure of one Mohendro Narain Dutt. He died leaving a will, whereby he demised his properties, ancestral and self-acquired, to his four sons, Jogendro, Bhupendro, Ganendro and Norendro, in equal shares.

After reciting that Jogendro, his son by his first wife, had come of age, and that the other three sons by his second wife were minors, the will proceeds as follows: "I do hereby constitute and appoint Srimati Bhava Sundari Dasi, my wife and their mother, executrix on behalf of the minor sons. Until the [628] attainment of majority by the said minor sons the said executrix shall remain in possession of all the property in their share, both moveable and immoveable; shall collect and realize the rents, as also the monies that may be due to me on my account; shall preserve and take care of all the property; shall educate and support the minors; and

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*Appeal from Order No. 275 of 1887, against the order of Baboo Krishna Chunder Chatterjee, Subordinate Judge of 24-Pergunnahs, dated the 23rd of May 1887.

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shall administer the household expenditure, and celebrate the religious rites and ceremonies on a reasonable scale. God forbid it, but if the said executrix should in the meantime feel that it is likely that she will die (soon), then she shall be competent to appoint in her lifetime my mother, Srimati Sukamoyee Dasi, and my adult son, Jogendro, or, failing them, any one whom her judgment approves, being a relative of hers and a trustworthy person, as executor or executrix on behalf of the minor sons, and such executor or executrix shall do everything under the authority that shall be vested in them by her. It shall be incumbent upon my wife and my adult son aforesaid, whatever they undertake to do, to do it according to the advice of my nephew, Radha Nath Bose, and Shambhu Chunder Bose, my trustworthy friend. If it should be necessary to grant to anybody a jungle-abadi, mourasi and mokurari pottah of any jungle land in my immoveable property, then, fixing a fair rent on it, my wife aforenamed, in unity with my adult son aforenamed, shall be competent to take a kabuliat and grant such pottah, and the said pottah shall never be liable to cancellation. According to the provisions I have laid down above in relation to my property, my adult son and the executrix shall perform and manage all matters."

The will is dated 12th Sraban 1272=26th July 1865.

The testator died on the 8th Bhadro 1272=23rd August 1865.

On 16th Bysack 1280=27th April 1873, Bhava Sundari and Jogendro, the executrix and executor under the testator's will granted an amalnamah of Sunderbun lot No. 44 to one Uzir Nuskur, who was to hold the land rent-free up to the year 1283, and at a rent of 4 annas per bigha in 1284, 6 annas in 1285, 8 annas in 1286, 10 annas in 1287 and 1288, and at 14 annas ever afterwards.

The amalnamah contained an agreement by Bhava Sundari and Jogendro to grant a mourrasi pottah at the above rates.

[629] As a matter of fact, the mourasi pottah was never granted to Uzir Nuskur.

Jogendro, the testator's eldest son, died on the 18th Bhadro 1280= 2nd September 1873, leaving a minor son Jotendro, in respect of whose estate a certificate under Act XL of 1858 was granted to his uncle Bhupendro by the District Judge of the 24-Pergunnahs on 22nd December 1873.

The certificate states that Bhupendro shall not be able, without the leave of the Court, to grant any kind of pottah relating to the minor's estate for a longer period than five years.

In 1874 some negotiations took place with a view to a mortgage of some portion of the testator's property, a fourth share of which descended to Jogendro upon the death of his father Jogendro, and on 27th July the District Judge gave permission for the mortgage of the minor's one-fourth share.

The mortgage does not appear to have been carried out, and on 11th Kartick 1282=27th October, 1875, a mourasi mokurari pottah of Sunderbun lot No. 44 was granted by Bhava Sundari and Bhupendro "for self and for minor Jotendro" to Nemye Chand Mondul, free of rent up to 1286, and at a progressive rate up to 1291, in which year and ever afterwards the rent was to be 11½ annas per bigha.

In 1882 Uzir Nuskur instituted proceedings in the Criminal Court against Nemye Chand Mondul under s. 145 of the Code of Criminal Procedure.

There can be no doubt that these proceedings were instigated by Bhupendro; they resulted in favour of Nemye Chand Mondul. In 1883 Bhupendro and his brothers, who were then majors, and Jotendro, by Bhupendro as his next friend, brought a suit against Nemye Chand Mondul.

The plaint in that suit set out the pottah of Kartick 1282 and alleged that defendant was in possession of 289 bighas in excess of the quantity of land granted to him thereby, and asked that he might be ejected therefrom, and for mesne profits.

This suit was compromised, the defendant undertaking to pay Re. 1 per bigha in respect of 286 bighas, being 4½ annas per bigha in excess of the rent he was paying under the pottah.

[**630**] In 1886 Bhupendro and his brothers, and Jotendro, through Bhupendro as his next friend, took proceedings under s. 158 of the Bengal Tenancy Act.

In their petition they alleged that Sunderbun lot No. 44 was their ancestral mourasi mokurari chuk; that Nemye Chand was holding possession thereof, setting up a permanent pottah alleged to have been obtained from Bhava Sundari during the minority of Ganendro and Norendro and from Bhupendro on behalf of himself and Jotendro without the sanction of the District Judge; that Ganendro, Norendro and Jotendro were all minors at the date of the pottah, and were not bound thereby; that Nemye Chand had no permanent right as he alleged; and they prayed that under s. 158 of the Bengal Tenancy Act the following matters might be determined:—

(*a*) What sort of right the opposite party has to hold the said land?

(*b*) What class of tenant he belongs to?

(*c*) If he is a tenure-holder, whether he is a permanent tenure-holder?

(*d*) What rent is payable now by the opposite party?

(*e*) Whether the rate of rent which the opposite party claims (to pay) is liable to enhancement?

Nemye Chand filed a written statement, in which he alleged (*inter alia*) that the mode and object and the form in which the action was brought was not what was contemplated, and aimed at by law; that s. 158 of the Bengal Tenancy Act did not apply to the case; and upon the merits he alleged that he was a permanent tenure-holder under the pottah and that his rent was not liable to enhancement.

The Subordinate Judge, after a brief recital of the facts, gave judgment as follows:—

" The execution of the lease by Bhupendro was a deliberate act on his part, and he cannot now be allowed to recede from the obligation created by the contract. He made an attempt to prove fraud in connection with the execution of the lease, but failed. Even if his servants misinformed him that would not vitiate the contract, the defendant not having been shown to have done anything to deceive him. Bhupendro entered into [**631**] the contract with his eyes open, and the Exhibit marked B " (the plaint in the suit of 1883), " shows that even as late as January, 1883 he recognized the lease, and the permanent character of the defendant's holding.

" Moreover, I am of opinion that it is beyond the scope of the present summary proceeding to hold an enquiry into the question of the alleged fraud.

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"Bhupendro having executed the lease as guardian of the minor Jotendro cannot now, in the same capacity, ask the Court with good grace to set aside the lease as far as the interests of the minor are concerned.

"The minor may or may not recognize the defendant to be a permanent tenure-holder, and I should not, therefore say anything at present either for or against his right to set aside or modify the lease. Bhava Sundari, as executrix of the will of her husband, appears to have acted in contravention of its terms in granting the lease, which is therefore void as against Ganendro and Norendro, who were minors at the time. The lease is void for the following reasons: The fifth clause of the will required Bhava Sundari in agreement with Jogendro to execute mourasi leases of jungle lands after ascertaining the exact quantity of the lands to be leased; and by the second clause he was to take the advice of Radha Nath Bose and Shambhu Chunder Bose.

"Jogendro was dead when the lease was granted, and his consent could not be taken. The power of the executrix to grant such a lease, therefore, ceased upon the death of Jogendro, *vide* Sugden's Powers, p. 252. The quantity of the lands was never ascertained, and the advice of Radha Nath and Shambhu was not taken. The lease being thus void *ab initio*, the acceptance of rent by Ganendro and Norendro does not set up a lease, but only creates a tenancy.

"In the case of instruments which are void and not voidable, no question of ratification can arise.

"So far the case of these two plaintiffs is favourable but the matter does not stop here.

"The Exhibit marked B shows that these two plaintiffs after attaining majority, brought a suit against this very defendant and recognized the defendant's tenure as created by the lease [**632**] granted by their brother; this may be regarded as tantamount to a fresh grant by the former in favour of the latter.

"The petitioner, Ganendro, disavows all knowledge of the contents of the plaint referred to above, but I cannot attach much weight to the evidence of an interested witness like him.

"Under all these circumstances I am of opinion that the defendant is a permanent tenure-holder, and that his rent is not liable to enhancement."

Against this order, which under s. 158 of the Bengal Tenancy Act, has the effect of, and is subject to, the like appeal as a decree, the petitioners have appealed to this Court.

Their grounds of appeal are as follows:—

..."*1st.*—That the lower appellate Court is wrong in holding that it is beyond the legitimate scope of a proceeding under s. 158 of the Bengal Tenancy Act to hold an enquiry as to the question of fraud, more particularly when evidence was gone into without any objection by either side.

"*2nd.*—That the Court below ought to have found upon the evidence on the record that the execution of the lease by Bhupendro set up by the defendant was brought about by the fraud of the defendant in collusion with the servant of the former, and therefore it is not binding on him.

"*3rd.*—That the lower Court is wrong in holding that the execution of the lease was a deliberate act on the part of Bhupendro, and that he entered into the contract with his eyes open, and recognized the lease and the permanent character thereof.

"*4th.*—That the Court below is wrong in declining to decide the questions as to how far the lease set up by the defendant is binding on the minor Jotendro.

"*5th.*—That the Court below has erred in holding that Bhupendro as guardian of the said minor having once executed the lease cannot now in the same capacity ask the Court to set aside the lease, so far as the interest of the minor is concerned.

"*6th.*—That the Court below ought to have held that, under the circumstances, the lease, so far as the said minor is concerned, is not binding on him.

"*7th.*—That the lower Court has erred in acting and resting its decision upon Exhibit B, and regarding it as tantamount to a [**633**] fresh grant of a permanent character by the petitioners Ganendro and Norendro in favour of the opposite party.

"*8th.*—That the lower Court, having held that no question of ratification can arise when the lease is *ab initio* void, ought not to have given any effect in the present proceedings to the so-called fresh grant or recognition, if there was any.

"*9th.*—That the lower Court, upon the whole evidence adduced in the case, ought to have held that the defendant's tenure is not a permanent one, and it ought to have enhanced the rate of rent according to the evidence on record.

"*10th.*—That the lower Court, having refrained from passing any opinion as to how far the minor is bound by the said lease, has erred in coming to the conclusion that "the defendant is a permanent tenure-holder, and his rent is not liable to enhancement.""

The appeal was argued before us some time since by Mr. Evans on the part of the appellant and Baboo Nil Madhub Bose for the respondent, and at the conclusion of the argument we took time to consider our judgment.

The first point that arises for consideration is, whether in a proceeding under s. 158 of the Bengal Tenancy Act it is open to the petitioners to dispute the validity of the pottah.

The petitioners seek in this proceeding to obtain the same relief as they would have claimed in a regular suit to set aside the pottah.

We were at first inclined to think that the appellants were not at liberty in such a proceeding to have the question of the validity of the pottah put in issue and tried; but on consideration we are of opinion that it is open to them to have the question thus determined, and that the Court is bound to go into it and decide it.

If the appellants had altogether denied the respondent's tenancy, they must have brought an action of ejectment, but by acknowledging him as their tenant they seem to bring themselves within the provisions of the section, and are entitled thereunder to ask the Court to determine the nature of the tenancy: and in determining that question, the Court must look into the title which the respondent sets up and pronounce upon its validity.

The only point on which the enquiry under this section seems to differ from the trial of a regular suit under the Code of Civil [**634**] Procedure is the omission on the part of the Legislature to provide for the levy of the usual Court-fee stamp on the institution of suits, and this omission we must presume was foreseen and intended. In connection with this matter we were referred by Mr. Evans to the provisions of

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Chap. X of the Act, relating to "Records of Rights and Settlement of Rents."

By ss. 101 and 102, the Local Government is empowered to order a record of rights to be prepared for any local area by a revenue officer, and in the preparation of such record the revenue officer may ascertain and determine the same questions as are referred to in s. 158.

By s. 106, if any dispute arises as to the correctness of any entry in the record, the revenue officer is to hear and decide the dispute, and, in so doing, he is, by s. 107, to adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. Then s. 108 provides for an appeal from the decision of such revenue officer to a special Judge, to be appointed by the local Government, and for a second appeal to the High Court from the decision of such special Judge.

Now s. 158 is apparently intended to apply to isolated cases the provisions of the foregoing sections of the Act with regard to the record of rights in local areas, with this difference that a local enquiry need only be made when found to be necessary (when it is to be made by a revenue officer), the matter being in the first instance determined by a Civil Court (instead of a revenue officer), and the appeal to this Court being in the nature of a first, and not a second, appeal.

Under these circumstanese we are opinion that it was open to the lower Court, and that it is open to us, to determine the question of the validity of the lease under which the respondent claims to hold.

We proceed, therefore, to dispose of the appeal upon the merits.

And first as regards the appellant Bhupendro. It is admitted that Bhupendro was of full age when he executed the pottah of 11th Kartick 1282; but he now seeks to avoid it on the ground of misrepresentation and fraud.

Although the lower Court expressed an opinion that it was beyond the scope of the present summary proceeding to hold an [635] enquiry into the question of the alleged fraud, it did in point of fact enquire into it, and found that fraud was not established.

We have gone through the evidence, and are of opinion that this finding is correct. The appellant's case is, that whereas he granted this pottah in respect of land, which he believed to be wholly covered with jungle, a considerable portion of the land had in fact been cleared and brought under cultivation by Uzir Nuskur, the former tenant; and that the respondent in collusion with his, Bhupendro's, servants falsely represented that the whole land was covered with jungle. We are of opinion that this case is not borne out by the evidence. There is not a suggestion to the above effect in the petition in this case; and the criminal proceedings and previous suit above referred to seem to us to point to a deliberate attempt to oust the respondent from the land after a large portion had been cleared, and brought under cultivation, and when neighbouring Sunderbun lots were being leased at higher rates of rent than the respondent was paying. As regards Bhupendro, therefore, we have no hesitation in holding that he is bound by the lease.

Then as regards appellants Nos. 2 and 3, Ganendro and Norendro, we are of opinion that they also are bound by the terms of the pottah. We agree with the Subordinate Judge that the power given by the will to grant a jungle-abadi-lease was a joint power vested in Bhava Sundari and Jogendro—a power that could not be exercised by one after the death of the other.

We are not disposed, however, to agree with the Subordinate Judge in holding that the lease was necessarily void, because the advice of Radha Nath and Shambhu Chunder was not sought.

We are, however, of opinion that Ganendro and Norendro cannot now be heard to say that the lease was not validly granted. In the suit of 1883, after they had attained majority, they treated it as a valid and subsisting lease; they have accepted the benefit of the compromise made by the respondent, and have continued to receive rent from him, both for the lands granted by the pottah and for the excess lands.

Whether their conduct be considered as amounting to a ratification of the lease or to a grant of a new lease upon the same [**636**] terms as those contained in the original pottah, or to an estoppel, the result is the same.

Lastly, we have to consider the case of the minor Jotendro.

The pottah was executed on his behalf by Bhupendro, his certificated guardian; but it is admitted that he executed it wihout having previously obtained the sanction of the Judge, as required by s. 18 of Act XL of 1858 and the terms of the certificate. The Subordinate Judge is of opinion that "Bhupendro, having executed that lease as guardian of the minor Jotendro, cannot now in the same capacity ask the Court with good grace to set it aside."

We fail to see what "good grace" has to do with the case. Either the lease is binding on Jotendro or it is not.

It has been held by this Court in *Shurrut Chunder* alias *Bhola Nath Chattopadhya* v. *Rajkissen Mookerjee* (1) that a sale of a minor's immoveable property by a guardian appointed under Act XL of 1858, who was also *kurta* of the joint family of which the minor was a member, is invalid if made without the sanction required by s. 18 of the Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor.

And in *Buchraj Ram* v. *Kissen Singh* (2) this Court held that a mortgage without the sanction of the Judge by a guardian of minor appointed under Act XL of 1858 is absolutely void; and the same view was taken by the Allahabad High Court in *Mauji Ram* v. *Tara Singh* (3). We think the same rule must hold good in the case of a lease for a term exceeding five years by a certificated guardian without the sanction of the District Judge.

As far as the infant is concerned, the respondent can obtain no benefit from the proceedings in the suit of 1883. If the minor himself could not ratify the lease, it is clear that Bhupendro, whether as certificated guardian, or as next friend, could not do so on his behalf. If the proceedings in the suit of 1883 operated, as far as Ganendro and Norendro are concerned, as a grant of a new lease upon the same terms as those contained in the original pottah, they cannot so operate as regards Jotendro, [**637**] for there is the same absence of sanction to those proceedings, and to the compromise, as there is to the original lease. Again, if these proseedings operate by way of estoppel as regards Ganendro and Norendro, they do not do so as regards Jotendro.

Therefore, in whatever light we look at this case, we are of opinion that the lease is not binding on Jotendro.

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(1) 15 B.L.R. 350. (2) 11 C.L.R. 345. (3) 3 A. 852.

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If this view be correct the respondent's position as regards Jotendro's four annas share in the land appears to be that of a non-permanent tenure-holder, whose rent is liable to enhancement.

The result, therefore, of our view of the whole case is that the decree of the Sub-Judge must be affirmed as far as regards twelve annas share of the lands held by the respondent, and reversed as regards four annas.

We determine—

(a) That the situation, quantity and boundaries of the land are as follows:—

That it is situate in Pergunnah Moida, Sub-registration and Station Baripore, in Talook No. 1346 of the Towzee of the Collector of 24-Pergunnahs, being Sunderbun Lot No. 44.

That the quantity of land is more or less 1,735 bighas, and that the boundaries are—

(1) *South*—North of the northern boundary embankment of the chuck belonging to Nogendro Nath Dutt.

(2) *North*—By measurement twenty-two russees north from the southern boundary.

(3) *West*—East of khal called Kaora Sote, and eastern side of Bhodury's khal.

(4) *East*—East of Jolkhola Road.

(b) That the name and description of the tenant thereof are as follows:—

Nemye Chand Mondul, son of late Huro Mohun Mondul, landholder of Bhowanipore, pergunnah Magura, station Debipore, in the Diamond Harbour sub-division.

(c) That the said tenant is, as regards twelve annas share of the said lands, *i.e.*, as regards Bhupendro's, four annas share, Ganendro's four annas, and Norendro's four annas share, a permanent tenure-holder whose rent is not liable to enhancement.

[**638**] That the said tenant is, as regards a four annas share of the said lands, *i.e.*, as regards Jotendro's four annas share, a non-permanent tenure-holder whose rent is liable to enhancement.

(d) That the rent payable by the said tenant in respect of the said twelve annas share at the time of the application was Rs. 935-3-17½ gundas.

That the rent payable by the said tenant in respect of the said four annas share at the time of the application was Rs. 311-10-19½ gundas.

Having regard to all the circumstances of the case, we think the respondent is entitled to his costs in all Courts.

H. T. H. *Appeal allowed and decree modified.*

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Tottenham.

In the matter of the petition of Khoda Bux Khan and others (*Petitioners*).* [29th February, 1888.]

Pleaders—Pleader's taids—Mukhtear—Legal Practitioners' Act (XVIII of 1879)—Ministerial duties of Pleaders, Delegation of to their bona fide *clerks.*

A Judge has a right to control his Court premises in such way as is most convenient to the public and to persons working there, but does not act rightly in passing any general order by which he excludes as a general body from his Court any portion of the community acting in an orderly manner.

The pleaders of this country are a body of men who, from the earliest times, have combined in their own persons the duties performed in England by barristers and attorneys, and in acting in this second and ministeral capacity are, on their own responsibility, entitled to work through any number of clerks or taids properly selected and paid by them; and no Court other than a High Court as established by Charter has the right to make rules defining the ministerial duties to be performed by them as distinct from the duties of their *bona fide* taids or clerks; nor does the Legal Practitioners' Act of 1879 control in any way the privileges which have always existed in them or restrict their powers, the Act being one passed to bring mukhtears under the control of the Court.

[639] This was a rule calling upon Mr. Kirkwood, the District Judge of Patna, to show cause why certain orders made by him, limiting to two the number of clerks employed by pleaders and setting out specifically their duties and ordering their enrolment in the Court books, should not be set aside as being made without jurisdiction. The orders referred to and the letter of the Nazir of the Patna Court to the District Judge, which was the origin of the orders, were as follows:—

"With reference to your Honor's orders prohibiting unauthorized persons to act in the Civil Courts as mukhtears, I have the honor to solicit your Honor's orders as whether pleaders,' "taids," of whom there are many (some pleaders having two or three taids working under them) fall under the category of unauthorized persons acting as mukhtears, and should be allowed to deposit money in my office, file lists of witnesses, withdraw money for the pleaders, and carry out other work." On this letter the following order was passed:—

"Pleaders' taids are merely allowed to deliver as messengers or postmen a list of witnesses to the Nazir, which list must be signed by the pleaders. Pleaders' taids, as such, are not allowed to carry on any transaction with the Court Amla, or to deposit any money, or withdraw any money, or make any application, or withdraw any document. Pleaders' taids are their private servants, unrecognized by the Court in any other capacity, without responsibility to the Court, and consequently not eligible for the performance of any of the acts referred to. Any pleader practising in the Civil Courts may employ within the compound of those Courts no more than two taids; the pleaders must register the names of these taids in a book, to be kept by the Nazir, which will show the name of the taid and the name of the pleader who, employs him, and the

* Civil Rule No. 31 of 1888, against the orders passed by T. M. Kirkwood, Esq., District Judge of Patna, dated the 19th and 25th of November and 3rd of December 1887.

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part of the Court premises in which this taid ordinarily is to sit. These registered taids, and no others on plea of being taids, will be admitted into the Court premises. These registered taids are thus admitted solely for the purpose of doing clerical work for their employers, or for the purpose of messages, calling clients, and so on. They will ordinarily not be allowed elsewhere than in their customary sitting place, save when employed in calling their master or clients. [640] Any pleaders' taids found doing any unauthorized act will be excluded from the Court and compound.

This order was objected to by the pleaders, and they, in a petition to the Judge, represented that it was one calculated to cause them great inconvenience, hardship, and pecuniary loss in the discharge of their professional duties; that the duties ordinarily done by pleaders' taids were to take petitions signed by the pleader to the Court, to deposit money on their behalf with the Nazir, to receive money from the Court on receipts granted by the pleader, to get certified copies from the Sherista on applications made and receipts granted by the pleader, to inquire into the dates fixed for the hearing of cases; that such acts had hitherto been carried out by taids in the Patna Courts; and, after objecting to the limitation placed on the number of their taids, they asked the Judge to reconsider his order. On this petition the District Judge passed the following order:—

"I have been through this representation, and have heard a large assembly of pleaders through their spokesmen, Baboo Guru Pershad Dass, in support of it. The issue is, who is entitled to do those acts which the Rules passed by the High Court under the Legal Practitioners' Act authorize certificated mohurrirs to do? Of course I except the parties themselves; leaving them aside, who else is entitled to do those acts? The pleaders say 'we are.' I by no means contest that position. Then the pleaders say, 'we have no time to do these acts ourselves; we claim to be entitled to hand over this portion of our duties to A, B, and C, whom we know, whom we have appointed our clerks or taids, and who will do them on our responsibility.' To that I reply 'you cannot do that; either do those acts yourselves, or if you must make them over to the only other class of persons authorized by the law to do them, namely, the certificated mukhtears. The law or rules do not recognize your taids; they have no authority to do any such acts; you cannot make yourselves into a Legislature or a High Court and constitute your employes a class without authority to do these acts, and so absolutely shut out from employment the very class of men authorized by law to do them. I am surprised at so large a body of gentlemen of eminent legal ability having signed this representation. It [641] is then said that if certificated mukhtears are employed they will have a right to a certain percentage of the fees, which percentage is now appointed [appropriated?] by the pleaders, that the pleaders will not consent to give up this percentage, and that the charge will really fall as an additional tax on the litigants. With that I have nothing to do, except to remark that a certificated mukhtear is entitled to be paid for his work as much as a pleader or any one else. I fixed the number of taids at two for the following reasons:—

"(1) It appeared to me that no one has a right habitually to sit and work at clerical or other work within the precincts of the Court without the permission of the Court, otherwise the Court premises may become converted into a congress of private offices.

"(2) It appeared to me advisable to put some limit to the number of taids employed in the Court premises by pleaders, on the score of accommodation, and in order that they may become recognized and well known, so that they may not be interfered with as mere touters or loiterers, and in order that they may not degenerate into touters or loiterers.

"(3) I consulted at least one of the leading pleaders, who told me that he only employed one taid, and thought two would be an ample allowance.

"(4) As apparently much of the work which pleaders' taids have hitherto been doing is unauthorized work and appertains to the work of the certificated mukhtears, fewer will now be required.

"Baboo Guru Prasad Sen asserted that he objected, as a matter of principle, to the Court imposing any limitation on the number of taids employed by pleaders within the precincts of the Court, holding that the Court had no authority to do so. For the reasons given above, I must maintain that the Court has a right to impose such limitation. The limitation of two taids per pleader will remain as the general rule, but any pleader finding this number too small for legitimate requirements may ask the Court for permission to employ a larger number within its precincts. I see no reason to alter the orders already passed; they appear to me correct and, in the interests of the [642] certificated mukhtears, called for. I would note that the pleaders argued their case before me with perfect good humour and propriety; and now, as always, I am perfectly willing to do anything I can, with propriety, or legitimately, do for them either individually or as a body."

The pleaders then moved the High Court to set aside these orders, and obtained the rule above referred to.

Mr. *Evans* and Mr. *Abdul Rahman* to show cause.

The Advocate-General (Mr. *Paul*), Mr. *J. Twidale* and Baboo *Saligram Singh* in support of the rule.

ORDER.

The order of the Court (PETHERAM, C.J., and TOTTENHAM, J.) was delivered by

PETHERAM, C.J.,—This is a rule which has been obtained by the learned Advocate-General for the purpose of setting aside certain orders which have been made by Mr. Kirkwood, the District Judge of Patna. We have heard in opposition to the rule Mr. Evans as *amicus curiae.* He appears in that character at the request of the mukhtears practising at Patna, I suppose, or for the mukhtears generally, and we have been very glad to hear him, because it is very desirable in a case of this kind that the Court should have all the assistance possible to enable us to understand what the facts of the case are and what the law in this country is with reference to these matters so that we may be able to come to a proper decision.

The orders referred to in the rule were as follows (*here followed the orders as set out above*).

It will be noticed on reading these orders that the learned Judge assumes to have the right to do two things. He assumes to have the right to regulate the transactions which a pleader must do himself and the transactions which he must do through his clerk, and he also assumes to have the right to regulate the number of persons who should be admitted to the Court premises.

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I think it will be well to deal with the second, which is the smaller question, first. There cannot be the slightest doubt that a Judge has a general power over his own Court in the sense [643] that he has a right to see that order is maintained, that the Court room is not encumbered by persons loitering about there to the detriment of the business of the Court, and that the public are not allowed to enter those portions of the Court house which are not intended for their use. But as a matter of fact the Court house is a public place, and is a place to which the public has a right to resort so long as they behave properly and do not make a disturbance and do not crowd the Court in such a way as to interfere with the disposal of business; and as long as persons behave themselves properly in a Court house there is no authority vested in any one to turn it into a private place; and although undoubtedly this learned Judge has a perfect right to control the way in which the Court room is to be used by particular persons—that is to say, to arrange the seats in such a way as he finds most convenient, alloting to the pleaders one place, to the parties another, and to the public a third—I do not think he is right or that he is justified in making any general order by which he excludes any portion of the community, as a general body, from his Court; and though I expressly wish to be understood as not interfering in any way with the right of the Judge to control his Court premises in such a way as is most convenient to the public and to persons working there, still I think that this very general order is objectionable, because it is directed against a particular class of persons, and because it is so mixed up with the rest of his order that it is objectionable on that ground too.

Then I proceed to deal with the other part of the order by which the learned Judge limits and defines the professional acts which he considers the pleaders must do individually and those which their clerks may do for them, and with reference to what I have to say now I would specially call attention to the learned Judge's remarks which show that, though they are directed to the actual taids of the pleaders, he does not go into the question whether these persons are *bona fide* taids or not. He does not deal with it by saying that in his opinion these persons who are called taids are not taids at all, but are unauthorized mukhtears and touts and persons who for that reason ought not to be there; he deals with them as actual taids, and, therefore, [644] in what I have to say in this case, I wish to be particularly understood as directing my remarks to persons who are *bona fide* taids or clerks of pleaders. If it were shown that the persons against whom the order is directed were not taids, but persons carrying on an independent profession and acting in individual cases and being remunerated by some arrangement for fees at a certain percentage or otherwise, a totally different set of considerations would arise; but, as I said before, the Judge has specially limited his remarks and the orders he has made to persons who are the actual and *bona fide* taids of pleaders. So that the only question which arises before us now is really the question whether the Judge had any right, or any legal power, to define certain acts, which he has here defined as acts, which must be done by the pleaders themselves and which they cannot employ their clerks to do for them.

It appears that from the earliest times, so far as we have been able to ascertain from the history of litigation in this country, a class of persons now known as pleaders has existed, and that these pleaders

have conducted the litigation of the country for the litigants, and, in doing so, have done the administrative work, arising out of such litigation in the offices of the Courts, themselves, and have appeared as advocates in the Courts as well; in other words, have combined, in their own persons, the two duties which are performed in England by attorneys and barristers. This has been the case apparently from the earliest times; and, so far as we can ascertain and so far as it has been shown to us to-day, down to comparatively recent times the only recognized legal practitioner in the mofussil Court has been the pleader or vakeel who combined both vocations in his own person. Now it is clear that, so far as the Courts are concerned, the legislature has to a great extent made these persons officers of the Court, and of course the object of doing that is that the Courts may have a control over them as their own officers, and may see that, in their dealings with the public, they were fit to be entrusted with the responsible duties which they had to perform. But it is equally clear that, although in their capacity of pleaders or vakeels, the Courts and the Legislature have a perfect right, and they would be [**645**] wrong if they did not exercise that right, to insist that in their character as advocates they should do the work themselves, the conditions of an advocate being conditions which a man cannot sever from himself as an advocate, and it is in that capacity alone that he appears before the Court for his client and argues the client's case and advocates his cause; but it is not so with a man who combines the two offices in himself and gets up the case and does the ministerial work as well, for, as to that portion of his business, if he is to appear as an advocate as well, he must do a portion of it through other persons, and therefore he must have clerks to do it for him. But that does not do away with his responsibility to the Courts to see that the business of his office is conducted with due diligence and done properly and honestly; and the person whom the Courts would hold responsible, if anything wrong were to take place, would be, not the clerk or the taid of the pleader, but the pleader himself; and if they have the pleader himself upon their rolls, they have a man over whom they have a control, and that is all that is necessary in the interests of justice; and, so it seems to us, that the only thing necessary is that the Court should insist upon his duties as an advocate being performed by the pleader himself and the ministerial part of his office work, on his responsibility, by persons properly selected and paid by him.

But in addition to that there arises this other question—Supposing it to be necessary that the duties to be performed by the pleader himself, other than those which he performs in open Court, should be defined, and those to be performed by his taid or clerk should be defined, that must be done by the body which has the superintending power over those persons and has the power to make rules, under the provisions of the Act, for their guidance as to the mode in which business is to be carried on, and that body is not the District Judge, but the High Court as established by Charter; and if any rules are to be framed, and if any regulations are to be made for the conduct of this part of their business, the proper and the only tribunal which has a legal right to make them is this Court and this Court alone, and to it the parties must apply if they wish any such rules to be passed.

[**646**] That being so, it seems to us that the learned Judge, in making these orders by which he has defined the duties to be performed by the clerks of the pleaders as contrasted with the duties which might be performed by the pleaders themsevles was acting outside his jurisdiction, and

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that would be a quite sufficient reason for us to make this rule absolute to set aside the whole order, the series of orders of which it is composed being so intimately connected with each other that, in our opinion, the order must stand as a whole or fall as a whole. But I think it right to add here that, so far as we can see, the duties thus defined being a portion of the original duties of pleaders which it is necessary, by the nature of things, should be performed by their clerks, there really was no reason for these orders unless the Judge were empowered and compelled to make them by reason of the rights which are supposed to have been conferred on these mukhtears by virtue of the provisions of Act XVIII of 1879.

With reference to the meaning of that Act, I think it will be well to say a few words as to what the history of mukhtears is. As I said just now, the only body of recognized legal practitioners in this country which existed before this time, or in old times, apparently was the pleaders, who were persons who did all the work themselves as officers of the Court. But as time went on another body of men grew up, as it necessarily would grow up in a country where litigation is so rife. They were a body of men who carried on business as law agents and obtained the name of mukhtears. They seem to have been persons who had little knowledge, but they possessed great facilities for moving about the country; they communicated with the inhabitants in the district, they came up for them to the centres of litigation, and they communicated with the pleaders, and for doing that they got paid in some way, whether by the clients or the pleaders, in some cases by the client, in some cases by the pleaders, and in some cases by both. In that state of things it was found to be a scandal that these people should be allowed to do their work in this way without any check, and practise extortion if they thought fit. It was, therefore, found necessary that they should [**647**] be brought under some sort of control, and accordingly the existence of mukhtears was recognized in an Act passed in 1865, which was subsequently repealed by Act XVIII of 1879, which is the Legal Practitioners Act now in force. The object of this Act was not to control the privileges which had always existed in the pleaders or to restrict in any way the powers which they had, but to control this unauthorized body of law agents or mukhtears for the purpose of bringing them under the control of the Court, so that they might be kept in order and might not be at liberty to go about oppressing people by extortion. But so far as this case is concerned, the rights of mukhtears have nothing whatever to do with it, because it seems to us that the rights of the mukhtears are absolutely independent of the rights of the pleaders, and the only thing that is said, so far as they are concerned, is, that persons who are not pleaders shall not do anything of that kind specified in this Act until they have obtained the sanction of the Court to do it.

In the result, and with these remarks as to the general position of the parties, we are of opinion that these orders of Mr. Kirkwood were beyond his powers, and therefore this rule must be made absolute to set them aside.

T. A. P. *Rule absolute*

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Before Mr. Justice Norris and Mr. Justice Beverley.

RADHASYAM MOHAPATTRA *alias* MADUN MOHUN MOHAPATTRA (*Plaintiff*) *v.* SIBU PANDA AND ANOTHER (*Defendants*)*
[12th April, 1888.]

"Lis pendens"—Contentious suit"—Transfer of Property Act (IV *of* 1882), *s.* 52.

A, on the 9th September 1883, sold certain immoveable property to *S*, for Rs. 99-12 by means of a conveyance which was not registered. On the 29th September 1883, *S* instituted a suit against *A* on that conveyance to obtain [**648**] possession of the property. On the 5th October 1883, when that suit was pending, but before the summons was served on *A, A* by a duly registered conveyance sold the same property to *R* for Rs. 198-8. In the suit filed by *S, A* filed a written statement, but did not further contest it, and *S* obtained a decree and got possession of the property. In a suit subsequently brought by *R* to obtain possession of the property from *S* upon the ground that his registered conveyance was entitled to priority over the unregistered document of *S*, it was contended that, *R*'s purchase having been made whilst *S*'s suit was pending, his title could not prevail against that of *S*. *Held,* that the doctrine of *lis pendens* did not apply to the facts of the case, as at the time of *R*'s purchase there was no contentious suit or proceeding in existence, the summons in *S's* suit not having been then served.

[**Diss.**, 27 C. 77 (83); 9 Bom.L.R. 530 (535)=31 B. 393; **F.**, 30 P.R. 1891; 21 A. 408 (409); **Cons.**, 80 P.R. 1903=19 P.L.R. 1904 **(F.B.)**; 31 C. 745 (752); **R.**, 12 M. 180 (182); L.B.R. (1893-1900) 431 (432); 1 O.C. 280 (281).]

THE suit which gave rise to this appeal was instituted by the plaintiff on the 22nd May 1885, to recover possession of certain immoveable property which he alleged he had purchased from defendant No. 2, Annapurna Debia, under a registered conveyance, bearing date the 5th October 1883, the amount of the purchase-money being Rs. 198-8.

The plaintiff alleged that after his purchase he got possession of the lands, but that he had been dispossessed under the following circumstances: He stated that defendant No. 2, acting in collusion with the defendant No. 1, prepared a false conveyance bearing date the 9th September 1883; and purporting to convey the land to defendant No. 1, in consideration of Rs. 99-12; that the conveyance was unregistered; that defendant No. 1 instituted a suit thereon and obtained a decree for possession; that defendant No. 2 did not defend the suit, but colluded with defendant No. 1 and allowed him to obtain a decree; that defendant No. 1 thereupon executed his decree and obtained possession on the 26th April 1884; that he (the plaintiff) preferred a claim which was disallowed, and that consequently he had been forced to institute this suit.

As a matter of fact the plaint, in the suit instituted by the defendant No. 1, was filed on the 29th September 1883, but the summons was not served on the defendant therein till after the 5th October 1883.

Both defendants filed written statements. Defendant No. 1 alleged that the plaintiff had purchased the property with full knowledge of his prior purchase and of his suit which was then [**649**] pending; that the plaintiff and defendant No. 2 had colluded together to deprive him of his rights, and that the plaintiff had induced the defendant No. 2

*Appeal from Appellate Decree No. 1868 of 1887, against the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 22nd of June 1887, reversing the decree of Baboo Gopal Krishna Ghose, Munsif of Jaipore, dated the 30th of November 1885.

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to execute the conveyance of the 5th October 1883 to effect that object; that in his suit against defendant No. 2 she had filed a written statement setting up that conveyance, but that she had failed to produce any evidence in support of her allegations, and that consequently he had obtained a decree and got possession of the property.

Defendant No. 2 denied that she had executed the conveyance in favour of her co-defendant or received the consideration money Rs. 99-12. She alleged that that document was a forgery concocted by the defendant No. 1 to deprive her of her property, and explained the fact of her not contesting his suit further than by filing her written statement therein by stating that she was ill and unable to appear when the suit was heard.

The Munsif found that the plaintiff's conveyance was genuine, and that the document under which defendant No. 1 claimed was fraudulent, and gave him no right to bring the suit he did against defendant No. 2. He came to the conclusion therefore that, even though the plaintiff purchased whilst that suit was pending, the doctrine of *lis pendens* did not operate to deprive the plaintiff of the benefit of his purchase, and he accordingly gave the plaintiff a decree.

The District Judge, on an appeal being preferred by defendant No. 1, remanded the case. He considered that before the question could be decided as to whether the plaintiff's title was affected by the doctrine of *lis pendens* there must be a finding as to whether the suit brought by defendant No. 1 was *bona fide* or was a mere collusive proceeding between him and defendant No. 2, and he therefore directed an issue to be framed and tried by the Munsif on that point.

On the remand the Munsif held that not only was the defendant No. 1's conveyance fraudulent, but that the suit was also a collusive proceeding between him and defendant No. 2, and that the decree therein had been fraudulently obtained and should not be given effect to.

This finding of fact was, however, reversed by the District Judge, who, after dealing fully with the other issues in the case, [**650**] held that the conveyance to defendant No. 1 was a genuine document, and that the purchase by the plaintiff having been made whilst the suit of defendant No. 1 was pending, the latter was entitled to succeed, and the plaintiff's conveyance was not entitled to priority. He accordingly reversed the decree of the Munsif, and dismissed the plaintiff's suit with costs.

The plaintiff now preferred this second appeal to the High Court, and the only material question argued on the appeal was as to whether the doctrine of *lis pendens* applied or not.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey*, for the appellant.

Baboo *Umbica Churn Bose*, for the respondents.

The judgment of the High Court (Norris and Beverley, JJ.) was as follows:—

JUDGMENT.

This is an appeal from the decree of Mr. Worgan, the District Judge of Cuttack, who has reversed the decree of the Munsif.

The facts of the case are shortly these: The plaintiff brought a suit to recover possession of certain pieces of land, and the title under which he claimed was based upon a conveyance from the defendant No. 2, dated the 5th of October 1883. This conveyance was registered. The defendant No. 1, who was in possession of the land, also claimed to hold it

under a conveyance from the defendant No. 2. This conveyance was dated the 9th of September 1883, and was unregistered. The defendant No. 1 alleged that he purchased for a sum of Rs. 99-12; the plaintiff alleged that he purchased for Rs. 198-8. *Prima facie*, therefore, the plaintiff's conveyance, being a registered document, would prevail over the conveyance of the defendant No. 1, which was unregistered.

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The defendant sought to defeat the plaintiff's stronger title based upon the registered conveyance by taking advantage of the doctrine of *lis pendens;* and the *lis pendens* upon which he relied arose as follows: He alleged that on the 29th of September 1883 he brought an action against the defendant No. 2, his vendor, to recover possession of the property which he alleged he purchased for Rs. 99-12 on the 9th September previously. [**651**] The summons in that suit as a matter of fact, was not served upon the defendant No. 2 until a date subsequent to the date of the present plaintiff's conveyance, that is to say, subsequent to the 5th October 1883. The defendant No. 1 obtained judgment in that suit against the defendant No. 2 on the 15th of January 1884. As a matter of fact the defendant No. 2 did not appear to defend the suit. She put in a written statement in which she alleged that she had parted with all her interest in the property to the plaintiff in this suit by virtue of the conveyance to him of the 5th October 1883, and she asked that he might be made a party to that suit. He was not, as a matter of fact, made a party to that suit; and, as I have said, judgment was given against the defendant No. 2, who did not appear to defend the suit. This is the *lis pendens* which the defendant No. 1 seeks to take advantage of.

The Munsif found that the doctrine of *lis pendens* did not apply. The District Judge has overruled that decision, and has held that the doctrine of *lis pendens* does apply.

We are of opinion that the decision of the District Judge is erroneous, and it is sufficient for us to state only one reason, which is shortly this: As a matter of fact at the date of the plaintiff's conveyance, that is, the 5th October 1883, there was no *lis pendens*. Section 52 of the Transfer of Property Act, which deals with the question of *lis pendens*, says: " During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein." As a matter of fact there was no contentious suit or proceeding in existence until the summons to the suit brought by the defendant No. 1 against the defendant No. 2 was served. Upon this short ground, without entering into the other points argued by Dr. Rash Behari Ghose for the appellant, points upon which it is not necessary to express any opinion, we think this appeal should be allowed.

[**652**] It has been urged by Baboo Umbica Churn Bose on behalf of the respondent that there is a finding by the District Judge to the effect that the plaintiff had knowledge of the suit. We fail to see any finding that the plaintiff on or before the 5th of October 1883, had notice of the suit, or that, on or before the 5th October 1883, he had notice of the previous conveyance of the 9th of September 1883.

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Upon these grounds we allow the appeal, set aside the decree of the lower Appellate Court, and restore that of the first Court with costs to the plaintiff throughout.

H. T. H. *Appeal allowed.*

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15 C. 652 (F. B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Tottenham, Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Ghose.

KRISHNO KAMINI CHOWDHRANI (*Plaintiff*) *v.* GOPI MOHUN GHOSE HAZRA (*Defendant.*)* [25th April, 1888.]

Small Cause Court, Mofussil—Jurisdiction—Contract Act (IX of 1872), ss 69, 70—Small Cause Court Act (XI of 1865), s. 6—Putni rent—Implied contract.

The plaintiff, a purchaser in execution of a putni right, brought a suit in a Munsiff's Court to recover from the defendant, a former holder of the putni right, a sum of money which she had been compelled to pay to the zemindar for rent which had accrued due prior to the date of her purchase. The Munsiff gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court, *held,* that, assuming the suit to lie independent of any express promise, it was one cognizable by a Court of Small Causes, and no appeal would therefore lie. *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdry* (1) distinguished.

Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. *Nath Prasad* v. *Baij Nath* (2) approved.

[**F.**, 12 M. 349 (351); **D.**, 23 C. 189 (191); 16 C.W.N. 975=17 C.L.J. 179=17 Ind Cas. 90 (91).]

THIS was a reference to a Full Bench made by the Chief Justice and Mr. Justice NORRIS.

[**653**] The facts were as follows: The defendants Nos. 1 and 2 were the holders, in equal shares, of a certain putni tenure. On the 1st Srabun 1291, in execution of a money-decree obtained against these defendants, their putni right and interest was put up for sale, and was purchased by the plaintiff. On the 1st Assin 1291 this sale was confirmed. Subsequently to the plaintiff's purchase the zemindars put up to sale, for arrears of rent under Regulation VIII of 1819, the putni taluk, and the plaintiff, to protect her own interests in the taluk, paid to the zemindars Rs. 620, which was the amount of arrears due for the kist running from Bysack to the 1st Assin. Of this amount the plaintiff admitted her liability for so much as represented the rent due from the 2nd to the 30th Assin, and called upon the defendants to repay to her the remainder of the sum paid by her. The defendant No. 1 arranged with the plaintiff for payment of his share, but defendant No. 2, although promising so to pay, did not do so, and the plaintiff therefore sued him in the Munsiff's Court for the proportionate share payable by him, making the defendant No. 1 a *pro forma* defendant.

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* Full Bench on Special Appeal No. 1213 of 1887, against the decree of T. B. Beighton, Esq., District Judge of Moorshedabad, dated 7th April 1887, reversing the decree of Baboo Prosunno Kumar Goopte, Officiating Munsif of Kandi, dated 11th September 1886.

(1) B.L.R. Sup. Vol. 675=7 W.R. 377. (2) 3 A. 66.

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The Munsif gave the plaintiff a decree; but on appeal the District judge reversed the decision of the Munsiff, holding that the principle of the case of *Sheogolam Singh* v. *Bhageerut*, referred to in Macpherson on Mortgages, 303 (1), applied, and that the putni was not sold free from all liabilities. On appeal to the High Court an objection was taken by the respondent that the case fell under s. 6 of the Small Cause Court Act, and that, therefore, no second appeal would lie. After argument on this point the following order was passed:—

Petheram, C. J.—As Mr. Justice Norris and myself are not disposed to take the same view of the point involved in the case, and as it is a point as to which the authorities are not agreed, we think it desirable to send the case to a Full Bench to decide whether, on the facts found in this case, the case is one which is cognizable by the Small Cause Court.

On the hearing before the Full Bench—

Baboo *Srinath Dass*, for the appellant, contended that the suit did not fall within s. 6 of the Small Cause Court Act; that there [**654**] was no express contract in the case, and that the case of *Rambux Chittageo* v. *Modhoosoodun Pal Chowdhry* (2) showed that there was no implied contract either, and that a suit for contribution cannot be brought in a Small Cause Court; that the case of *Nath Prasad* v. *Baij Nath* (3) showed it was true that such a suit as this was cognizable by the Small Cause Court, but the reason for this was that the Contract Act had made a change in the law, but that this has been held not to be so—*Ramjoy Surma* v. *Joynath Surma* (4); that the principle of *Rambux Chittageo* v. *Modhoosoodun Paul Chowdhry* (2) had all along been followed in this Court, and that in the new Provincial Small Cause Court Act express provision had been made for the exclusion of such suits; and further referred to *Futteh Ali* v. *Gunganath Roy* (5).

Baboo *Kuruna Sindhu Mookerjee*, for the respondent, contended that the decisions cited by the appellant had no application, as the present suit was not one for contribution between co-sharers; that the suit was not one for contribution at all, there being no joint liability between the plaintiff and the defendant; that the plaint was framed as one for the recovery of money which the defendant should have paid to the plaintiff, [Pigot, J.—It is only by straining the language of the plaint that the suit can be called one for contribution; the payment made by the plaintiff was merely one to clear off an incumbrance on his land which attached to the land before he became purchaser]; that the case of *Rambux Chittangeo* v. *Modhoosoodun Pal Chowdhry* (2) showed that there was no implied contract; and that, therefore, the suit was not cognizable by the Small Cause Court; that contribution was based on joint liability, and there was no joint liability here; that cases on implied contracts were cognizable by a Small Cause Court—*Sunker Lal Pattuck Gyawal* v. *Ram Kalee Dhamin* (6); *Govinda Muneva Tiruyam* v. *Bapu* (7); that the present was a case of an implied contract falling under s. 69 of the Contract Act; and that sch. II, art. 41 of Act IX of 1887 was a guide as [**655**] to what class of cases was excluded from a Small Cause Court.

Baboo *Srinath Dass*, in reply, referred to s. 9, Chap. V of the Contract Act, as giving the definition of an implied contract, contending that there was no proposal for his client to accept made by the defendant.

(1) S. D. A. N. W. P. (1854) 344. (2) B. L. R. Sup. Vol. 675=7 W. R. 377.
(3) 3 A. 66 (4) 9 C. 395 (5) 8 C. 113.
(6) 18 W. R. 104. (7) 5 M. H. C. 204.

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15 C. 652 (F.B.)

The opinion of the Court (PETHERAM, C. J., TOTTENHAM, PIGOT, MACPHERSON, and GHOSE, JJ.) was as follows:—

OPINION.

This case is referred upon the question whether or not it was cognizable by the Small Cause Court under s. 6 of the Small Cause Court Act (XI of 1865).

The suit is brought by a purchaser in execution of a putni right to recover from the defendant No. 1, one of the former holders of the putni right, a sum of money equal to a portion of what she has been compelled to pay to the zemindar for rent.

The rent which she has been compelled to pay accrued due, some of it before and some of it after the month of Srabun 1291. It was in Srabun that the plaintiff became the purchaser, and she claims from the defendant, whose putni right she purchased, payment of a portion of the sum which she has been compelled to pay in respect of the rent which accured due prior to Srabun, stating that the other defendant, who is a co-sharer in the putni right so sold, and who is made defendant *pro forma*, had promised to pay his share claimed by the plaintiff on a similar ground, and that the defendant in the present proceedings whilst saying that he would at some time or other pay his share, has never done so; this alleged promise does not appear to have been proved, and does not form part of the case, and the question is, not whether this suit will lie, but assuming that it will lie independent of any express promise, whether the Small Cause Court had jurisdiction to entertain it. If it lies, in our opinion, under s. 69 of the Contract Act, the terms of that section being "a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

[656] The case of *Rambux Chittangeo* v. *Modhoosoodun Pal Chowdhry* (1) is relied upon as showing that such a suit will not lie in the Small Cause Court under s. 6. That case, however, was before the Indian Contract Act was passed, at a time when the law upon this subject had not been defined by legislation.

We think that, having regard to this, we are at liberty to consider this case independently of the considerations which formed the ground of the decision of this Court in the case of *Rambux Chittangeo* v. *Modhoosoodun Pal Chowdhry*, and to hold, as the High Court of Allahabad held in *Nath Prasad* v. *Baij Nath* (2), that cases falling within the provisions of ss. 69 and 70 of the Indian Contract Act are cognizable by a Small Cause Court under s. 6 of the Small Cause Court Act.

This case was, therefore, not appealable, and the appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

(1) B.L.R., Sup. Vol. 675=7 W.R. 377. (2) 3 A. 66.

15 C. 656=13 Ind. Jur. 217.

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APPEL-
LATE
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15 C.
656=13
Ind. Jur.
217.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

JUGDEO NARAIN SINGH (*Defendant* No. 2) *v.* RAJAH SINGH (*Plaintiff*).* [8th May, 1888.]

Voluntary payment—Money paid, but not due, and paid under compulsion—Contract Act (IX of 1872), ss. 15, 72.

In execution of a decree the plaintiff purchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim which was disallowed, as he had not then obtained, and consequently could not produce the sale certificate. In order to prevent the sale, he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back.

[657] *Held*, following *Dooli Chand* v. *Ram Kishen Singh* (1), that it was not a voluntary payment, and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdhry* (2) referred to; *Asbibun* v. *Ram Proshad Das* (3) doubted.

[F., 32 P.W.R. 1911=9 Ind. Cas. 966; **Appl.**, 22 C. 28 (32); **Appr.**, 25 M. 548 (552); R., 31 C. 1001 (1003); 12 C.W.N. 151 (153); 38 C. 1=12 C.L.J. 566 (571)=14 C. W.N. 945=6 Ind. Cas. 810; 16 C.L.J. 156 (160)=13 Ind. Cas. 144; 11 Ind. Cas. 155 (158); 2 S.L.R. 20 (22).]

THE plaintiff instituted this suit for a declaration of his title to a 1-anna and 2-gundas share in certain mouzahs, and to recover the sum of Rs. 109-14-6 which he had deposited in Court under the following circumstances: He alleged that defendant No. 3, Sheoram Singh, was formerly the owner of the share of the mouzahs in suit, and that on the 4th March 1884 that share was brought to sale at the instance of a Mr. Holloway who held a decree against him, and that at that sale he, the plaintiff, purchased the share for Rs. 382; that after his purchase defendant No. 1, Lala Bunseedhur, proceeded to execute a decree which he had obtained against Sheoram Singh by attaching the same share; that he (the plaintiff) thereupon preferred a claim to the property, but that his claim was disallowed, as he was not then in possession of the sale certificate. After his claim was so disallowed the plaintiff stated that, in order to prevent the share being sold at the instance of Lala Bunseedhur, he paid the sum of Rs. 109-14-6 into Court, that being the amount of Lala Bunseedhur's decree, and he therefore now brought this suit for the relief above mentioned, making Lala Bunseedhur and Sheoram Singh defendants, and also one Judgeo Narain Singh who had purchased Lala Bunseedhur's decree.

Jugdeo Narain Singh alone contested the suit, the other defendants not appearing. Amongst other things he disputed the plaintiff's claim on the ground that the suit was bad for misjoinder of causes of action, and that the money deposited in Court being a voluntary payment was not legally recoverable. The other issues raised by the defendant are immaterial, as they formed no portion of the grounds upon which the appeal to the High Court was preferred. The Munsif held that the suit

* Appeal from Appellate Decree No. 2080 of 1887, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Bhagulpore, dated the 22nd of June 1887, reversing the decree of Baboo Kali Coomar Bose, Munsif of Beguserai, dated the 29th of December, 1885.

(1) 8 I.A. 93=7 C. 648. (2) 12 M.I.A. 65=10 W.R.P.C. 29. (3) 1 Shome 25.

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was bad by reason of misjoinder of causes of action, and dismissed it accordingly without going into the question as to whether the plaintiff could recover the sum of Rs. 109-14-6.

[**658**] On appeal, the Subordinate Judge decreed the plaintiff's suit as far as his claim to the money went. He found that, although the suit was one for a declaration of title to immoveable property and a claim to a refund, the plaintiff had one cause of action only, which arose out of the order refusing his claim in the execution proceedings; that leave under s. 44 of the Civil Procedure Code should, therefore, have been obtained; that no leave having been obtained, the Court was not bound to dismiss the suit altogether, but could give a decree for one of the reliefs asked for; that as the defendant had withdrawn his objections as to the plaintiff's right and title to the disputed share, all the plaintiff asked was a decree for the money; and that he was entitled to that decree.

In support of his finding on the latter point, the Subordinate Judge relied on the decision in the case of *Dooli Chand* v. *Ram Kishen Singh* (1), and refused to follow the case of *Asbibun* v. *Ram Proshad Das* (2), to which he had been referred, on the ground that the former being a decision of the Privy Council of a later date ought to be followed.

Against that decree the defendant, Jugdeo Narain Singh, now preferred this second appeal to the High Court.

Dr. *Rash Behari Ghose*, for the appellant.

Dr. *Troylucko Nath Mitter*, for the respondent.

The arguments advanced at the hearing of the appeal appear sufficiently in the judgment of the High Court (Norris and Beverley, JJ.) which was delivered by—

JUDGMENT.

Norris, J.—The facts of this case appear to be as follows:—

Sheoram Singh, defendant No. 3, was the owner of a 1-anna 2-gundas share in certain mouzahs.

One Holloway obtained a decree against Sheoram, and in execution of his decree attached and put up for sale his (Sheoram's) 1-anna 2-gundas share, which was purchased by the plaintiff on the 4th March 1884. After the plaintiff's purchase, defendant No. 1, who had also obtained a decree against Sheoram, proceeded to attach the same 1-anna 2 gundas share. The plaintiff objected [**659**] to the attachment; and his objection was investigated and disallowed on the ground that he had not obtained the sale certificate.

Upon his objection being disallowed the plaintiff deposited in Court Rs. 109-14-6, being the amount of the decree obtained by defendant No. 1 against defendant No. 3.

Defendant No. 2 is the assignee of the defendant No. 1.

Being defeated in his claim case plaintiff now brings this suit for the declaration of his purchased right in Sheoram's 1-anna 2-gundas share, and for recovery of the Rs. 109-14-6 deposited in Court.

The defendants Nos. 1 and 3 did not appear to defend the suit. The Munsif dismissed the plaintiff's suit upon the ground of misjoinder of causes of action.

On appeal the Subordinate Judge gave the plaintiff a decree for the amount claimed, and against this decree defendant No. 2 has appealed to this Court.

(1) 8 I.A. 93=7 C. 648. (2) 1 Shome 25.

Two objections are urged on his behalf by Dr. *Rash Behari Ghose*: *first*, that there was a misjoinder of causes of action; *second*, that the plaintiff's payment was a voluntary payment.

It is unnecessary to express any opinion upon the first point, for we find that in both Courts the defendant virtually admitted the plaintiff's title, and, therefore, we think the suit may fairly be looked upon as one brought only to recover the money.

In support of his second objection, Dr. *Rash Behari Ghose* argued that the case of *Fatima Khatoon Chowdhrain* v. *Mahomed Jan Chowdhry* (1), one of the cases relied upon by the Subordinate Judge as showing that the payment was not a voluntary one, was not really in point, as it was decided in the year 1868, before the passing of the Contract Act, which by s. 72 defines the cases in which money must be repaid or returned; and by s. 15 defines what is "coercion."

In support of the argument the learned pleader referred to the case of *Asbibun* v. *Ram Prosad Das* (2).

The learned pleader further sought to distinguish the case of *Dooli Chand* v. *Ram Kishen Singh* (3), the case mainly relied upon by the Subordinate Judge, from this case.

[**660**] For the respondent it was urged that the last-mentioned case was a conclusive authority in plaintiff's favour. It was further urged that the Contract Act was only an Act "to define and amend certain parts of the law relating to contracts," and that the provisions of s. 72 of the Act were not exhaustive. In reply it was argued that, even if the provisions of s. 72 were not exhaustive, those of s. 15 clearly were; and that no payment could be said to be involuntary unless made in consequence of "coercion" as therein defined.

In *Fatima Khatoon Chowdhrain* v. *Mahomed Jan Chowdhry* (1), the facts were these. The appellants, two sisters, who had married individuals of the same family, became entitled to dower in the form of a charge on an estate or property which had belonged to a person of the name of Nyum Chowdhury He died in debt, and his heirs and representatives were sued by the respondents to recover some very considerable sums of money alleged to have been due by him, in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. Under one of the many proceedings that took place in the suit, the decree-holders obtained authority to sell the estate upon which the dower of the appellants was charged. In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the appellants, they, upon a proceeding which they instituted and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the estate, paid the sum of between Rs. 59,000 and Rs. 60,000 into Court. The appellants subsequently sued the decree-holders to recover the money thus paid into Court. The Zillah Court gave the appellants a decree. Upon appeal the High Court reversed the decision of the Zillah Court upon the ground "that by law the payment, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and therefore that the money could not be recovered back." The Privy Council said that "the money had been paid into Court, not voluntarily, but under a species [**661**] of compulsion, and for the purpose of

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(1) 12 M.I.A. 65=10 W.R.P.C. 29. (2) 1 Shome 25. (3) 8 I.A. 93=7 C. 648.

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preventing the injurious sale of the property." They further said in answer to the ground upon which the High Court had reversed the judgment of the Zillah Court that "it was not a payment at all; it was originally a mere deposit in Court of the full amount recoverable by the decree-holder; it was deposited under protest for the purpose of preventing an injurious sale of the property."

They further said "those were the circumstances under which the money was paid, the payment being clearly no voluntary payment, and the suit having been determined on its merits in favour of the appellants they are clearly entitled to recover this money back again."

Now, if that case had come before a Court of co-ordinate jurisdiction, and we had been inclined to take a different view of the law as there laid down, we might have felt ourselves at liberty to say that we were not pressed by the decision upon the ground that the observations above referred to were *obiter dicta*.

That they are so appears from a reference to what Lord Romilly says at p. 77, L. R., 8 I. A.: "Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of those numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which the respondent must be held disentitled to retain the money they have received) that this judgment was in effect satisfied; that all that the decree of the Court had entitled the respondents to take out of the different properties in question had been paid and satisfied in one way or another; and was received by them so as to disentitle them to institute or to continue any further proceedings against those properties in respect of the claim now in question."

But though no doubt, as observed by Wilson, J., in *Kinu Ram Dass* v. *Mozaffer Hosain Shaha* (1), even a "*dictum* of the Privy Council has not the weight of a decision," yet "it is of course entitled to the most careful consideration;" and it is binding upon us in a case similar in all respects to the one in which [662] the *dictum* occurs. We cannot distinguish this case from the case before the Privy Council. The only point of difference appears to be that in the Privy Council case there was an express declaration of an intention to bring a suit on the rejection of the claim case; but we do not think that the absence of such declaration in this case is at all material. Unless, therefore, the decision of the Privy Council can no longer be regarded as law, we must follow it and dismiss this appeal.

The Privy Council case was decided in 1868. In 1877, the Indian Contract Act having been passed in 1872, the Privy Council case was discussed by a Division Bench of this Court consisting of Markby and Prinsep, JJ., in the case of *Asbibun* v. *Ram Prosad Das* (2). In that case Markby, J., said: "It appears to me that the facts of this case cannot be distinguished from those of the case reported in 12 Moore's Indian Appeals, 65; and if that case is still law, it must govern the case before us. It is there laid down that a voluntary payment with a full knowledge of the facts cannot be recovered back. But it was held that where a man pays a money into Court to be paid to the decree-holder in order to stay a sale in execution, expressing his intention to bring a suit to contest the right of the decree-holder to attach and sell the property, that is not a voluntary payment, and may be recovered back if it turn out that the decree-holder had no right to sell the property. I have no doubt the

(1) 14 C. 809 (827).

(2) 1 Shome 25.

plaintiff in the case was guided in what he did by the law as laid down in that decision.

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"But since that decision was given, and before this payment was made, the matter had been dealt with by the Legislature of this country —s. 72 of Act IX of 1872 provides that a person to whom money has been paid by mistake or coercion must repay it. This, I take it, is the same general rule as that laid down by the Privy Council, only expressed in the reverse way. But just as the Privy Council go on to determine whether a particular act was a voluntary act, so the Legislature here defines generally what is 'coercion,' and it seems to me that the meaning which the Legislature had attached to the word 'coercion' shows that a payment of the kind which the Privy [**663**] Council declared to be involuntary does not come within the legislative definition of 'involuntary payments.' In other words, the legislature here takes a different view of what constituted an involuntary payment from that taken by the Privy Council. Section 15 declares that 'coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.' The payment in this case was not made under any of the conditions here described.

"The only question then is whether Act IX of 1872 contains the whole law upon this subject, or whether it may be supplemented by the law as laid down by the decisions of the Courts, and as contained in general principles of equity. In some respects, no doubt, Act IX of 1872 is incomplete. In the preamble, it is expressly said that it only explains and defines certain parts of the law of contract. But there are nevertheless, as it appears to me, some particular topics with which the legislature intended to deal completely, and I think that the matter now under consideration is one of those topics. It seems to me that, if we were to hold otherwise, the provisions of the Act as to the recovery of money paid involuntarily would be entirely useless. Unless these provisons completely define the cases in which money paid may be recovered back, because the payment was not voluntary, they tell us nothing at all, for no one would doubt that by the law of this country the cases specified by the Act in ss. 72 and 15 are cases in which money may be recovered back on this ground. The important question is whether they are the only cases, and unless the legislature intended to say that they were the only cases, nothing whatever will have been done towards the simplification of the law upon this subject. Every one knows the extreme difficulty that has been experienced in determining what payments are, and what payments are not, voluntary, and when money once paid may be recovered back. I think the legislature intended to get rid of this difficulty by laying down a short and simple rule upon this subject, which the Courts of this country, not always trained to the discussion of these difficult questions, might easily apply. Of course [**664**] we may thus find ourselves barred in some cases from applying a remedy when a remedy would seem desirable, but that is not unfrequently the consequence of having fixed and precise rules of law. I therefore think that the money was not paid involuntarily, and could not be recovered back, and that the decision of the Courts below should be reversed and the suit dismissed with costs.

"I only wish to add that there is no contention, and I do not think there could be any contention that this case comes in under s. 15 of the

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Contract Act. But I do not wish to prejudice the question whether under some circumstances a man who sets the Court in motion to attach property in execution may not be said to detain property. That question does not now arise."

We are bound to say that we felt much pressed by the force of this judgment, the weight of which is considerably enhanced by the observations of the Privy Council in the case of *Ram Coomar Coondoo* v. *Chundercanto Mookerjee* (1), where their Lordships say, at page 50: "When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases for which *no specific rules may exist.*" But upon a careful consideration of the judgment of MARKBY, J., we think the learned Judge misconceived the basis of the plaintiff's claim. It was not a claim based upon contract pure and simple; it was not a claim to recover money paid under an agreement entered into by the plaintiff in consequence of "coercion" as defined by s. 15 of the Contract Act.

If the case before MARKBY, J., and this case had been brought in England when the old system of pleading was in existence, the plaintiff would have claimed for "money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff."

In Bullen and Leake's Pleadings, 3rd Ed., 44, it is stated "that this is the most comprehensive of all the common counts; it is applicable whenever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render a receipt of it, a receipt by the defendant, [**665**] to the use of the plaintiff." In *Moses* v. *Macferlan* (2), Lord Mansfield thus speaks of the action for money had and received: "This kind of equitable action to receive back money which ought not in justice to be kept is very beneficial, and therefore much encouraged; it lies only for money which *ex æquo et bono* the defendant ought to refund; it does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law, as on payment of a debt barred by the statutes of limitation, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances."

Though Lord Mansfield's application of the principles thus laid down to the facts in *Moses* v. *Macferlan* (2) has been held to be incorrect, the principles themselves have never been disputed.

We think, therefore, that, though it may be that in an action brought in this country to recover money paid under a contract entered into through "coercion," the coercion proved must be such as comes within the provision of s. 15 of the Contract Act (upon which point we express no opinion); yet it does not follow that in the form of action we

(1) 4 I.A. 23=2 C, 233. (2) 2 Burr. 1,000. See p. 1012.

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have to consider in this case that the "coercion" need be of such a character.

And further we are not prepared to say that the defendant's conduct did not amount to "a detainer of the plaintiff's property to the prejudice of the plaintiff with the intention of causing him to enter into an agreement," *viz.*, an agreement to pay the debt of a third person.

But we think the point in dispute is conclusively settled by the case of *Dooli Chand* v. *Ram Kishen Singh* (1). It is [**666**] unnecessary to set out the facts of that case in detail: it is enough to state that the respondent, the purchaser of a mouzah, paid money into Court to prevent the sale thereof in execution of the appellant's decree, which had been already satisfied.

The Privy Council said: "The arguments at the bar were not directed to show that there is any equity upon which the appellant could retain this money; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouzah which the respondents had purchased, and was made therefore under compulsion of law, that is, under force of these execution proceedings. In this country, if the goods of a third person are seized by the Sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary: see *Valpy* v. *Manley* (2)."

It was sought to distinguish that case from the present by pointing out that in the Privy Council case the appellant's decree had been already satisfied.

In our judgment this fact is immaterial. It was sought also to impugn this decision upon the ground that the Privy Council had not considered the effect of ss. 15 and 72 of the Contract Act.

It may be that these sections were not relied on; but looking to the fact that all the learned Counsel engaged in the case had practised in this country, and that two of the members of the Board had been Chief Justices of Bengal, we must assume that any argument based upon these sections, such as had been urged before us, was felt to be untenable. If it had been urged, we think the answer given would have been the one we have pointed out.

The appeal will be dismissed with costs.

H. T. H. *Appeal dismissed.*

(1) 8 I.A. 93=C. 648. (2) 1 C. B. 594.

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[667] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

KARTICK NATH PANDEY AND OTHERS (*Judgment-debtors*) *v.* TILUKDHARI LALL, FOR HIMSELF AND AS GUARDIAN OF SARUNDHARI LALL, HIS MINOR BROTHER (*Decree-holders*).*
[18th May, 1888.]

Execution of decree—Sale of property covered by decree to Court which passed decree when property is situate outside its local jurisdiction at time of application—Civil Procedure Code (Act XIV of 1882), s. 223 (c)—Jurisdiction.

A mortgage decree was passed directing the sale of certain property wholly situate within the local limits of the jurisdiction of the Court which passed the decree. After the decree the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. The decree-holder then applied to the first Court for execution of the decree, and thereupon the judgment-debtor objected that that Court had no jurisdiction to entertain the application or to direct the sale of the property. *Held,* that the Court had authority to execute its own decree and bring the property to sale.

Held, further, that s. 223 (*e*) of the Code of Civil Procedure does not curtail the power of a Court to execute its own decree, but gives it a discretion either to execute the decree itself or, *on the application of the decree-holder,* to send it to another Court for execution, and thereby extends rather than limits the Court's power.

[**R.**, 22 B, 640 (645); 163 P.L.R. 1901; 39 C. 101 (109)=16 C.W.N. 402.]

THIS was an appeal against an order refusing to stay execution of a decree which had been obtained by the decree-holders, respondents, upon a mortgage against the judgment-debtors, the appellants. At the date of the decree the whole of the property comprised in the mortgage was situated in the district of Monghyr, and within the jurisdiction of the Subordinate Judge of Bhaugulpore, in whose Court the suit was instituted and the decree passed.

After the decree was passed a Subordinate Judge was appointed at Monghyr and given jurisdiction over the district known by that name, and upon the application being made by the decree-holders to the Subordinate Judge of Bhaugulpore for execution of the decree, the judgment-debtors objected that the Court had no jurisdiction to execute the decree, inasmuch as the whole of the mortgaged property was situated within the jurisdiction of the Subordinate Judge of Monghyr.

[**668**] That objection was disallowed by the Subordinate Judge who delivered the following judgment:—

" The decree in this case that directs the sale of some properties was passed by this Court. The properties are admittedly situate in the jurisdiction of the Subordinate Judge of Monghyr, a jurisdiction constituted subsequent to the date of the decree. This Court, therefore, has now ceased to have jurisdiction to execute it. This brings the case under s. 649 of the Civil Procedure Code.

" The interpretation that has been put on that section by the ruling in *Latchman Pundeh* v. *Maddan Mohun Shye* (1) gives the decree-holder in the present case the option either to take out execution from this Court

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*Appeal from Order, No. 101 of 1888, against the order of Baboo G. C. Bose, Subordinate Judge of Bhaugulpore, dated the 25th of November 1887.

(1) 6 C. 513.

or to apply for it direct to the Court of the Subordinate Judge of Monghyr. The decree-holder has chosen this Court, and there is nothing to restrain him from making that choice. This application, therefore, is valid and will proceed. The objection of the judgment-debtor is rejected with costs.''

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Against that order the judgment-debtors preferred this appeal to the High Court.

Baboo *Dwarka Nath Chuckerbutty*, for the appellants.

Mr. *Evans* and Baboo *Bhubun Mohan Doss*, for the respondents.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This is an appeal by the judgment-debtor under a mortgage decree of 23rd December 1878, made by the Subordinate Judge of Bhaugulpore. The mortgaged property, which by the decree is ordered to be sold, is wholly situated in the district of Monghyr, which district was formerly comprised within the local limits of the jurisdiction of the Subordinate Judge of Bhaugulpore. Since the passing of the decree, however, it appears that a Subordinate Judge has been appointed at Monghyr with a territorial jurisdiction conterminous with that district. An application having been made to the Subordinate Judge of Bhaugulpore to execute the decree and bring the mortgaged property to sale, the judgment-debtor objected that [**669**] the property being now situated within the jurisdiction of the Subordinate Judge of Monghyr, the Subordinate Judge of Bhaugulpore had no jurisdiction to execute the decree and bring the property to sale. This objection was overruled by the Subordinate Judge, and the present appeal has been brought against that order.

It is contended, *first*, that the Subordinate Judge of Bhaugulpore had no jurisdiction to entertain the application; and, *secondly*, that, even if he could entertain the application, he had no jurisdiction to direct the sale of the property.

On the first point, we think it clear upon the authority of the case cited by the lower Court *Latchman Pundeh* v. *Maddan Mohun Shye* (1) that the Subordinate Judge of Bhaugulpore had jurisdiction to entertain the application.

We are further of opinion that, in the present case, he also had jurisdiction to execute the decree. In support of the appellant's contention, we have been referred to the cases of *Maseyk* v. *Steel & Co.* (2) and *Shurroop Chunder Gooho* v. *Ameerunnissa Khatoon* (3). Neither of those cases is precisely in point, inasmuch as in both of them some portion of the property was admittedly situated within the jurisdiction of the Court which made the decree, whereas, in the present case none of the property is now situated within the local jurisdiction of the Subordinate Judge of Bhaugulpore. So far as they decide anything, however, those cases are in favour of the respondent: for in both cases it was decided that the Court which made the decree had power to execute it. It is true that in the latter case cited, FIELD, J., remarked: "The case of course would be very different if the property consisted of different taluks or different revenue-paying estates, the whole of any one or more of which was situated within (another) the Furreedpore district.'' This, however, was not the case before him, and we cannot regard the remark as carrying any greater weight than an *obiter dictum*. The case of *Maseyk* v. *Steel & Co.* (2) was

(1) 6 C. 513. (2) 14 C. 661. (3) 8 C. 703.

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decided on the principle that a Court which has jurisdiction to make a decree for the sale of mortgaged property has also jurisdiction [670] to execute its decree and bring the property to sale. We think that that is a correct principle of law, and, as shown in that case, it is in accordance with the practice on the Original Side of this Court. On behalf of the appellant some reliance has been placed upon certain remarks of Mr. Justice Ghose in that case, but those remarks do not seem to have affected the decision of the case before him, and we do not, therefore, feel ourselves pressed by them. Mr. Justice Ghose says that he concurs generally in the judgment pronounced by the Chief Justice; and he further remarks as follows: "Now it seems to me that if the Court which made the decree had jurisdiction to entertain the suit in respect of the whole of the properties comprised in the mortgage-deed, it would also have jurisdiction to sell them in execution of that decree, unless it be shown that that authority has been taken away or curtailed by any of the provisions of the Civil Procedure Code." In the present case, as in that case, s. 223, clause (*c*), is relied on as curtailing that authority. We are of opinion that this contention is unsound. That section begins by laying down the general proposition that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions thereinafter contained; and the section then goes on to say: "The Court which passed a decree may, *on the application of the decree-holder*, send it for execution to another Court, if the decree directs the sale of immoveable property outside the local limits of the jurisdiction of the Court which passed it." We think that the use of the word "may" in this clause does not take away from the Court the power to execute its own decree conferred by the previous part of the section, but rather gives it a discretion either to execute the decree itself, or *on the application of the decree-holder*, to send it to another Court for execution.

It appears to us in fact to be an extension rather than a limitation of the Court's powers, and an extension for the sake of convenience. In the cases put in clauses (*a*) to (*d*) it might sometimes be inconvenient for the Court to execute its own decree, and the law, therefore, gives it power, on the application of the decree-holder, to transfer the decree to another Court [671] for execution. No such application was made in this case, and the Court had, therefore, no authority to send the decree to the Monghyr Court for execution.

We have not been referred to any other section of the Code or to any decision of Court in support of the position contended for by the appellant, and upon the authority of the decision in *Maseyk* v. *Steel & Co.* (1) we must, therefore, hold that the Subordinate Judge of Bhaugulpore had authority to execute the decree of his own Court, and in execution thereof to bring to sale property wholly situated in the Monghyr district.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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(1) 14 C. 661.

15 C. 671.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

1888 July 4.

CRIMINAL REVISION.

15 C. 671.

GUNGA CHUNDER SEN AND OTHERS (*Petitioners*) v. GOUR CHUNDER BANIKYA (*Opposite Party*).* [4th July, 1888.]

Criminal intimidation--Penal Code (Act XLV of 1860), *s.* 503.

The threat referred to in s. 503 of the Penal Code must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind.

THE prisoners in this case were charged by one Gour Chunder Banikya with having committed, on the 28th Aughran 1294, an offence under s. 503 of the Penal Code.

The evidence in the case disclosed that Gour Chunder had purchased a ryoti holding from a tenant of the three accused, who were talukdars. The accused objected to this purchase, and threatened, unless the land was given up, to beat the complainant and burn down his house. The particular occasion on which the offence was committed was on the 28th Aughran 1294, when all three accused uttered this threat in the presence of certain persons who deposed to the fact, and further deposed that the [672] complainant was not present on that occasion. The evidence given by them did not show in any way that the accused had intended that the threats used should be communicated to the complainant.

The Deputy Magistrate of Nowakhali convicted the accused and sentenced them to six months' rigorous imprisonment. This conviction was upheld by the Sessions Judge, who however, reduced the sentence to one of six months' simple imprisonment.

The prisoners then obtained this rule calling upon the complainant to show cause why these orders should not be set aside.

Baboo *Umbica Charan Bose* (with him Baboo *Aukhil Chunder Sen*), in support of the rule, contended that, inasmuch as the threat had not been uttered in the presence of the complainant, the accused could not be convicted of an offence under s. 503 of the Penal Code.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) to show cause.

JUDGMENT.

PETHERAM, C.J.,—This is a rule which has been obtained for the purpose of revising a conviction of three men for an offence under ss. 503 and 506 of the Indian Penal Code, that is to say, for the offence of having threatened the complainant within the meaning of those sections. The charge is a charge of having threatened him on the 28th Aughran 1294 and in support of that charge two witnesses are called who speak to what took place on that occasion.

The facts of the case up to that point are these: that the complainant had purchased a ryoti tenure within the limits of the accused's zemindari, and the accused disliked his being there, and apparently, from what the witnesses say, they intimated their dislike of that to them. Two witnesses say that on that day they were at he house of the accused,

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* Criminal Revision No. 175 of 1888 against the order passed by W.H.M. Gun, Esq., Sessions Judge of Nowakhali, dated the 9th of May 1888, confirming the order passed by Baboo Probhat Nath Roy, Deputy Magistrate of Nowakhali, dated the 30th of April 1888.

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when a *peada* of theirs came and told them that the complainant, notwithstanding what they had done, was still in the place and was still taking away the paddy on the land, upon which the accused said that they would beat him and set fire to his house. Assuming that to be true, the question is, whether that is a threat within the meaning of the section.

[673] The section which defines the offence is s. 503, and it is in these words: "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat, commits criminal intimidation."

It is clear that the gist of the offence, as defined in that section, is the effect which the threat is intended to have upon the mind of the person threatened, and it is equally clear that before it can have any effect upon his mind it must be either made to him by the person threatening or communicated to him in some way. In this particular case there is no suggestion that the threat was made to the person threatened. All that happened was, that in the presence of some persons the accused used the words I have quoted in their house. In one sense those words amount to a very bad threat, but there is no evidence on the face of them, and there is no other evidence, that they intended that the words should be communicated to the complainant for the purpose of influencing his mind. It seems to us that the evidence in the case falls far short of establishing the offence defined by this section, which is, in our opinion, a threat communicated or uttered with the intention of its being communicated to the person threatened for the purpose of influencing that man's mind. In this case there is nothing whatever to show that it was the intention of the accused that the threat should be communicated to the complainant. The complainant himself was called, and he does not say that he ever heard this particular threat. Though he speaks of a threat uttered on some other occasion, he does not say that the threat which is the subject of this charges was ever communicated to him or that he ever heard it. Under these circumstances we think that there is no evidence of an offence having been committed under this section and that this rule must be made absolute.

T. A. P. *Rule absolute.*

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15 C. 674=13 Ind. Jur. 104.

[764] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

KEDAR NATH CHATTERJI (*Defendant No.* 1) *v.* RAKHAL DAS CHATTERJI AND ANOTHER (*Plaintiffs*).* [9th July, 1888.]

Limitation Act (*XV of* 1877) *sch.* II, *art.* 11—*Civil Procedure Code* (*Act XIV of* 1882), *ss.* 280, 283—*Judgment-debtor, suit by, to establish title to property the subject-matter of claim in execution proceedings.*

A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term as used in s. 283 of the Code of Civil Procedure

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*Appeal from Appellate Decree No. 2641 of 1887, against the decree of Baboo Madhub Chunder Chuckerbati, Subordinate Judge of Burdwan, dated the 27th of August 1887 affirming the decree of Baboo Gopi Mohun Mukerji, Munsiff of Burdwan, dated the 25th of August 1886.

so as to preclude his instituting a suit after the lapse of one year from the date of such order (the period of limitation prescribed by art. 11, sch. II, Act XV of 1877) to establish his title to, and to recover possession of, the property which has been the subject-matter of a claim in execution proceedings, and in respect of which an order has been made under s. 280 of the Code.

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15 C. 674=13 Ind. Jur. 104.

G, in execution of a decree, attached certain immoveable property belonging to the plaintiff whereupon *B* preferred a claim, and on the 10th March 1881 got the attachment removed. On the 20th July 1881 *B* sold the property to *K*. In 1882 *G* instituted a suit against *B* to set aside the order of the 10th March, 1881, and to have it declared that the property was liable to attachment as belonging to the plaintiff. *K* was not made a party to that suit, and it was eventually compromised between *G* and *B*, the plaintiff's title being admitted. *G* thereupon again attached the property, and was met by a claim preferred by *K*, which was allowed on the 15th August 1883, *G* then brought another suit against *K*, to obtain relief similar to that claimed in his suit against *B*, but his suit was dismissed on the 17th February 1885. On the 25th September 1885 the plaintiff instituted a suit against *G*, *B* and *K*, to obtain a declaration of his title to, and to recover possession of, the property. It was contended that the suit was barred by limitation, being governed by art. 11, sch. II of Act XV of 1877, inasmuch as it was brought more than one year after the date of the order of the 15th August 1883.

Held, that the suit was not such a suit as was contemplated by s. 283 of the Code of Civil Procedure, not being one to establish any right which was the subject-matter of the litigation in the execution proceedings, and that consequently the provisions of art 11 did not apply to it and it was not barred by limitation.

[F., 3 C.L.J. 381 (383); 15 M.C.C. R. 89; R., 13 M. 366 (368); 17 B. 629 (631); 22 B. 875 (884); 25 M. 721 (723)=12 M.L.J. 411; U.B.R. (1892—1896), Vol. II, 458 (461); 34 M. 533=8 M.L.T. 417=8 Ind. Cas. 157.]

[**675**] In this case the plaintiffs sued to have their right and title to certain immoveable property declared and to recover possession thereof, and five separate persons were made defendants to the suit, *viz.*, No. 1, Kedar Nath Chatterji; No. 2, Gour Kishore Ghose; No. 3, Boidya Nath Pal; No. 4, Sreemutty Bighoremoni Dasi, and No. 5, Kedar Nath Pal.

The main facts in the case material for the purpose of this report, which were not disputed, were as follows:—

Defendant No. 2, Gour Kishore Ghose, who had obtained a decree against the plaintiffs, attached the property, the subject-motter of this suit, whereupon defendants Nos. 3. 4, and 5, who were in the same interest, preferred a claim, and on the 10th March 1881 succeeded and got the attachment removed. On the 20th July 1881 defendant No. 3, purporting to act for himself, and defendants Nos. 4 and 5, sold the property to defendant No. 1, Kedar Nath Chatterji. In 1882 defendant No. 2, Gour Kishore Ghose, having so failed in his execution proceedings, instituted a suit against defendants Nos. 3, 4 and 5, who had succeeded in their claim, for a declaration that the property was liable to attachment as being the property of the plaintiffs. That suit terminated in a compromise by which the plaintiffs' title was admitted. Defendant No. 1, Kedar Nath Chatterji, was not made a party to that suit.

After the termination of that suit Gour Kishore Ghose again proceeded to attach the property in execution of his decree against the plaintiffs, whereupon defendant No. 1, Kedar Nath Chatterji, preferred another claim, setting up his purchase of the 20th July 1881. This second claim was allowed on the 15th August 1883, and thereupon defendant No. 2, brought another suit against Kedar Nath Chatterji to set aside the order allowing his claim, and to have it declared that the property was liable to attachment by him. This suit was dismissed on the 17th February 1885 as the result of a compromise made out of Court.

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The plaintiffs then instituted the present suit on the 25th September 1885 to recover possession of the property, setting out the above proceedings, and alleging that defendants Nos. 1 and 2 had fraudulently colluded together in settling the suit [676] which terminated on the 17th February 1885, and that defendant No. 1 had dispossessed them of the property.

Defendant No. 1 alone contested the suit.

He denied the plaintiff's title and the collusion charged, and amongst other pleas contended that the suit was barred by limitation.

The only issue raised in the case material for the purpose of the appeal was that of limitation.

The Munsif decided the case in favour of the plaintiffs both on the merits and on the question of limitation, and gave them a decree. On the latter point he held that the plaintiffs had proved possession within twelve years of suit, and apparently, though not specifically, held that twelve years' limitation was the period applicable to the facts of the case.

Against that decree the defendant No. 1 appealed, and the Subordinate Judge agreed with the findings of the lower Court upon the merits, and also that the suit was not barred by limitation, and accordingly dismissed the appeal.

Upon the question of limitation the judgment of the Subordinate Judge was as follows:—

"It is contended that as the plaintiffs were the judgment-debtors in the execution proceedings in which this appellant intervened under s. 278 of the Procedure Code, they must be regarded as parties to that claim case, and they were bound to institute this suit within one year from the date of the adverse order in the claim, that is, the 15th August 1883. This suit is governed by the provisions of art. 11 of sch. 11 of the Limitation Act, XV of 1877, and as it has been instituted more than one year after that date, it is barred by limtiation.

"I think, however, that plaintiffs cannot be regarded as parties to that claim case, though they were certainly parties to the execution proceedings. I do not refer here to the practice of our Courts, where a claim under s. 278 and the following sections for all intents and purposes is treated as a separate case in which the decree-holder and the claimant are the only parties. Under the old law, s. 246, Act VIII of 1859, there was a provision to summon the judgment-debtor: consequently when he was so summoned he could be regarded as a party. [677] There is no such provision in s. 278 and the following sections down to s. 282. The decree-holder cannot also be regarded as his representative as his interest is limited. This was the view taken in the case of *Shivapa* v. *Dod Nagaya* (1).

"There is a stronger ground than the above for holding that the provisions of art. 11 are not applicable to this case. In the case of *Bukshi Ram Pergash Lal* v. *Sheo Pergash Tewari* (2) it has been authoritatively laid down that the suit contemplated by s. 283 is a suit which may be brought by the unsuccessful party in a proceeding under ss. 280, 281 or 282 to establish a right to the property in dispute, which right was the subject-matter of litigation in the execution proceedings.

"Let us then see whether the subject-matter of litigation in this suit is identical with that in the last claim case. There the decree-holder

(1) 11 B. 114.

(2) 12 C. 453.

sought to enforce his right to sell the property as belonging to the judgment-debtor, and the claimant sought to get the attachment removed on the ground that it belonged to him. In this case the plaintiffs seek to recover possession on proof of their title. Recovery of possession was no one's case in that proceeding.

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"I think, therefore, that this is not a suit against an order under s. 280, and is not therefore based upon the provisions of s. 283, to which alone art. 11 of the second schedule, Act XV of 1877, applies. The plea of special limitation is therefore groundless."

The defendant Kedar Nath Chatterji now preferred this second appeal to the High Court.

Baboo *Lal Mohun Das* (for Dr. *Troyloky Nath Mitter*), for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Tarapodo Chowdhry*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

BEVERLEY, J.—The facts out of which this case arises are as follow:—

Defendant No. 2, in execution of a decree against the plaintiffs, attached the property now in suit, whereupon defendants Nos. 3 to [**678**] 5 preferred a claim, and succeeded, on the 10th March 1881, in getting the attachment removed. On the 20th July 1881 defendant No. 3 sold the property to defendant No. 1, who is the appellant before us. In 1882 defendant No. 2 instituted a regular suit for a declaration that the property was liable to attachment. To that suit the appellant was no party. It appears to have been decided on 26th January 1883 in terms of a compromise by which plaintiffs' title to the property was admitted.

Defendant No. 2 then proceeded to attach the property afresh, and this time he was met by a claim on the part of the appellant, which was allowed on the 15th August 1883.

Defendant No. 2 thereupon brought a second suit to set aside the order in that claim case, and that suit was dismissed on the 17th of February 1885.

The plaintiffs then instituted the present suit on the 25th September 1885 to recover possession of the property on the strength of their title. The only question with which we are concerned in the present appeal is whether or not the suit is barred by limitation by reason of its having been instituted more than one year after the 15th August 1883, the date on which the appellant's claim was allowed.

Both the lower Courts have held that it is not so barred.

By art. 11 of the second schedule to the Limitation Act of 1877, a suit by a person against whom an order is passed under s. 280, 281 or 282 of the Code of Civil Procedure, to establish his right to the property comprised in the order, must be brought within one year from the date of the order. In the present case the order of the 15th August 1883 was an order under s. 280 of the Code. If, therefore, the plaintiff was a person against whom that order was made, the present suit would seem to be barred under the article of the Limitation Act above referred to.

Now the right to bring a suit to contest an order under s. 280 is given by s. 283, which runs as follows: "The party against whom an order under s. 280, 281 or 282, is passed may institute a suit to establish the

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right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." The question is, was the plaintiff a party against whom the order was made in the claim case, and is [679] the present suit a suit to establish the right which he claimed in that case?

No doubt in one sense the plaintiff, who was the judgment-debtor in the execution proceedings in which the claim was preferred, was a party to those proceedings, and the order was so far made against him that it adjudicated the question as to whether he was or was not in possession of the property at that time.

But if the section be construed strictly, as we think it must be construed, it seems to us that no order was really made against him under s. 280, and that the present suit is not governed by art. 11 of the Limitation Act.

When a claim is preferred to property which has been attached as the property of the judgment-debtor, the contest is really between the decree-holder who asserts that the property is liable to attachment, and the claimant who alleges that it is not in the actual or constructive possession of the judgment-debtor, and therefore not liable to attachment. And the order made in such a case is either that the property be released from attachment as not being in the possession of the judgment-debtor (s. 280) or that the claim be disallowed, the property being found liable to attachment (s. 281). In a sense the order in either case may be said to be against the judgment-debtor; in the one case it declares that the property is not in his possession; in the other it declares that it is liable to attachment and sale. But in neither case does it affect his right or title to the property, and in point of fact it is an order to which he need be no party, as it may be made behind his back.

Then, if we turn to s. 283, we see that the suit there referred to is a suit to establish the right which is claimed to the property in suit, that is to say, the right which is claimed in those proceedings, being on the one hand the right to have the property attached and sold in execution and on the other the right to have it released from attachment. The words of the section are not "the right to the property" meaning the title to the property, but "the right, which he claims to the property" which, we take it, means "the right which is claimed in that proceeding in respect of the property"—that is, as we have said, the right to [680] have it sold or the right to have it released from attachment. That this is so, is clear, we think, from the fact that the decree-holder has no right or title in the property attached, and could not sue to establish any such right. What he claims and what he may sue to establish is the right to have the property declared to be liable to attachment and sale in execution of his decree.

The learned pleader for the appellant has relied upon the case of *Netietom Parengaryprom* v. *Tayanbarry Parameshwaren Nambudry* (1), in which a Full Bench of the Madras High Court held, under the similar provisions contained in s. 246 of the Civil Procedure Code of 1859, that the judgment-debtor was a person against whom an order might be made under that section. The correctness of that decision, however, has been doubted, and we have not been referred to any reported case in which it has been followed. On the other hand, several cases have been cited to us in which it has been held that the

(1) 4 M.H.C. 472.

judgment-debtor was not a party against whom the order was made in the claim case, and that he was therefore not bound to bring his suit to establish his title to the property within one year from the date of the order—*Cheriyarakel* v. *Vayaka Parambath Imbichi Ammah* (1); *Imbichi Koya* v. *Kakkunnat Upakki* (2); *Nitta Kolita* v. *Bishnuram Kolita* (3); *Mannu Lal* v. *Harsukh Das* (4); *Shivapa* v. *Dod Nagaya* (5). In most of these cases the case of *Netietom Parengayprom* v. *Tayanbarry Parameshwaren Nambudry* (6) was referred to, but the Court declined to follow it, and held that a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but that it must depend upon the facts of each case. In the case of *Cheriyarakel* v. *Vayaka Parmbath Imbichi Ammah* (1), MORGAN, C.J., and HOLLOWAY, J., went so far as to say that but for the Full Bench decision referred to, they would have had great difficulty in saying that the judgment-debtor was a party to the order at all.

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[**681**] There are certain remarks in the case of *Bukshi Ram Pergash Lal* v. *Sheo Pergash Tewari* (7) which go to support the view we take of the meaning of s. 283. In that case Mr. Justice MITTER said: " Under this section the decree-holder who fails in a proceeding between himself and a claimant under s. 280 of the Code of Civil Procedure may institute a suit to establish his right to the property which he claimed in the proceeding before the execution Court, *viz*., the right to attach and sell the property which was claimed by the claimant in satisfaction of his decree. That is, in our opinion, the correct construction of art. 11, which refers only to suits contemplated by s. 283. That being so, the question which calls for decision in this case is, whether the present is a suit which comes within the purview of s. 283. It seems to us that the suit contemplated by s. 283 is a suit which may be brought by the unsuccessful party in a proceeding under ss. 280, 281 or 282 to establish a right to the property in dispute, which right was the subject-matter of litigation in the execution proceedings."

In the present case we are of opinion that the suit is not such a suit as is contemplated by s. 283. It is not a suit to establish any right which was the subject-matter of litigation in the execution proceedings. It is a suit to establish the plaintiff's title to the property in respect of which the claim was preferred, but that title was not the subject of those proceedings, nor was it affected by the order made therein.

For these reasons we dismiss this appeal with costs.

H. T. H. *Appeal dismissed.*

(1) 6 M.H.C. 416. (2) 1 M. 391. (3) 2 B.L.R. Ap. 49.
(4) 3 A. 233. (5) 11 B. 114. (6) 4 M.H.C. 472. (7) 12 C. 453.

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MAY 16.

APPELLATE CIVIL.

15 C. 681.

15 C. 681.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

JOGENDRO CHUNDER GHOSE AND ANOTHER (*Plaintiffs*) *v.* DWARKA NATH KARMOKAR AND OTHERS (*Defendants*).* [16th May, 1888.]

Notice to Quit—Service of notice to quit by registered letter, Sufficiency of.

Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon [682] it purporting to be by an officer of the Post Office stating the refusal of the addressee to receive the letter: *Held,* that this was sufficient service of notice. *Lootf Ali Meah* v. *Pearee Mohun Roy* (1) and *Papillon* v. *Brunton* (2) referred to.

[**F.**, 17 C.W.N. 1073 (1075)=20 Ind. Cas. 363 (365); **R.**, 13 C.P.L.R. 74 (77); 6 C.W.N. 134 (137); 35 B. 213=13 Bom. L.R. 323=11 Ind. Cas. 351; **D.**, 7 C.L.J. 251; 81 P.W.R. 1908.]

SUIT for recovery of khas possession and for damages.

Jogendro Chunder Ghose and another, the plaintiffs, alleged that Khetramoni Dasi, defendant No. 3, held a tenure consisting of three bighas of land; that the tenure was not transferable, and that she had no right of occupancy therein; that Hera Chand, her husband and predecessor in title, had granted a mourasi pottah to Dwarka Nath Karmokar and Durgachurn Karmokar, defendants Nos. 1 and 2, who had excavated a tank and had also so deteriorated the condition of the land that it was no longer fit for cultivation. The plaintiffs, accordingly, prayed for khas possession by ejectment, and Rs. 300 as damages. The defence set up was that the plaintiffs were estopped by their own conduct; that the suit was not maintainable, as notice to quit was necessary, and no notice had been served; that the tenure was a transferable one; that defendants Nos. 1 and 2 were in possession by virtue of the mourasi pottah granted to them by Hera Chand; and that therefore the plaintiffs were not entitled to damages or to khas possession.

The suit was dismissed by both the lower Courts on the sole ground that notice to quit being necessary and not proved, the suit was not maintainable.

The plaintiffs appealed to the High Court.

Mr. *Woodroffe*, Baboo *Hem Chunder Banerji*, Baboo *Rash Behary Ghose* and Baboo *Uma Kali Mukerji*, for the appellants.

Baboo *Guru Das Banerji* and Baboo *Karuna Sindhu Mukerji*, for the respondents.

Mr. *Woodroffe*, on the question of service of notice, cited the cases of *Papillon* v. *Brunton* (2) and *Lootf Ali Meah* v. *Pearee Mohun Roy* (1). He also referred to s. 16, cl. (*b*) of the Indian Evidence Act, 1872, and pointed out that there was evidence of service of notice.

[683] The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

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* Appeal from Appellate Decree No. 1615 of 1887, against the decree of Baboo Bhugwan Chunder Chatterji, Subordinate Judge of Khulna, dated the 30th of April 1887, affirming the decree of Baboo Bhoobun Mohun Ghose, Munsif of Satkhira, dated the 8th of March 1886.

(1) 16 W.R. 223. (2) 5 H. & N. 518.

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15 C. 681

JUDGMENT.

In this case the service of the notice, which it was sought to effect personally upon the defendant Khetramoni Dasi, was not proved in the opinion of the Courts below, they disbelieving the assertion of a Mahomedan witness who deposed to having actually handed the notice to the party to be served, she being a *purdanashin* woman. The service of the notice in another form was, however, proved, having been effected by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal by the defendant to receive the document. Upon the cases cited before us—*Lootf Ali Meah* v. *Pearee Mohun Roy* (1), and *Papillon* v. *Brunton* (2),—and having regard also to s. 16, illustration (*b*) of the Evidence Act, we think that only a captious doubt could lead us to regard that service as insufficient. The case was dismissed in both Courts on the sole ground that the notice being necessary and not proved the plaintiff could not maintain the suit. Other matters appear to have been gone into and largely discussed,—one, that under the circumstances a notice was not necessary inasmuch as the defendant No. 3, Khetramoni Dasi, having, by her acts, repudiated the relation of landlord and tenant existing between her and the plaintiff, became thereby a trespasser, and that in this suit notice was therefore unnecessary. Now, having decided that notice was duly given, we consider it unnecessary to decide whether a notice was necessary or not, and we express no opinion upon that question at all. It must be treated as not decided upon this appeal or in these proceedings. It is important, however, to record this in our judgment, because manifestly the case between the parties was not completely gone into, and it is desirable that nothing should be said here which would at all interfere with what is, we think, the right of the parties to have on remand, *viz.*, a complete enquiry into all matters legitimately arising in the suit—and amongst them [**684**] this question may be one—without a decision of those matters being in any manner prejudiced or affected by such opinion as may have been come to by the lower Courts during the preliminary enquiries that have as yet alone taken place in this litigation. We, therefore, set aside the decrees of the lower appellate Court and the original Court. We find that the defendant, Khetramoni Dasi, was duly served with notice (Exhibit 2 put in.) We leave for future argument the question whether or not the notice was, in its terms, a proper one, limiting ourselves to holding that the service of it is established, and we remand the case to be re-tried by the original Court upon the whole facts as appear in the pleadings. The parties will be at liberty to adduce such further evidence as they may be advised to bring. The costs of all the Courts will abide the result.

C. D. P. *Appeal allowed and case remanded.*

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(1) 16 W.R. 223. (2) 5 H. & N. 518.

1888
FEB. 15.

PRIVY COUNCIL.

15 C. 684 (P.C.)=15 I.A. 81=12 Ind. Jur. 291=5 Sar. P.C. J. 175.

15 C. 684 (P.C.)=15 I.A. 81=12 Ind. Jur. 291=5 Sar. P.C.J. 175.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

MAHOMED BUKSH KHAN AND OTHERS (*Defendants*) *v.* HOSSEINI BIBI AND OTHERS (*Plaintiffs*).
[9th, 10th, 11th and 15th February, 1888.]

Issues—Inconsistent issues—Undue influence—Mahomedan law of gift—Possession not delivered at the time, but afterwards obtained—Mushaa, mixed, or common property, with shares undistinguished.

The execution of a hibanama having been denied by the plaintiff, a Mahomedan widow and purdanashin, in a suit brought by her to have it set aside as fabricated she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will.

The above questions being inconsistent with one another, the latter should not have been admitted to form part of an issue together with the former.

On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make: (*b*) is or is not improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to make **[685]** the gift originated with the donor, the principles being always the same, although the circumstances may differ.

The hibanama gave an undivided share in mokurari and zemindari holdings, besides other property not reduced into possession, the whole of which had, as a matter of title, devolved upon the donor as a member of a family of which the donees were also members.

Held, that the hibanama did not infringe the Mahomedan dectrine of mushaa, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division, whence it followed that one of three sharers might give his share to the other two. *Ameena Bibi* v. *Zeifa Bibi* (1) referred to and approved.

Held, also, that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the donees had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In regard to the principle and the analogy in other systems of law to be found in the cases relating to voluntary transfers (where, if the donor should not have done all that he could have done to perfect his intended gift, he cannot be compelled to do more) the Hindu case of *Kali Das Mullick* v. *Kanhaya Lal Pundit* (2) was referred to.

[**F.,** 14 Bur. L.R. 65 (66); 10 Bom. L.R. 494 (495); 8 Ind. Cas. 38=15 C.W.N. 328; 3 Ind. Cas. 330=12 C.L.J. 115; 18 A. 1=15 A.W.N. 123; **Expl.,** 5 L.B.R. 251; 23 B. 682; **Appl.,** 8 Ind. Cas. 717 (720); 14 A. 8=11 A.W.N. 21; **Commented upon,** 34 C. 51 **(F.B.)**=4 C.L.J. 437 (439)=1 M.L.T. 364=11 C.W.N. 20; **R.,** 7 Ind. Cas. 166=12 C.L.J. 357; 20 Ind. Cas. 286; 13 M. 549; 24 M. 513=11 M.L.J. 227 (232); 30 M. 519=17 M.L.J. 562 (564)=2 M.L.T. 522; 19 B. 323; 8 Bom. L.R. 921 (928); 13 B. 352; 17 B. 486; 27 B. 31 (39)=4 Bom. L.R. 754; 7 C.L.J. 387 (394); 21 A. 165; L.B.R. (1893—1900), 445; 35 M. 120=14 Ind. Cas. 993 (997); 12 Bom. L.R. 53 (63)=5 Ind. Cas. 633 (635); 86 P.R. 1910=171 P.L.R. 1910=130 P.W.R. 1910=8 Ind. Cas. 307; 13 O.C. 347=8 Ind. Cas. 717 (718); 1910 L.B.R. 251 (255)=9 Ind. Cas. 469 (470); 18 C.W.N. 282 (289)=21 Ind. Cas. 985; **D.,** 14 M. 172; 18 A. 125=16 A.W.N. 1.]

(1) 3 W.R. 37. (2) 11 I.A. 218=11 C. 121.

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APPEAL from a decree (12th September 1884) of the High Court, reversing a decree (7th October 1882) of the Subordinate Judge of Gya.

The suit giving rise to this appeal was commenced by a Mahomedan widow, a purdanashin, who died shortly after, and it was continued by her heirs. The questions now raised were: First, as to the actual execution of a hibanama by her, she having both denied the making of the instrument, and also alleged coercion, and other undue influence, to have been exercised upon her; and, secondly, whether the hiba, if made, was a gift of property so sufficiently ascertained and divided as to be valid by Mahomedan law; and, thirdly, whether, if the gift had been made, the requirements of that law had been fulfilled by possession following the gift.

The hibanama, which was dated 30th May 1881, purported to have been executed by Shahzadi Bibi, who, in the following September, brought this suit to have it set aside. She died [686] shortly after, and was now represented by her heirs. The instrument purported, as a hiba-bil-iwaz (in consideration of a ring given to the donor), to give the whole of Shahzadi's one-sixth share in the estate of her then recently deceased daughter, Omda Begum, to the minor children of the latter, under the guardianship of their father, Mahomed Buksh Khan, who, with them, was a defendant in this suit. The share comprised, among other things, a one-sixth share of an hereditary and mokurari interest in about twenty villages, in pergunnah Shergatti, in the Gya district, which share, having been inherited as the instrument recited, by Shahzadi, was by her given, by a previous hibanama, dated 9th September 1876, to her daughter Omda, then alive. This having led to disputes, an ikrarnama, executed in 1879, gave the possession of nearly all the villages to Nubi Buksh Khan, Shahzadi's husband, who, however, died in that year, or the year following, with the result that Omda became entitled to the whole property given to her by Shahzadi, and more besides, under the rules of inheritance. Omda died on the 14th May 1881, when, under Sunni law, her mother Shahzadi became entitled to a one-sixth share in the whole of her estate. That estate was composed of the one-sixth share in the villages given by Shahzadi to Omda in 1876, with, in addition, Omda's interest in village assigned to her under the ikrarnama of 1879, as well as her interest in property that had been her father's, and was allowed to Omda by a family solehnama, executed on the 14th February 1880, after his death. Omda's estate also comprised her dower due from her husband, Mahomed Buksh Khan, and a part of certain decrees, the whole estate being valued in the hibanama of 30th May 1881 at Rs. 50,000.

This hibanama was alleged by the plaint not to have been executed by Shahzadi. Coercion was also alleged and the prevention of any communication by Shahzadi with her friends. The issue framed raised the questions whether the instrument was genuine and executed by her, or with her knowledge and consent, and whether it was, if executed, obtained by undue influence. The Subordinate Judge of Gya found that the hibanama was genuine, having been "executed with the [687] knowledge, consent, and natural desire of Shahzadi Bibi;" adverting also to the inconsistency of the allegation of undue influence, with the denial of any execution whatever. Disallowing objections to the gift founded on the Mahomedan doctrine of mushaa, and also on the non-delivery of possession by Shahzadi, he dismissed the suit with costs.

On appeal this decree was reversed by a Divisional Bench of the High Court (GARTH, C. J. and BEVERLEY, J.). The judgment of the

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High Court went into the character and effect of the hibanama and the evidence given in support of it. The Judges expressed themselves not satisfied that the document was executed, or that, even if it was, Shahzadi had understood its contents, or had been a free agent at the time.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the High Court had reversed the decree of the Subordinate Judge on insufficient grounds.

Mr. *R. V. Doyne*, for the respondent, argued that the judgment of the High Court was correct in result, according to what this committee had recognized in regard to persons in the position of the alleged donor. Where documents had been executed by secluded women, it must be shown that such persons had acted independently of all constraint and had been able to consult their own legal advisers if they wished to do so, the affirmative being upon those who derived benefit from the transaction. As was said in the judgment in *Greeschunder Lahoree* v. *Bhuggobutty Debia* (1), the Courts in India had always to be careful to see that deeds taken from purda women had been fairly taken, and that a woman executing a deed of gift had been a free agent, and had been duly informed of the effect of what she was about. Even if this hibanama had been executed, there had been no evidence of a satisfactory kind that Shahzadi was a perfectly free agent; and it was for the defence to establish this. On the contrary there was much to show that she was under duress at the time of the alleged making of the instrument. Besides the above, there were two [688] legal objections to the hibanama: First, that Shahzadi was out of the possession of the shares in the mokurari and zemindari interests, the subject of gift, as also of the share in the unpaid dower, and of the share in the money payable under the decree; secondly, that the share of Shahzadi in the above was in property jointly owned by her and by other persons, and such share has not been distinguished from those of the other owners. Such a gift, accordingly, fell within the doctrine of the Mahomedan law in regard to mushaa, or the undivided part of a thing, and was invalid. He referred to Baillie's Mahomedan Law, Book VIII, Chap. 1; Hedaya Book XXX, Chap. 1; and Vol. III, p. 293 of Hamilton's Translation; *Mullick Abdool Guffur* v. *Muleka* (2); and *Amirunnissa Khatoon* v. *Abedunnissa Khatoon* (3), which last case was distinguishable on the ground that specific interests were held, that not being the case here.

Mr. *J. D. Mayne*, in reply, having relied on the evidence to show that the deed was genuine, argued that the Mahomedan law was not contravened by giving effect to this gift. Nor did that law necessarily operate in this instance. The gift could be maintained as a contract, being in itself an equitable act on the part of the mother of the recently deceased Omda towards her children; and he referred to the restriction of 21 Geo. III, c. 70, s. 17, within the local jurisdiction of the Courts in the Presidency towns, as pointed out in the judgment in *Nobinchunder Bonnerjee* v. *Bomeschunder Ghose* (4). He referred also to Act VI of 1871 and its provision in s. 24. However, applying the Mahomedan law, the gift in this instance was of property sufficiently ascertained. On the question of mushaa the case of *Ameena Bibi* v. *Zeifa Bibi* (5) was in point; he referred also to *Mullic Abdool Guffoor* v. *Muleka* (2). As regards

(1) 13 M.I.A. 419 (431).
(2) 10 C. 1112.
(3) 2 I.A. 88=15 B.L.R. 67.
(4) 14 C. 781 (787).
(5) 3 W.R. 37.

possession having been obtained after, but not at the time of, the gift, he argued that the gift had been, nevertheless, completed by acts carrying it out, as far as it possibly could be carried out, the nature of the property being considered. [**689**] The rules of the Mahomedan law, on this head, in insisting on possession being given only enforced a principle that was common to all jurisprudence. To explain the principle, perhaps the most appropriate case was a Hindu one, *viz.*, *Kali Das Mullick* v. *Kanhya Lal Pundit* (1), showing that the mere fact of the donor being out of possession cannot be used to defeat a gift otherwise complete. There, as here, the donor had done all that could be done to complete the gift, which was, therefore, maintainable. He referred also to Macnaghten's Mahomedan Law, Chap. V, p. 51; Baillie's Mahomedan Law, 522; Hedaya, Vol. III, 295, and Vol. IV, 204, *Bahi Khushal* v. *Lakhma Mana* (2); *Ibrahim* v. *Suleman* (3); and *Amirunnissa Khatoon* v. *Abedunnissa Khatoon* (4).

On a subsequent day, 15th February, their Lordships' judgment was delivered by—

JUDGMENT.

LORD MACNAGHTEN.—In this case the suit is brought to recover property contained in a hibanama or deed of gift bearing date the 30th May 1881, and purporting to be executed by a widow lady named Shahzadi Bibi, who is dead. The persons to whom the hibanama purports to convey the property are grandchildren of Shahzadi, the infant children of her daughter Omda, who had died a very short time before. The ground of action alleged by the plaint is that hibanama was a fabricated document, and that the alleged signature of Shazadi was a forgery.

To understand the story and the position of the parties it is necessary to give a short sketch of the pedigree of the family. Shahzadi Bibi was the daughter of Sikundar Ali and Hesamut Bibi; she had two brothers, Nawab Ali and Mannujan. Nawab Ali married a person of the name of Hedyat. Shahzadi Bibi herself married one Nubi Buksh. By him she had only two children, both daughters, Omda Bibi and Hosseini Bibi. Omda Bibi married Mahomed Buksh Khan, and by him had nine children, who are the infant appellants. Hosseini married Rubidad Khan. Mahomed Buksh Khan was the son of Jehangir Buksh Khan. [**690**] Jehangir married a person of the name of Mahamdu. Mahamdu's mother was Hasan Bibi. Jehangir's mother was Rousham Bibi, who also appears to have been the mother of Nubi Buksh and the sister of a lady called Daem Bibi, who was grandmother or in the position of grandmother to Shahzadi.

It appears that from Daem Bibi, Shahzadi derived a property consisting of some 22 villages. In 1876, being then the wife of Nubi Buksh, but living apart from her husband, and apparently not being on good terms with him, she determined to make over this property to her daughter, Omda Bibi. Her general mukhtear at that time was Mahadeo Lal. He seems to have remonstrated against the gift, and to have informed her husband, who also remonstrated. The lady, however, was firm in the purpose, and on the 9th September 1876 she executed a hibanama granting this property to her daughter.

Now there is no question as to the genuineness of that document. It is executed by Shahzadi, by the pen of Mahadeo Lal, her general

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(1) 11 I.A. 218=11 C. 121.
(2) 7 B. 452.
(3) 9 B. 146.
(4) 2 I.A. 88=15 B.L.R. 67.

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mukhtear; but she also authenticates it by writing upon it some words in Hindi: "likha-se janoge," which are said to mean: "From what is written you will know." Among the attesting witnesses were Jehangir Buksh Khan, Jewan Lal, Mahadeo Lal, and Dost Mahomed Khan, who were examined in this suit in connection with the execution of the hibanama of 30th May, 1881. It is not unimportant to observe that it appears by the attestation of the hibanama of 1876 that Dost Mahomed Khan was the person who then identified Shahzadi Bibi, which confirms his statement in this case that he was in the habit of appearing before her.

After that deed was executed disputes arose between Nubi Buksh Khan and Shahzadi. It is said that there were suits, both civil and criminal. Ultimately an arrangement was made on the 22nd December 1876, by which a life-interest in the bulk of the property was secured to Nubi Buksh, and subject to that the hibanama was confirmed. In order to equalize the shares of his two daughters, it appears, that Nubi Buksh, after settling some property on two other children, who were not the children of Shahzadi, gave 10 annas of the rest of his property to Hosseini and 6 annas to Omda.

[**691**] At the end of 1879, or the beginning of 1880, Nubi Buksh died. On his death fresh disputes arose in the family. They were ultimately settled by a deed of compromise bearing date the 14th February 1880. From that time until the present quarrel the parties appear to have lived on good terms. The result of the various transactions which have been referred to was to place the two daughters, Omda Bibi and Hosseini Bibi, on an equal footing as regards the property they derived from their parents. Hesamut Bibi, the mother of Shahzadi, a witness for the respondents, says in her evidence: "Both Hosseini and Omda Bibi were equally rich, one of them was not richer than the other."

Shahzadi Bibi lived at Amas. Mahomed Buksh Khan and Omda lived at Khira. In May 1881 Omda fell sick, and she was moved to a place called Nawadi. Shahzadi went to Nawadi to be with her sick daughter. About four days after she went there Omda died. She died on the 14th May 1881. The body was taken to Madarpore, which was the family burying place and all the immediate relatives, including Shahzadi, went there and stayed at the house of Hasan Bibi during the customary period of mourning, which is nominally 40 days. On the death of Omda, by Mahomedan law, Shahzadi succeeded to a sixth of her estate. Her estate consisted of the 22 villages which were conveyed to her by the deed of September 1876; of other villages which she derived under the arrangement of 1876 and the compromise of 1880; of her dower, which amounted to one lac; and of a decree against Jehangir Buksh Khan, the amount of which is not stated, and which does not appear in their Lordships' opinion to be material for any purpose in the suit. If it had been material no doubt the parties would have taken care to have informed the Court what the amount of that decree was. On the 18th June 1881 the 40 days of mourning ended with the ceremony called "Chehloom." Mahomed Buksh Khan then went to Khira, and took Shahzadi with him. On the 22nd of June it appears that Shahzadi made a complaint before a Magistrate that she was detained there against her will. The Magistrate investigated the complaint, and seems to have thought that it was to a certain extent well founded, and he sent her home to [**692**] Amas under the protection of two constables. She repeated that complaint on the 15th of July, and again on the 25th of that month; but on the 2nd August

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the Magistrate in charge came to the conclusion that there were no sufficient grounds for a prosecution and that if she chose to go on she must act at her own risk. The matter then dropped.

On the 22nd September 1881 Shahzadi filed her plaint in this suit. The only ground of action alleged in the plaint is that the hibanama of 30th May 1881 was a fabricated document, and that her alleged signature was a forgery. On the 12th October 1881 Shahzadi died. The proceedings were continued by her daughter, Hosseini Bibi, and her father and mother, Sykundar Ali and Hesamut Bibi. On the 16th March 1882 issues were settled. Amongst the issues was this: "*2nd*, whether the hibanama on behalf of Shahzadi Bibi is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence?" In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by the plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded. There was another issue which also was only admissible on that assumption, namely: "*3rd*, whether in case the said hibanama is proved to be genuine it is invalid on any ground according to Mahomedan law."

The questions therefore which had to be decided by the Court and which now have to be considered by their Lordships, are three: First, was the deed really executed by Shahzadi? secondly, if so, are there any circumstances which go to prove that it ought not to be held binding upon her? and thirdly, is the gift valid under Mahomedan law?

Now, to take the first question: Was the deed really executed by Shahzadi? It purports to be executed by her by the pen of Mahadeo Lal, who was no doubt for a considerable time her general mukhtear. It puports to bear as her signature the Hindi words which admittedly she wrote on the deed of the 9th September 1876 by way of authenticating that document. Her execution is [693] attested by no less than 21 witnesses, nine of whom, as well as the writer, have been examined in support of the deed. She was a purda nashin lady. There were women inside, and they of course, according to the evidence, could have seen her execute the deed. Three swear they saw the execution; two whose presence is deposed to by several witnesses swear that they were not even in Madarpore. Their evidence, however, is not believed by either Court. Of the male witnesses three, and three only according to the evidence, could have seen the deed executed—Nawab Ali, who died before the hearing, Mannujan, and Dost Mahomed. The others attest the deed on Shahzadi's admission. In the afternoon of the day on which the deed is alleged to have been executed the Sub-Registrar came over and took her acknowlegment. The Sub-Registrar is stated by the Subordinate Judge to be "a respectable and learned person." He deposes that he knew Shahzadi's voice, and that she acknowleged the deed before him.

The Subordinate Judge, who had the advantage of seeing the witnesses, unhesitatingly came to the conclusion that the deed was genuine. He relied principally on the evidence of Mannujan, Mahadeo Lal, and Manwar Ali, the Sub-Registrar. The High Court came to a different conclusion. They say: "We think that a large amount of suspicion attaches to this evidence, and we are not satisfied that the deed was really executed by Shahzadi." Their Lordships cannot consider the judgment of the High Court satisfactory. The learned Judges suspect everybody; they suspect everything. Every one who took an intelligent part in the transaction,

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the dead as well as the living—Shahzadi's relations as well as her son-in-law's dependents; even the Sub-Registrar of the district who attended only in the discharge of his official duties—one and all are alike involved in general and indiscriminate suspicion.

The learned Judges say that they cannot but regard Jehangir Buksh Khan as the prime mover in the matter; and they add: "We cannot help suspecting that this witness had a good deal more to do with the preparation, execution, and registration of this deed than he has chosen to tell the Court." In their Lordships' opinion this witness seems to have answered fairly every question that [694] was put to him, and if his evidence be true, and there is nothing to contradict it, his connexion with the transaction was of the slightest. According to his statement, he was summoned by a letter from Shahzadi to come over and witness the execution of the deed. He came over in the early morning; he spoke to Shahzadi and she spoke to him. She acknowledged that she had executed the deed, and he attested it. Then he mounted his horse and rode away, and that appears to be the only connexion he had with the transaction, except that he is the father of Mahomed Buksh Khan, and Mahadeo Lal was his general mukhtear.

The learned Judges also mention as a matter of suspicion that no independent person seems to have been called in to attest that deed, and that no independent person has deposed in favour of its execution. The latter conclusion is not quite accurate. The Sub-Registrar, whether he is to be believed or not, was unquestionably an independent person, and had no connexion whatever with either side. It is somewhat difficult to understand what is meant by the objection that no independent person was called in to attest the deed. It has not been suggested that any member of the family or any person who would naturally have been present if the deed were genuine was absent on the occasion when it is said to have been executed. Every member of the family with whom we are acquainted, with the exception of Hosseini Bibi and her husband, was present and attested the deed. It would not have been very natural that Hosseini or her husband should have been called in to attest a deed which disappointed their hopes, or at any rate defeated their chance of succession. But, in point of fact, according to the statement of Rubidad Khan, Hosseini Bibi was incapacitated by illness from going to Madarpore. It is stated that she did not go there until the chehloom. Rubidad Khan also states that he was not there, that he was present at the burial, but that from the time of the burial till the chehloom he did not go to Madarpore. It is difficult to see what advantage would have been gained by summoning an independent person to attest the deed. The lady was a purda nashin lady. A stranger would not have been admitted to her presence. The [695] attestation of a stranger who could not have seen her write and who could not have known her voice would have carried the matter very little further.

Then there are three minor matters of suspicion on which the learned Judges comment. They say the draft of the deed was not produced. It is difficult to see what light that draft could have thrown upon the transaction. At any rate, it was not called for. It is said that two letters which are mentioned in the evidence as having been sent by Shahzadi to summon Mahadeo Lal and Jehangir Buksh Khan were also not produced. They were not called for either. The plaintiffs seem to have been satisfied with a statement of what was contained in those letters by the recipient of the one and the writer of the other. Of

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course, if the deed was forged, notwithstanding the publicity connected with it, there could have been no difficulty in forging Shahzadi's signature to a letter.

The learned Judges also observe that it is a remarkabla circumstance that none of the female witnesses who were behind the purda make any direct statement on the point of Shahzadi's writing the words in Hindi. They merely state, say the Judges in general terms, that Shahzadi executed the deed. That observation also does not appear to be quite accurate. The three ladies who were behind the purda, and who gave evidence for the defendants Malik Jehan Bibi, Hasan, and Mahamdu, state that the deed was executed by Shahzadi in their presence. One—and one only—of those ladies was cross-examined upon the point, and her statement in cross-examination is every positive. That is Mahamdu. She says: "The females had witnessed it in my presence. First the females witnessed it and then the males. The signature of Shahzadi Bibi was put in my presence. Shahzadi Bibi ordered Mahadeo Lal to sign for her, and then he signed for her. After that she wrote below it two or four letters in Hindi which she knew." Mahamdu seems to have been the first witness who was examined on behalf of the defendants—certainly the first or second—the other two were not cross-examined upon the point. Their cross-examination appears to have been entirely directed to irrelevant objects.

[696] "Another very suspicious circumstance" in the opinion of the learned Judges is this, that the Hindi words written, or said to have been written, on the deed by Shahzadi Bibi, with the object of authenticating it, are identically the same, letter for letter, as those which are found on the hibanama of 1876. They add: "The fact of these Hindi words corresponding so exactly with those on the deed of 1876, which was apparently not in Shahzadi's possession or produced before her at the time of execution, does certainly raise the suspicion that they were not really written by her, but had been copied by some other person from the former deed."

Now it is material to mention a circumstance which in that passage appears to have been overlooked, namely, that those words occur, not once only, but twice. They were written in the morning, and they were written again in the evening when the Sub-Registrar came over to take Shahzadi's acknowledgment. The Sub-Registrar states that he knew Shahzadi's voice; he states that he read the deed to her. Then he goes on to say: "I asked whether she had executed the deed of gift or not? She said that she had executed it, and it might be registered. On the back of the deed of gift I, at that time, wrote out the registration with my own hand. After that I asked the Mussumat who knew her. The Mussumat said that Nawab Ali Khan and Mannujan Khan, who are her full brothers, knew her. I then asked both of them, and they said that they knew her. After that I wrote out in the deed the identification by both. After that I pointed out to Nawab Ali Khan the place where he should sign for Shahzadi Bibi, and also the place where they should affix their own signatures. After that Mahadeo Lal, mukhtear, signed for Shahzadi Bibi by his own pen, and she also wrote: 'You will know from what is written.' Nawab Ali Khan and Mannujan Khan affixed their signatures. After the signature affixed by Mahadeo Lal, Shahzadi Bibi affixed her signature. I did not make any objection to what Shahzadi Bibi wrote, because on other occasions also when I had taken her admission and made registration she used to write so much

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and I knew that he knew to write so much." Therefore, whether the first signature—that is, the Hindi words—[697] be genuine or not, it is quite plain that these same words were added again in the evening when the Sub-Registrar went over to take Shahzadi's acknowledgment. If the learned Judges of the High Court are right, who was the forger? None of the ladies could write. That is clear. Jehan Lal, the writer of the deed, was not present at the time; he only came up just as the Sub-Registrar was going away. The only males who, according to the evidence, saw the lady on that occasion were her brother Nawab Ali and Mannujan. Mannujan cannot write. So that the words must either have been written by Nawab Ali or by the lady herself. There is not the slightest ground to suspect Nawab Ali of any fraud or forgery, and therefore it appears to be the necessary conclusion that the words must have been written by the lady herself.

When the cloud of suspicion in which the High Court has enveloped the transaction has been cleared away, the evidence in favour of the genuineness of the deed is absolutely overwhelming. There is no evidence whatever on the other side.

There is nothing but Shahzadi's assertion that she did not execute the deed—an assertion in which no doubt she persisted from the time she complained to the Magistrate down to the time of her death.

Their Lordships think that the Subordinate Judge was right in relying on the evidence of the Sub-Registrar and of Mahadeo Lal, the mukhtear, with whose character the Subordinate Judge also seems to have been acquainted. He says he " holds a diploma, and is a respectable person in his community, and the Court has never seen any act of his by which it can suspect him." Mannujan broke down on cross-examination. The Subordinate Judge attributes his confusion entirely to illness, and apparently the Civil Surgeon and Assistant Civil Surgeon of the district certified to that effect. Be that as it may, their Lordships think that it would not be safe to rely on Mannujan's evidence, except so far as it is corroborated by other witnesses and they consider that more reliance is to be placed on the fact that the signature of Shahzadi was identified by her brother Nawab Ali, who seems to have been in a superior position to Mannujan. He was a person of education, and appears to have been trusted by other [698] members of the family. The mother, Hesamut, employed him to receive for her the allowance which her husband was condemned to pay, and she says: " I was on good terms with Nawab Khan. There was no misunderstanding between us at any time, I had confidence in him." Certainly if this deed was a forgery he must have known all about it, but what possible reason can there be to suspect him of having been a party to such a gross fraud? In their Lordships' opinion there is none. It is not necessary to go further into the evidence. It is sufficient to say that their Lordships have come to the same conclusion as the Subordinate Judge, that the deed was really executed by Shahzadi.

Then comes the question, was the deed executed under such circumstances that it ought not to be allowed to stand? Duress and coercion may be laid out of consideration. The witnesses who spoke to anything of that kind were discredited by both Courts. But there remains the more subtle form of undue influence. Their Lordships desire not to say a word which could interfere with the settled principles on which the Court acts in considering the deeds of purdanashin ladies, or could tend to lessen the protection which it is the duty of the Court to throw around those who are unable to protect themselves. They do not forget that this

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lady was a purdanashin lady. They do not forget that at the time of the execution of the deed she was living in more than ordinary seclusion; that she was in very deep distress; and that she was surrounded by the members of that branch of the family to which the objects of her bounty more immediately belonged. But bearing all these things in mind, and reviewing the whole evidence, they come to the conclusion that the lady knew perfectly well what she was doing, and that in every sense the act was her own act.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same, though the circumstances differ; and as a general rule, the same questions arise. The first and practically perhaps the most important question is, was the transaction a righteous transaction—that is, was it a thing which a right-minded person might be expected to do? Can there be [699] any doubt about the answer to that question? Shahzadi made a settlement on Omda. Omda was her favourite daughter, and had a large family. By an untoward and unlooked-for event a share of Omda's fortune which was principally derived from that settlement devolves on Shahzadi. To her the acquisition of property by her daughter's untimely death seems to have been an odious and repulsive thing, and she determines as soon as possible to give it back to her daughter's orphan children. Was there anything unnatural in that? It appears to their Lordships to have been a most natural act, and one which a right-minded person would be disposed to do.

Then there comes the question—was it an improvident act? That is to say, does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? Upon that Mr. Doyne made some forcible observations. He said that by the earlier hibanama this lady had stripped herself of all that she possessed; that she had reduced herself to penury; that then by accident a portion of the property came back to her; and he insisted that it was an improvident act on her part to divest herself immediately of that pittance when she had nothing else to live upon. Now that case is not made by the evidence. There does not appear from first to last any complaint on the part of this lady that she was reduced to poverty. Nor was her position that of a pauper. She had a house of her own; she had servants; she comes in a dooli; so far as the evidence goes she had enough for her wants, and her wants as a widow were probably very small. It does not, therefore, appear to have been a transaction so improvident as to show that it was not her own act.

Then was it a matter requiring a legal adviser? What could have been simpler than what she desired to do? She was not apportioning her property among the members of her family; she was not determining how much she could spare; but when property came to her by this sad accident she says: "I will have none of it." What could a legal adviser have told her? If he had advised her to wait till she left the house where Mahomed Khan was, if he had told her to place herself between two [700] fires, and allow Rubidad Khan on the one hand and Mahomed on the other to urge the claims of their respective children, she would not have benefited much by the advice.

Lastly, did the intention of making the gift originate with Shahzadi? Upon that there is positive evidence and there is negative evidence. The positive evidence is very strong, but the negative evidence appears to be stronger still. Mahadeo Lal, who was unquestionably her general mukhtear

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as long as she had any property to deal with, and who was employed by her to prepare this deed, says: "I went to Shahzadi Bibi at the deori for condolement, and then Shahzadi Bibi told me this: 'I had at first given my property in writing to my daughter Omda Bibi, but now owing to her death one-sixth share devolves upon me. As I have no hope of living long, I do not like to take the estate of Omda Bibi. I wish to give that share to her sons and daughter. Please write out a draft of hibanama.'" In cross-examination he says even more positively that it was her own doing, and that he prepared the hibanama by her own direction.

Then Mahamdu (*sic*) says this in cross-examination: "Shahzadi Bibi herself commenced to talk about the hiba. I do not recollect how many days after going to Madarpore conversation took place about the hiba. But she had spoken of it after ten or fifteen days. Shahzadi Bibi first spoke about the hiba to me and other females. Shahzadi Bibi said: 'I had already given in writing during the lifetime of my daughter. Now she is dead, and a share has devolved upon me. How can I snatch it from grandsons and granddaughters? The children have become motherless. I will again give them in writing.' We told her: 'It is your pleasure. You have got a share; you may do with it whatever you like.'" There is not a scrap of evidence to show that the idea was suggested to her by Mahomed Buksh Khan or any one else. And it is a circumstance not to be overlooked that Mahomed Buksh Khan did not obtain any benefit personally for himself.

But the negative evidence is still stronger. No case of undue influence was set up by Shahzadi. The plaint is based on forgery and forgery alone. The question of undue influence was introduced for the first time in the issues; but although it was introduced then, it was not accepted by the family. We find [**701**] that on the application for registration, which took place a few days after the issues were settled—the date is the 23rd March 1882—the sole averment still is that the deed was a forgery. It is somewhat singular that, although the ladies who were examined as witnesses for the defendants were the first witnesses who were examined, and they stated that Shahzadi executed the deed of her own free will and without undue influence, the ladies on the other side who came forward a month afterwards to give evidence preferred to state what both Courts have held to be absolutely untrue, namely, that they were not present at Madarpore at all—they preferred stating that to admitting that they were present and trying to make out a case of undue influence, which they must have known then would have been fatal to the deed if it could be proved.

Their Lordships therefore hold that the suggestion of undue influence is not proved.

There remains the question whether the gift was good by Mahomedan law. On that two points were made. In the first place it was said to be open to objection on the Mahomedan doctrine of mushaa, which appears to be this: that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion. But it appears to be settled by Mahomedan law that if there are two sharers of property, one may give his share to the other before division. That seems to be established by a passage in Macnaghten's Precedents, Case XIII, which was adopted in the case to which Mr. Mayne referred of *Ameena Bibi* v. *Zeifa Bibi* (1).

(1) 3 W.R. 37.

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Now, if one of two sharers may give his share to the other, supposing there are three sharers, what is there to prevent one of the three giving his share to either of the other two? Mr. Doyne was asked what confusion that would introduce. Mr. Doyne took refuge in the doctrine itself, which he said was a very refined doctrine. To extend it to this case would be a refinement on a refinement, amounting, in their Lordships' opinion, almost to *areductio ad absurdum.*

The other point was, that the gift was invalid because possession was not given. That subject was considered in a case which [702] came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pundit* (1). There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanama itself authorises the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time. That view seems to be supported by a passage in Macnaghten's Precedents, Case X, where the question was: If property left by two brothers devolve on the widows, "are the widows entitled to dispose of their late husband's property by gift, and if they have to dispose of their late husband's property by gift, and if they have a right to do so, is the deed of gift executed by them in favour of one of the husband's heirs available in law?" Then it is stated that, "although the widows at the time of the execution of the deed of gift were not seised of the property, yet, if agreeably to their desire, the donee, in pursuance of a judicial decree, became subsequently seised thereof, the fact of the doners having been out of possession at the time of making the gift is not sufficient to invalidate it."

Their Lordships, therefore, are of opinion that the appeal ought to be allowed, and that the decree of the High Court ought to be reversed and the decree of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The respondents will pay the costs of the appeal and the costs in the High Court. The deposit of 300*l.*, which was made by the appellants, will be returned.

C. B. *Appeal allowed.*

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

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(1) 11 I.A. 218=11 C. 121.

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CIVIL.

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15 C. 703.

[703] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

CHINTAMONI MAHAPATRO (*Plaintiff*) *v.* SARUP SE AND ANOTHER (*Defendants*).* [5th July, 1888.]

Limitation Act (XV of 1877), s. 10—Auction-purchaser—Assignee of trustee.

An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an *assignee* of the trustee within the meaning of that term as used in s. 10 of the Limitation Act (XV of 1877), and consequently a suit against such a person by a plaintiff claiming to be entitled as trustee to possession of the trust property is governed by the ordinary rules of limitation and not excluded therefrom by the provisions of s. 10.

[R., 21 B. 257 (267); 27 B. 500 (511)=5 Bom. L.R. 303.]

THE plaintiff in this case sued to recover possession of certain land, and for a declaration of his right thereto, alleging that the land was the *debutter* property of an idol, Gopi Nath Jeo, of which he was one of the *shebaits*. He alleged that the land in suit had been sold in execution of a decree obtained against his father by the defendant No. 1, and purchased by the defendants in 1873; that it was *debutter* land and inalienable; that immediately after the sale his father died leaving him a minor, and that his age was on the 6th October 1885, the date of the institution of the suit, only nineteen years and four months; and that his cause of action arose on his completing his eighteenth year. The suit was admittedly instituted more than twelve years after the defendant's purchase.

The defendant contended that the suit was barred by limitation, and also by *res judicata*, as the plaintiff's uncle, one Gora Chand Mahapatro who was also a *shebait* of the idol, had sued them to recover possession of the land on the same ground as that alleged by the plaintiff, and that his suit had been dismissed. On the merits they stated that the property never was charged with the maintenance of the idol, and that the idol did not exist.

[704] The Munsif decided the case in favour of the plaintiff and gave him a decree in the terms asked for.

He held that the suit was not barred by *res judicata*, as the plaintiff was not the representative of his uncle, and was not bound by the decree in that suit; that it had been proved that the property in suit was the *debutter* property of the idol and that the defendants purchased it with notice that it was charged with the maintenance of the idol; that consequently art. 134 of sch. II of the Limitation Act did not apply to the case, as the assignees purchased with notice of the trust, and that s. 10 of the Act saved the suit from being barred by limitation.

On appeal the decision of the Munsif was reversed by the Subordinate Judge, who without going into the merits of the case held that the suit was barred by limitation. The material portion of the judgment of the Subordinate Judge was as follows:—

"In the lower Court, defendants' pleader relied upon art. 134 of sch. II of the Limitation Act, which provides a period of 12 years from the

* Appeal from Appellate Decree, No. 2422 of 1887, against the decree of Baboo Dwarka Nath Bhuttacharji, Subordinate Judge of Midnapore, dated the 6th of August 1887, reversing the decree of Baboo Akhoy Coomar Sen, Munsif of Tumlook, dated the 24th of June 1886.

date of the purchase, and as more than 12 years have elapsed since the date of the defendants' purchase, it was contended that the suit had become barred. The learned Munsif overruled this contention on the strength of s. 10 of the Limitation Act; but I do not think this ruling is correct. Section 10 makes an exception in favour of assignees for valuable consideration. The Munsif says the assignees purchased the property with notice of the trust. The present Limitation Act makes no difference between purchase with notice and purchase without notice. In Act IX of 1871 we find the words 'a purchaser in good faith for value,' but in framing Act XV of 1877 the Legislature deliberately expunged the words 'good faith' (*vide* speech of the Honourable Mr. Stokes on the passing of the Limitation Bill).

"Respondents' pleader, without supporting the Munsif's argument, very ingenuously says: 'Art. 134 has no application here.' His argument is that when a trustee conveys trust property to a third person he commits a breach of trust, and the beneficial owner can at once sue for the property, and art. 135 applies; but when the sale is effected, not by the trustee, but [**705**] against his will by the Court, the person beneficially interested may wait till the purchaser takes possession, and in fact no cause of action accrues until adverse possession is taken by the purchaser. This is a good argument, but the language of art. 134 is wide enough to cover the case of an auction sale.

"Granting, however, that art. 144 governs the case, the suit must still be held to be barred. Adverse possession began from the date of the defendants taking possession, and defendant swears that he took possession within six or seven months of his purchase. There is nobody to contradict defendant, and thus it appears that defendant's adverse possession began more than 12 years before suit. Again plaintiff says his father died in 1280. His witness Shambhu Ram says plaintiff's father died in 1280 or 1281. Another witness of plaintiff says that when defendants took possession plaintiff's father was either lying ill or dead. I am not satisfied that plaintiff's father had died when defendants took adverse possession, and I cannot rely upon the loose and random statement of the witness Mohendro, who is very hostile to defendant. Plaintiff's witness Thakur Das says that defendant is in possession since 1280 or 1281. The cause of action, therefore accrued to plaintiff's father more that 12 years before suit. The suit therefore is barred by limitation, I do not enter into the merits at the request of the respondents' pleader."

The suit accordingly being dismissed the plaintiff now preferred this second appeal to the High Court.

Baboo *Nil Madhub Bose*, for the appellant.

Baboo *Gopal Chunder Ghosal*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—We think that the finding of the lower appellate Court to the effect that this case is not governed by s. 10 of the Limitation Act is correct. The meaning of that section, as I understand it, is to declare that as a general rule trust property shall not be subject to any law of limitation; that no length of time shall bar an action to recover such property; but that when trust property finds its way into the [**706**] hands of an assignee for valuable consideration, the ordinary law of

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limitation shall apply; that the assignee shall have the same benefit as an ordinary purchaser of property, not trust property, would have. In this case the defendant was an auction-purchaser; and the question is, whether he is an assignee within the meaning of s. 10. We think that the lower appellate Court has rightly held that an autcion-purchaser is an assignee within the meaning of that section. It was suggested by the learned pleader for the appellant that the word "assigns" must be read as governed by the word "his" in the section; and that the assignee must be a direct assignee of the trustee.

I do not think we should be justified in, nor is there any authority for, giving that limited meaning to s. 10. We think that the Subordinate Judge was quite right in the view he took of s. 10.

Whether art. 134 or art. 144 applies to this case, I do not think it is necessary for us to express any opinion at all. If the Subordinte Judge is wrong in thinking that art. 134 is wide enough to cover the case of an auction sale, at any rate, it is admitted that art. 144 applies; and if art. 144 applies, the plaintiff's claim is barred, as the Subordinate Judge finds that the cause of action accrued to the plaintiff's father more than 12 years before suit.

The appeal must therefore be dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 706.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

OLIULLAH (*Plaintiff*) *v.* BACHU LAL KHOTTA (*Defendant*).*
[11th June, 1888.]

Practice—Second appeal—Vakeel, Right of, to be heard without certified grounds of appeal or without any order admitting the appeal—Rules and Orders of Court (Appellate Side), 86 and 162.

A vakeel will not be heard on behalf of an appellant on second appeal when neither duly certified ground or grounds of appeal have been filed, nor the appeal been admitted by order of Court under Rules 86 and 162 of Court.

Kishen Chunder Roy v. *Hurrish Chunder Bose* (1) followed.

[**707**] THIS suit, which had been brought in 1882 in the Court of the Munsif at Sealdah by Oliullah against Bachu Lal Khotta for the recovery of possession of a piece of land as part of wakf property, was remanded for retrial by the High Court on 11th February 1885.

The remand order was carried out, and on the 27th August 1885 the Munsif partially decreed the suit. On appeal the District Judge reversed the decision of the Munsif, dismissing the suit with costs. The plaintiff appealed to the High Court. The grounds of appeal were filed by the plaintiff in person.

Baboo *Okhoy Coomar Banerjee*, for the appellant.

Mr. *Dunne*, Baboo *Amarendra Nath Chatterji* and Baboo *Karuna Sindhu Mookerji*, for the respondent.

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* Appeal from Appellate Decree, No. 2457 of 1887, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 8th of August 1887, reversing the decree of Baboo Karuna Das Bose, Munsif of Sealdah, dated the 27th of August 1885.

(1) 3 W.R. 216.

At the hearing a preliminary objection was taken on behalf of the respondent to the appearance of a vakeel for the appellant on the ground that no certified grounds of appeal had been filed on behalf of the appellant; and the case of *Krishen Chunder Roy* v. *Hurish Chunder Bose* (1) was cited in support of the objection.

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15 C. 706.

The judgment of Court (PIGOT and RAMPINI, JJ.) so far as it is material to this report, was as follows:—

JUDGMENT.

In this appeal a preliminary objection is taken to the appearance of the learned vakeel on behalf of the appellant. The appeal was presented by the appellant in person. There is no certificate by a vakeel that there are good grounds for the appeal; and a case decided by Bayley and Phear, JJ., *Kishen Chunder Roy* v. *Hurish Chunder Bose* (1), is cited as showing that, under such circumstances, a vakeel will not be heard by this Court. Further, it appears upon enquiry by us that no order of the Court, such as is contemplated by Rule 86 and Rule 162, which refers to and keeps it in force, has been passed admitting the appeal. Under these circumstances the appeal has got on the Board without any guarantee whatever, either by a certificate from a vakeel or an order of a Judge after considering the case, that it is a proper case to be set down for hearing in second appeal, and we must wholly decline to entertain it. The case must therefore be struck out of the list.

The appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

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15 C. 708=13 Ind. Jur. 108.

[708] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Gordon.

UPOMA KUCHAIN AND ANOTHER (*Defendants*) *v.* BHOLARAM DHUBI (*Plaintiff*).* [28th May, 1888.]

Hindu Law, Marriage—Sudras—Inter-marriage between persons of different sections of the Sudra caste, Validity of.

There is nothing in Hindu law prohibiting marriage between persons belonging to different sections or sub-divisions of the Sudra caste.

Narain Dhara v. *Rakhal Gain* (2), *Inderun Valungypooly Taver* v. *Ramasawmy Talaver* (3), and *Ramamani Ammal* v. *Kulanthai Natchiar* (4) referred to.

[**F.**, 3 L.B.R. 244; 72 P.R. 1908=47 P.W.R. 1908=64 P.L.R. 1908; **R.**, 22 B. 277 (279): 1 Bom. L.R. 144; 7 M.L.T. 17=26 M.L.J. 49=5 Ind. Cas. 42=33 M. 342 (346); 11 Bom. L.R. 822.]

BHOLARAM DHUBI brought this suit against his wife Nichali Kuchain (defendant No. 2) and his mother-in-law Upoma Kuchain (defendant No.1) for the restitution of conjugal rights. In Bysack 1290 (April-May 1882) the plaintiff was married to Nichali Kuchain in the district of Sibsagur in Assam. The plaintiff was the son of a man of the Dhubi caste by a Koch woman. Nichali's mother, defendant No. 2, was a Keot,

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*Appeal from Appellate Decree, No. 2061 of 1887, against the decree of H. Luttman-Johnson, Esq., Judge of Assam Valley District, dated the 7th of July 1887, affirming the decree of Baboo Prosonno Coomar Ghose, Extra Assistant Commissioner of Golaghat, dated the 30th of June 1886.

(1) 3 W.R. 216. (2) 1 C. 1. (3) 13 M.I.A. 141. (4) 14 M.I.A. 346.

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but having lived with a Bengali she was outcasted. The plaintiff and the defendant Nichali were, however, regarded as Sudras.

The defendants resisted the suit on the grounds that there was no marriage; and that the marriage, if contracted, was invalid in law, as the contracting parties belonged to different castes.

The Court of first instance held that the marriage had been duly solemnized according to Hindu rites; and that there was no rule of law which declared marriages between persons belonging to different sections of the Sudra caste invalid. Accordingly the Court decreed the suit with costs.

The defendants appealed to the Judge of the Assam Valley District, who dismissed the appeal on the grounds that the Hindu law of marriage did not apply to keots and Kochs in Assam; and that the parties in this case had been married in as formal a manner as persons in their position in life were usually married, [**709**] and the defendant Nichali had given no sufficient reasons for refusing to be bound by her contract.

The defendants appealed to the High Court.

Baboo *Jogendra Nath Ghose* (for Baboo *Shama Churun Pal*), for the appellants.

Baboo *Jogesh Chunder Roy*, for the respondent.

The judgment of the Court (MACHPERSON and GORDON, JJ.) was as follows:—

JUDGMENT.

This is a suit by a husband against his wife for restitution of conjugal rights. The parties are residents of the district of Sibsagur in Assam, where the marriage was contracted; the plaintiff is a Dhubi or washerman, and the defendant is a fisherwoman. The defence in the lower Court was, first that there was no marriage; and, secondly, that the marriage, if contracted, was invalid in law, as the contracting parties belonged to different castes.

The Munsif held, first, that the marriage had been celebrated according to the usual Hindu rites and secondly there was no rule of law which would make an intermarriage between persons belonging to different sects or sub-divisions of the *Sudra* caste invalid.

The case was then carried on appeal before the Judge of the Assam Valley District, who has disposed of the matter in a very summary way. He gets over the question as to the validity of the marriage by holding that the Hindu law of marriage does not apply to *Kochs* and *Keots* in Assam. He then goes on to hold that the parties in this case were married in as formal a manner as persons in their position in life are usually married. The effect of his judgment is to uphold the Munsif's finding that a proper marriage ceremony had been performed. The Judge cites no authority for holding that the Hindu law of marriage does not apply to the particular classes to which these persons belong, and if the Hindu law does not apply, it is not apparent under what law, or under what custom, this marriage was celebrated. Admittedly there is no evidence of any custom on the record; and it was the case of the plaintiff that the marriage was celebrated according to, and consistently with, Hindu law; [**710**] and it was the case of the defendant that, inasmuch as the Hindu law did apply, the marriage was invalid. No party for a moment contended that the Hindu law was not applicable. The Judge was, we think, not right in disposing of the matter in this extremely summary manner.

The question remains, however, whether, according to Hindu law, this was a valid marriage. It was contended on the authority of a judgment of Mr. Justice Mitter in the case of *Narain Dhara* v. *Rakhal Gain* (1) that marriage between two persons belonging to different sub-divisions of the *Sudra* caste is invalid. But that, we think, amounted to no more than an expression of opinion. The opinion of Mr. Justice Mitter was dissented from by Mr. Justice Markby, and the case was not decided on that ground. We further think that the opinion there expressed is inconsistent with the decision of the Judicial Committee of the Privy Council in the case of *Inderun Valungypooly Taver* v. *Ramaswamy Talaver* (2). The question there was whether the plaintiff, being illegitimate, and therefore as it was argued, of no caste at all, could contract a legal marriage with a person of the *Sudra* caste, and their Lordships said: "Their Lordships are not aware that there is any authority—there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the *Pundits;* and though their Lordships do not agree in everything that has been stated in the High Court of appeal, they are satisfied that in the *Sudra* caste illegitimate children may inherit and have a right to maintenance; and that in this very instance the illegitimate father of the mother of the plaintiff, as well as his daughter, were treated as members of the family; and, on the whole, seeing that these parties are both of the *Sudra* caste, and that the utmost that has been alleged really is that the *zemindar* was of one part of the *Sudra* caste, and the *lady* to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule, which ought not to be countenanced.

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[**711**] The same view was taken in the case of *Ramamani Ammal* v. *Kulantha Natchiar* (3). There a similar objection having been taken, their Lordships said (p. 352): "On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the *Sudra* caste."

We think that those decisions are conclusive as to there being no rule of law rendering such marriages invalid. It is true that the cases referred to were cases from the Madras Presidency; but it has not been shown to us that in this respect any principle of Hindu Law followed in that Presidency is inapplicable to the Presidency of Bengal; nor has any case or any authority from ancient writers been cited to show that such marriages are invalid. Mr. Mayne in his work on Hindu Law treats such marriages as obsolete; and most probably they are so in the more advanced parts of Bengal, in which castes have become sub-divided in such a way that the sub-divisions are regarded as distinct castes in themselves. But the facts that these marriages are not resorted to is no ground for holding that they are invalid according to law. Our attention was also called to another case—an unreported one—(Reg. Ap., 274 and 322 of 1886), which came before Mr. Justice Wilson and Mr. Justice O'Kinealy. In that case it was not necessary to decide the precise point which is now before us, but both the learned Judges intimated very distinctly their opinion that, if it were necessary to dissent from the opinion of Mr. Justice

(1) 1 C 1. (2) 13 M.I.A. 141. (3) 14 M.I.A. 346.

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Mitter, in the case to which we have referred, they would have done so. We hold, therefore, that there is nothing in the Hindu Law prohibiting a marriage between the parties to this suit.

The appeal is dismissed with costs.

C. D. P. *Appeal dismissed.*

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15 C. 708 =13 Ind. Jur. 108.

15 C. 712.

[712] CRIMINAL REFERENCE.

Before Mr. Jutice Wilson and Mr. Justice Tottenham.

DHIKU AND ANOTHER (*Complainants*) *v.* DENO NATH DEB *alias* DINU AND ANOTHER (*Accused*).* [18th May, 1888.]

Appeal in Criminal case—Cattle Trespass Act (I of 1871), *s.* 22*—Illegal seizure of cattle.*

No appeal lies from an order under s. 22 of Act I of 1871, awarding compensation for illegal seizure of cattle.

Queen-Empress v. *Raja Lakshma* (1) followed (2).

[F., 19 M. 238.]

THE accused were charged in this case with the wrongful seizure of some cattle belonging to the complainants, and under s. 22 of the Cattle Trespass Act (1 of 1871) were fined by the Honorary Magistrate of Sylhet—Denonath, Rs. 20 and Bogra Rs. 15, which fines were ordered to be paid to the complainants as compensation.

The accused appealed to the Deputy Commissioner, by whom the finding and sentence of the Magistrate were set aside.

The case was submitted by the Sessions Judge of Sylhet to the High Court under s. 438 of the Criminal Procedure Code, on the ground that the order of the Deputy Commissioner had been made without jurisdiction, as he had no power to entertain the appeal. The Judge referred to the case of *Queen-Empress* v. *Raja Lakshma* (1), in which it was held that no appeal lay in such a case.

No one appeared on the reference.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows: —

JUDGMENT.

We think that the ruling of the High Court of Bombay in *Queen-Empress* v. *Raja Lakshma* (1), to which the Sessions Judge refers, is one that should be followed, and that no appeal lay to the Deputy Commissioner. We set aside his order and direct that the order of the first Court be restored.

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* Criminal Reference No. 135 of 1888 made by R. H. Greaves, Esq., Sessions Judge of Sylhet, dated the 28th of May 1888, against the order passed by G. Stevenson, Esq., Deputy Commissioner of Sylhet, dated the 6th of February 1888.

(1) 10 B. 230. (2) See also *In re Gunesh Pershad*, 3 N.W. 200.

15 C. 713.

1888 June 29.

Civil Reference.

15 C. 713.

[713] CIVIL REFERENCE.

Before Mr. Justice Macpherson and Mr. Justice Gordon.

Bisva Nath Shah (*Plaintiff*) v. Naba Kumar Chowdhary (*Defendant*).* [29th June, 1888.]

Small Cause Court (Provincial). jurisdiction of—Provincial Small Cause Court Act (IX of 1887), sch. II, *arts.* 2, 41, 42 *and* 44—*Suit for costs paid by one of two persons jointly liable.*

N. C. granted\a lease of three plots of land to *B.S.* The heirs of the former lessee brought a suit against *N.C.* and *B.S.* to recover possession of the same three plots of land. The suit was decreed with costs; and the costs, amounting to Rs. 80 and annas 5, were recovered from *B.S.* alone. Thereupon *B.S.* brought this suit against *N.C.* in the Court of Small Causes at Pubna for the recovery of that amount.

Held, that the suit was one which did not come under arts. 2, 41, 42 or 44 of sch. II, Act IX of 1887, and was cognizable by the Small Cause Court.

[F., 28 A 292=A.W.N. (1906) 6=3 A.L.J. 6.]

Reference under s. 617 of the Code of Civil Procedure by the Judge of the Court of Small Causes at Pubna.

Bisva Nath Shah (the plaintiff) brought this suit to recover from Naba Kumar Chowdhary (the defendant) the sum of Rs. 80 and annas 5, the amount of costs, awarded against Bisva Nath and Naba Kumar in a previous suit (in which they were defendants), but recovered from Bisva Nath alone.

It appears that the defendant had granted to the plaintiff a lease to three ryoti holdings which were situated in the defendant's putni taluk.

The heirs of a former lessee brought a suit against the plaintiff and the defendant for the recovery of possession of the three holdings. They obtained a decree, and recovered the whole amount of the costs from the plaintiff alone.

The plaintiff alleged that the defendant had induced him to take a lease of the holding through misrepresentation; that he had persuaded the heirs of the former lessee to bring the above suit, and had given evidence in their favour at the trial.

The plaintiff further alleged that, at the instigation of the defendant the whole amount of the costs had been recovered by [714] distress and sale from the plaintiff; and contended that it was recoverable from the defendant on equitable grounds.

The defendant, on the other hand, contended that the plaintiff had no cause of action in respect of the whole amount claimed, and even assuming that he had, the suit being one for contribution, the Small Cause Court had no jurisdiction to try it.

The Judge dismissed the suit, contingent on the opinion of the High Court on the questions, assuming the suit to be one for contribution: (1) whether it came within the scope of sch. II of the Provincial Small Cause Courts Act, 1887, and (2) whether, having regarded to art. 2 of that schedule, it was cognizable by a Court of Small Causes.

No one appeared on the reference.

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* Civil Reference No. 10-A of 1888 made by Baboo Bulloram Mullick, Judge of the Court of Small Causes at Pubna, dated the 19th of April 1888.

1888 JUNE 29.

CIVIL REFERENCE.

15 C. 713.

The opinion of the Court (MACPHERSON and GORDON, JJ.) was as follows:—

OPINION.

We are of opinion that art. 2 of the second schedule of Act IX of 1887 (Provincial Small Cause Courts Act) has no application to the present case, and that the suits for contribution which the Small Cause Court has no jurisdiction to try are those specified in arts. 41 and 42, or which might come under art. 44. The present case does not come under any of these articles. We think, therefore, the Small Cause Court has jurisdiction to deal with the case, and we set aside the order of the Judge, and direct him to proceed with it.

C. D. P.

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15 C. 714.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Gordon.

HIRA LAL DAS FOR SELF AND AS EXECUTOR FOR HIS MINOR BROTHER, KANAI LAL DAS (*Plaintiff*) *v.* MOTHURA MOHUN ROY CHOWDHRY AND OTHERS (*Defendants*).* [9th July, 1888.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 53—*Established usage, meaning of.*

The words "*established usage*" in s. 53 of the Bengal Tenancy Act, 1885, do not refer to a practice previously prevailing between the landlord [715] and his tenant, but to the established usage of the pergunnah in which the holding is situate.

[**F.**, 21 C. 132 (134); **R.**, 7 C.W.N. 687 (689).]

SUIT for the recovery of arrears of rent in kists.

Hira Lal Das brought a suit in the Court of the Third Munsif of Perozepore, on behalf of himself and as guardian of his minor brother Kanai Lal Das, against Mothura Mohun Roy Chowdhry and seven others for the recovery of arrears of rent, road and public works cesses, due for the first or Assar kist of the year 1293 B.S. (1886) in respect of a taluk held by the defendants under the plaintiffs' zemindari.

The plaintiffs alleged that the defendants held the land under a gurbundobasti kobala jumma payable by four kists or instalments, *viz.*, Assar, Assin, Pous and Cheit; and that the Assar kist for 1293 (June 1886) was due from the defendants, which they refused to pay. The plaintiffs contended that by s. 53 of the Bengal Tenancy Act, 1885, rent was payable in four kists in the absence of usage which made it payable in more or less than four instalments. On the other hand, the defendants, none of whom filed a written statement, contended that the suit was not maintainable on the ground that by the established usage of the pergunnah, as contemplated by s. 53, rent was payable not in kists, but at the end of the year. They adduced evidence in support of the usage; and also relied on the judgment and decree in a previous suit for rent in respect of the

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* Appeal from Appellate Decree, No. 2256 of 1887, against the decree of Baboo Kedar Nath Mozumdar, Subordinate Judge of Backergunge, dated the 30th of July 1888, reversing the decree of Baboo Bidhu Bhoosan Chuckerbati, Munsif of Perozepore, dated the 27th of December 1886.

same taluk between the plaintiffs and defendants, in which the Court had held that rent was payable annually. 1888 JULY 9.

The Munsif was of opinion that s. 53 of the Bengal Tenancy Act made rent payable in four equal instalments, except when there was an agreement or established usage by which it was payable in more or less than four instalments, but that in no case could the rent be payable annually. He held that the defendants had failed to prove the usage they relied upon, and that the rent was payable in four kists; and decreed the suit accordingly. APPELLATE CIVIL. 15 C. 714.

On appeal by the defendants the decision of the Munsif was reversed by the Subordinate Judge, who held that s. 53 provided that money rent was payable in four equal instalments in the absence of agreement or established usage of payment at the end of the year. He also held the decree in the previous suit [716] to be "conclusive evidence of argeement or established usage between the parties that the defendants are to pay rent at the end of the year and by kists." He therefore decreed the appeal.

The plaintiffs appealed to the High Court.

Mr. *W. M. Das* and Baboo *Rajendra Nath Bose*, for the appellant.

Baboo *Bhubon Mohan Das*, for the respondents.

Mr. *Das*.—Under the new Rent Act (s. 53, Act VIII of 1885) money rent is payable by a tenant in four equal instalments unless there be an agreement or established usage to the contrary. Under the old Rent Act (s. 21. Bengal Act VIII of 1869), in the absence of any agreement or established usage, the rent was payable annually. The onus, therefore, is now thrown on the tenant to prove by agreement or established usage that he is liable to pay rent not by four equal instalments, but annually. The Judge has wrongly held the decree in the previous suit to be "conclusive evidence of agreement or established usage." He is also wrong in his interpretation of the words "established usage." As to the right meaning of those words see *Chytunno Chunder Roy* v. *Kadar Nath Roy* (1).

Baboo *Bhubon Mohan Das* submitted, on behalf of the respondents, that the decree in the former suit precluded the appellants from recovering the rent in kists.

The judgment of the Court (PIGOT and GORDON, JJ.) was as follows:—

JUDGMENT.

We think the judgment of the Subordinate Judge must be set aside and the appeal allowed. The Subordinate Judge treats the decision between the parties in the former suit, whereby an annual kist was decreed, as conclusive evidence of agreement or established usage between the parties. We think he has made two mistakes. That decree is not any evidence whatever of agreement between the parties. There was a dispute between them as to the time at which the rent was payable, and a decree was made in accordance with the law existing at the time ordering payment of rent [717] yearly. This negatives, so far as it has any effect, such inference as might be drawn as to the existence of an agreement from the fact of yearly payments, as it explains them. Secondly, the Subordinate Judge refers to established usage *between the parties*, plainly treating that as within the scope of s. 53 and using the words "between the parties" as

(1) 14 W.R. 99.

1888 JULY 9. — APPELLATE CIVIL. — 15 C. 714.

if they were in s. 53. That might be an useful addition to the Act, but the words are not there, and the words "established usage" in that section refer not to a practice previously prevailing between the parties, but to the established usage of the pergunnah in which the property is situate. The decree of the lower appellate Court is set aside and that of the Munsif restored with costs throughout. This decision will apply to appeals Nos. 2257 and 2258 of 1887.

C. D. P. *Appeal allowed.*

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15 C. 717 (P.C.)=15 I.A. 99=12 Ind. Jur. 289=5 Sar. P.C.J. 186.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

BHAGBUT PERSHAD SINGH AND OTHERS (*Defendants*) *v.* GIRJA KOER AND OTHERS (*Plaintiffs.*) [15th February, 1888.]

Hindu Law, Alienation—Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose--Burden of proving the nature of the debt.

The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose.

The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt.

A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title and interest of the debtors, but of the property being such interest. On the other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint.

[718] *Held,* in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities.

[**F.**, 17 C. 584 (**P.C.**); 15 B. 293 (296); 12 A. 99; 11 M.L.T. 142=(1912) M.W.N. 453=14 Ind. Cas. 69; 18 C.W.N. 42 (43); 36 B. 68=13 Bom. L.R. 1161=12 Ind. Cas. 949 (950); **Expl.**, 34 C. 735=11 C.W.N. 613=5 C.L.J. 569; **Rel. on.** 17 C.W.N. 280 (288)=17 C.L.J. 38 (47)=18 Ind. Cas. 625; 19 Ind. Cas. 878 (880)=17 C.W.N. 1022 (1024); **R.**, 14 B. 320 (326); 9 A.W.N. 142; 13 A. 216=11 A.W.N. 57; 20 B. 338 (344); 1 O.C. 53 (55, 59); 3 Bom. L.R. 322; 27 C, 724; 4 Bom. L.R. 587; 25 A. 214=23 A.W.N. 21 (**F.B.**); 29 M. 200 (**F.B.**)=1 M.L.T. 28=16 M.L.J. 69 (72); 28 A. 508=3 A.L.J. 274 (302)=A.W.N. (1906) 117; 34 C. 642=2 M.L.T. 207=11 C.W.N. 593=5 C.L.J. 491; (**F.B.**) 34 M. 188=8 Ind. Cas. 1072 (1080)=9 M.L.T. 235=(1910) M.W.N. 799=21 M.L.J. 320; 34 C. 184=5 C.L.J. 441=11 C.W.N. 294 (295); 34 C. 941=6 C.L.J. 237=11 C.W.N. 959 (963) (**F.B.**) 31 A 176 (226)=6 A.L.J. 263=1 Ind. Cas. 479; 105 P.W.R. 1908=55 P.R. 1908; **D.**, 15 B. 87 (89)]

APPEAL from a decree (21st June 1883) of the High Court affirming a decree (8th June 1881) of the Subordinate Judge of Patna.

1888 Feb. 15.

PRIVY COUNCIL.

15 C. 717 (P.C.) = 15 I. A. 99 = 12 Ind. Jur. 289 = 5 Sar. P.C. J. 186.

The appellants were the sons and representatives of Punnu Singh, deceased, against whom this suit was brought, he having in his lifetime purchased, at several sales in execution of decrees against the respondents' fathers, the family estate in which the respondents now claimed their shares. This family estate was a five-anna four-pie share of mouzah Bazidpur Dhanki, in the Patna district. The question raised by this appeal was whether, after the sales of this estate in execution, the interests of the sons of the judgment-debtors could be recovered from the purchaser in consequence of the nature of the debts.

Under successive sales in 1879 fractional parts of the family share in Bazidpur Dhanki were sold in execution of decrees obtained by different creditors against three brothers living jointly, each with their families in the same coparcenary, *viz.*, Jhaller Singh, Pertab Narain Singh, and Roghuburdyal Singh, the sons of Sumbhu Dut Singh. Three sons of each of the above three brothers, some of the sons being minors, now represented by their respective mothers, sued Punnu Singh, the purchaser of the share in Bazidpur Dhanki, to obtain a decree for their interests, inherited under the Mitakshara, in the family estate. They joined as co-defendants with the purchaser their three several fathers, and the wives, besides claiming as guardians of the minor sons, claimed their own interests also.

The plaint alleged that the income of the ancestral estate was sufficient for the family, and that there was no necessity for the loans contracted by the fathers; but that the latter by dissipation and extravagance wasted the income, and had taken loans on the security of the ancestral estate, the mahajuns having lent without due inquiry. It also stated that the order [719] issued for possession, on the application of Punnu Singh, was only in respect of the right, title and interest of the judgment-debtors, the fathers, but that he had taken possession of the entire share of five annas and four pies in Bazidpur Dhanki, and the claim was that "in case the purchase of defendant No. 1, Punnu Singh, in respect of the rights and interests of the fathers should be held valid, then that the plaintiffs might be put into possession of their legal shares by partition, and that mesne profits and interest might be awarded."

In his written statement Punnu Singh alleged that the loans were taken for necessary expenses and the payment of former debts, the maintenance and education of the minors, and expenditure in suits. Of these loans the plaintiffs had derived the benefit, some of them, moreover, not having been born at the time when the family "became involved in debt."

At the same time that they instituted this suit (30th September 1880) the plaintiffs brought another against other purchasers of portions of the joint family estate at other sales.

The Subordinate Judge tried the two suits together, and dealing with the issues in both, which raised the question of the nature of the fathers' debts, he found that the plaintiffs had not proved that "the monies which were borrowed were applied specially for licentious purposes." At the same time he found that the defendants had failed to prove that there was any necessity for the loans, or that the defendants had inquired into the necessity of them "to such an extent as a cautious man would have inquired." He also found that five of the plaintiffs had not been born until after the date of the decree. Having rejected the claims of the latter, the Subordinate Judge held that the others were entitled to decrees for their shares, "not having been parties to the suit in which the

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auction sale had taken place, and thus having been unable to protect their rights."

He accordingly made the order for the division of the ancestral estate as set forth in their Lordships' judgment.

In both suits the purchasers of the family estate appealed to the High Court, of which a Divisional Bench, Mitter and Wilkinson, JJ., gave judgment in both appeals, referring in the judgment in this case to what was applicable in [720] the judgment delivered in the other. The view taken by the Judges of the facts was that on the one hand the defendants had not proved that the monies borrowed were required for family necessities, and on the other, that the plaintiffs had not established that they were applied to immoral purposes, though the conduct of the three brothers had been shown to have been immoral.

They referred to *Deen Dayal* v. *Jugdeep Narain Singh* (1), and held the plaintiffs entitled to the decree as made by the Subordinate Judge, the purchaser having bought with knowledge of their claim. They therefore affirmed the judgment of the Subordinate Judge.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellants, contended that the purchaser at the execution sale was entitled to the entire share in the village as sold and certified to have been sold. The Courts below had concurred in finding that the debts in satisfaction of which the family estate had been sold had not been incurred, or shown to have been contracted, for immoral purposes. The purchaser was not bound to look behind the decree under which the sale took place, nor to prove any necessity for the loans, nor that inquiries had been made by the creditors before making them. He referred to *Nanomi Babuasin* v. *Modhun Mohun* (2); *Hanuman Pershad Panday* v. *Baboo Munraj Koer* (3); *Girdhari Lal* v. *Kantoo Lal* (4); *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (5).

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the High Court in a suit brought by the widows of Baboo Jhaller Singh, Baboo Pertab Narain Singh, and Baboo Roghuburdyal Singh, on behalf of themselves and the infant children of their respective husbands, to recover possession of property which had been [721] purchased by the first defendant, Baboo Punnu Singh, under certain orders made in execution against the three husbands. The property which was the subject of this suit, namely, a five annas four pies share of Bazidpur Dhanki, was ancestral property governed by the Mitakshara. The husbands by four bonds had charged the five annas four pies share with certain debts. One of those bonds was given by one of the husbands alone, namely, Jhaller. The decree under which the first sale in execution took place was on a judgment upon a bond given by the three husbands to secure a certain sum of money lent to them, and by which they charged by way of mortgage, as security for the amount lent, the five annas four pies share. They were sued, not only to recover the money out of their general assets, but in the first place to have it realized out of the five annas four pies share. The decree was that the money should be recovered out

(1) 4 I.A. 247=3 C. 198. (2) 13 C. 21=13 I.A. 1. (3) 6 M.I.A. 424.
(4) 1 I.A. 321=14 B.L.R. 187. (5) 6 I.A. 85=5 C. 148.

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of the property charged, and the five annas four pies share was attached in execution of the decree, and was sold in execution. The sale was confirmed by the Court, and the confirmation recites that the action had been brought for the recovery of a certain amount, and "as the right and interest of Baboo Jhaller Singh, and Baboo Pertab Narain Singh, and Roghuburdyal Singh, judgment-debtors, in the undermentioned land, or immoveable property, were sold on the 6th October 1879, in execution of this decree through the bailiff of the Court of the Judge of Patna, and as seven days have elapsed and no objection is filed, it is ordered that the said auction sale be confirmed, and the said sale is confirmed by this order." Then at the foot of the certificate of confirmation the property is stated to be the five annas four pies share of the mouzah Bazidpur Dhanki, so that there can be no doubt that by the bond under which the sale took place that property was charged; the debt was decreed to be recovered out of the property; the property was attached; the property was sold, and the sale was confirmed as to the property itself. Therefore it was not a mere sale of the right, title, and interest of the debtors. It was the sale of the property being the right, title, and interest of the debtors.

The suit was brought by the widows on behalf of themselves and the children to set aside the sale entirely; and they also [722] prayed that possession might be awarded in respect of the whole five annas four pies share; and secondly: "In case the purchase of defendant No. 1,"—that is, the purchase of Punnu—"in respect of the right and interest of defendants Nos. 3 to 5 (that is, the three husbands), be held valid, then your petitioners might be put in possession of their legal share by partition."

The case was tried by the Subordinate Judge, and he gave a decree in favour of the plaintiffs for the shares to which he considered the claimants would be entitled if a partition had been made. His judgment is in the Record, and his order is: "That the case of the plaintiffs be decided with this detail that the claim of five of the plaintiffs" naming them—"be dismissed with costs." Those were five of the children who were not in existence when the bonds were executed. There is no appeal on the part of those children with regard to the dismissal of their claim. Then upon the claim of the widows and the other children he ordered that the property "be divided into fifteen shams,"—which means fifteen shares,—"of which twelve shams be declared to be the property of the plaintiffs and three of Ghaller, Pertab, and Roghubur that each of the plaintiffs mentioned above do get possession of one sham, and the remaining shares, that is to say, the shares of the three husbands, remain in the possession of the defendants."

Upon that there was an appeal to the High Court, and the Court gave their judgment on the 21st of June 1883. For their reasons they referred to a judgment they had given in another suit. The effect of the judgment was that although the defendants had failed to prove that the loans in respect of which the bonds were executed were required for family necessities, still the plaintiffs had equally failed to establish that they were "applied to immoral purposes;" that the lenders did not make any proper enquiry which a prudent lender would make to satisfy himself as to the necessity of the loans. As to the evidence of immoral and extravagant conduct of the husbands, the High Court said: "Although the witnesses examined by the plaintiffs give a somewhat exaggerated account of it, yet we

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are on the whole satisfied that these persons were leading a life of debauchery and sensuality; and if the lenders had made proper [723] inquiry they would have found that the necessities of the loan arose from their improper and immoral way of life. The lower Court seems also to be of this opinion. The Subordinate Judge in one portion of his judgment says: 'The mere bad conduct of Jhaller, Pertab, and Roghubur is not sufficient to resume the property.' But the lower Court thinks that the evidence adduced is not sufficient to establish that the amounts borrowed under the aforesaid bonds were actually applied to immoral purposes. In this opinion we also concur." It therefore appears that the High Court thought that, although the bonds were not proved to have been given for monies advanced for improper purposes, still the lenders of the money who had sued and recovered their judgments had not made proper inquiries to ascertain whether there was an actual necessity for the loans. But it must be borne in mind that this was not a case of a joint family consisting of brothers, but it was one consisting of fathers and children; and it has been held that sons are liable to pay the debts of their fathers, unless incurred for immoral or illegal purposes.

That principle was laid down by the Judicial Committee in the case of *Suraj Bunsi Koer* v. *Sheopershad Sing* (1), where a ruling of Chief Justice Westropp (2) was referred to with approbation, in which he said; "Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather." Colebrooke's Dig., Book I, cap. I, par. 167, and *Girdhari Lal* v. *Kanto Lal* (3) were cited as authorities for the proposition, and in a subsequent part of their Lordships' judgment the decision in the case of *Kantoo Lal* is summed up in the words following: "This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions: First, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or [724] under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

Now, although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to show that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the children to show that the debt was contracted for an immoral or illegal purpose. If it was necessary to show that the debt was so contracted, the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of *Suraj Bunsi Koer* v. *Sheo persad Singh* (1) it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose.

(1) 6 I.A. 104=5 C. 148. (2) 11 B.H.C.R. 83. (3) 1 I.A. 321=14 B.L.R. 187.

In the case of *Nanomi Babuasin* v. *Madun Mohun* (1) the principle laid down in the previous case was adopted; and at page 17, L. R., 13 I A., in the judgment of their Lordships, it is said: "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is no conflict of authority." It appears, therefore, from the decisions that now in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity.

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PRIVY COUNCIL.

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[725] Under these circumstances their Lordships think that the judgment of the High Court was an erroneous one, and they will humbly advise Her Majesty that that judgment and the judgment of the Subordinate Court, in so far as it was adverse to the appellants, should be reversed, and that the suit be dismissed with costs in both those Courts. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

C. B.

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15 C. 725 (P.C.)=15 I.A. 127=12 Ind. Jur. 377=5 Sar. P.C.J. 150=Rafique and Jackson's P.C. No. 102.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Lord Macnaghten, Sir B. Peacock and Sir R. Couch.

[*Three appeals and a cross-appeal from the Court of the Judicial Commissioner of Oudh.*]

INDAR KUNWAR AND ANOTHER (*Defendants*) v. JAIPAL KUNWAR (*Plaintiff*). [20th, 24th, 25th, 26th, January and 10th March, 1888.]

Will, Contruction of—Oudh Estates Act (I of 1869), ss. 8, 13 and 22—Unregistered will of talukdar—Meaning of "Maharani Sahiba" as applied to wife or wives—Decree for maintenance to widow under the will on which her suit was based, though her claim was for a different relief—Costs.

A talukdar, who died childless, but leaving two widows, bequeathed, by an unregistered will, to the "Maharani Sahiba" his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption.

Held, that to determine whether the will referred, in such bequest and power, only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with

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(1) 13 I.A. 1=13 C. 21.

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PRIVY COUNCIL.

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his views, as evidenced by his conduct, and his will generally. *Abbott* v. *Middleton* (1) referred to and followed.

As his views appeared to favour single heirship, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one, and the donee of the power to adopt being one: *Held*, that accordingly the words "Maharani Sahiba" were not here used as a collective term for both widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both.

[726] *Held*, also, that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. 1 of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukdari as out of the non-talukdari estate of the testator.

Held, also, that this had been rightly decreed to her, as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed. *Held* also, that the difficulty of construction having been caused by the testator himself, and in regard to the circumstances and position of the parties, costs would come out of the estate.

[R., *22* C. i (3) (P.C.); *26* A. *393* (P.C.)=8 C.W.N. *699*=11 Bom. L.R.; 516=1 A.L. J. 381.]

THREE appeals and a cross-appeal, consolidated and heard as one, from a decree (27th March 1886) of the Judicial Commissioner of Oudh, reversing a decree (3rd October 1884) of the District Judge of Fyzabad.

These appeals arose out of a suit (3rd December 1883) relating to the will of the late Maharaja Sir Digbijai Singh, K.C.S.I., talukdar of Balrampur, who died on the 27th May 1882, leaving two widows, of whom the senior adopted a son to him in 1883. This suit was brought by the junior widow, now respondent in appeals preferred by the defendants, against the senior widow and adopted son, claiming joint proprietary possession of a moiety of the late Maharaja's moveable and immoveable estate under his will, which was not registered within the thirteenth section of the Oudh Estates Act I of 1869, governing so much of the testator's estate as was talukdari. The principal questions of these appeals were: (1) the effect of ss. 13 and 22 of the above Act in regard to the junior widow's taking any benefit under a will not registered as the Act required; and (2) the construction of the will in regard to the use of the words "Maharani Sahiba," *viz.*, whether by them the late Maharaja indicated the junior widow, as included in that expression, or the senior widow alone. The Courts below differed as to the latter question, the first Court holding that the junior widow had no right to more than the maintenance allowance given her by the will, while the Judicial Commissioner held that her right to the beneficial enjoyment of her husband's estate was equal to that [727] of the senior widow. When leave to appeal to Her Majesty was granted an order was made in execution by the Judicial Commissioner (22nd June 1886), which came before their Lordships in *Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar* (2).

The late Maharaja, whose property, on account of his loyalty as talukdar of Balrampur, was exempted from the confiscation of March 1858, caused his name to be entered in lists II and V (3) of the lists prepared in accordance with s. 8 of the Oudh Estates Act, 1869, and it so

(1) 7 H. L. C. 389. (2) 14 I.A. 1=14 C. 290.

(3) List II is of the talukdars whose estates, according to the custom of the family, on or before the 13th day of February 1856, ordinarily devolved upon a single heir.

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remained during his life. He married his senior wife, Maharani Indar Kunwar, in 1860, and the Maharani Jaipal Kunwar, his second wife, in 1877; but had no issue.

The Maharaja's will on the 15th March 1878 was executed and attested in the manner prescribed by s. 19 of Act I of 1869, more than three months before his death, and was deposited in the Registration Office of Lucknow, under s. 42 of the Registration Act, III of 1877. This deposit was made under the belief that it was a registration within the meaning of Act I of 1869, s. 13 (1). The will was written in the Hindi character, by a [728] servant, Ram Shunker, deceased in 1882, in the same year as the Maharaja. The will, as translated by the Judicial Commissioner, omitting the preamble, and certain charitable and religious bequests, was as follows:—

"At this time, that is to say up to the date of the writing of this document, I have no issue by my Khas Mahal; but by the mercy of Almighty God, I am not yet without hope. If, by the favour of Almighty God, issue should be born of my Khas Mahal, whether it be of the senior or of the junior Maharani Sahiba, then let it be owner of the entire riasat and of all the property, moveable and immoveable, like myself, without the writing of any will. Perchance at some time I may lose hope of issue by my Khas Mahal; then in that case I have power to adopt whom I please; and having executed a deed in due form I will cause it to be verified by the Government, and let that adopted son, as if he were an actual son, be the owner after me of the entire riasat like myself; provided that after the adoption no issue be born of my Khas Mahal, for in that case let the issue of my Khas Mahal be considered the owner of the riasat and of all the assets, moveable and immoveable, and let the adopted son have nothing to do with it, only let that adopted son be held entitled to receive food and raiment by way of maintenance during his life; and let not the amount of this maintenance exceed six thousand (6,000) rupees yearly. Should I have no issue by my Khas Mahal and in my lifetime find no opportunity to adopt, then in that case, without aliening moveable assets, let the Maharani Sahiba after me be during her/their lifetime the owner of the entire riasat and of the property moveable and immoveable. There is to the Maharani Sahiba full authority to select, and within two years to adopt according to the custom of the family, and according to the Hindu law, such minor male child of my family as she/they may think fit. Should (God forbid) the said adopted son die in his minority, then again there is authority to the Maharani Sahiba to make a second adoption

List V is of the grantees to whom sanads or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture.

(1) Act I of 1869, s. 13, provides that "no talukdar or grantee, and no heir or legatee of a talukdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to any person not being either (*a*) a person who, under the provision of this Act, or under the ordinary law, to which person of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukdar or grantee, heir or legatee, had died intestate; or (*b*) a younger son of the talukdar or grantee, heir or legatee, in case the name of such talukdar or grantee appears in the third or fifth of the lists mentioned in s. 8, except by an instrument of gift, or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

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according to the above conditions; and let that adopted son be, in place of an actual son, the owner of the entire riasat and the assets, moveable and immoveable, seated on the throne like myself. No one else can have any sort of claim; but may Government have a care that in accordance with the above detail and decision, a son be adopted by the Maharani Sahiba within two years. Should, peradventure, the Maharani Sahiba die without adopting any son, or should that adopted son die in his minority, or without issue and intestate, then in that case let that person of my family be owner of my riasat and of all and several moveable and immoveable property, who may be lawfully held entitled according to the custom of the riasat. It will be proper for Government, during the minority of the heir, to manage, as Court of Wards, all the assets of the riasat, with such advice and arrangement that the opinion of the District Officer and the Maharani Sahiba and some Agent who is fit and a well-wisher of the riasat be associated therewith in order that the settlement of the riasat and welfare of the ryots may prosper. Let the minor heir be well educated and let the necessary expenses of the riasat be met as may on occasion be expedient. Besides the expenses of the [729] riasat let the two Maharani Sahiba receive for their personal expenses form the money of the riasat according to the subjoined detail-fifty, five thousand rupees a year and let the two Maharani Sahiba spend this as each may please. This is the detail—the Bari Maharani Sahiba thirty thousand (30,000) rupees, and the Choti Maharani Sahiba twenty-five thousand (25,000) rupees. Let the rest of the cash assets, and the moveable property, remain in the treasury of the riasat, under the care of the Guardian of the Court of Wards; and on the heir attaining his majority let him make over to the said heir all the cash assets of the riasat, and the property, moveable and immoveable, and let that heir be like myself, the owner of the entire riasat, seated on the throne. It will be proper for my representatives to maintain for ever according to the instructions, and to provide according to the subjoined detail for such expenditure as is prescribed, on account of the alms-house, and dispensary and school, and worship at the Shrine of Bijulipur, and the marriage of maidens of the Janwar lineage, and may Government always take care that this endowment subsists; let it never be discontinued."

The parties accepted this translation as correct, except where the words "her"/"their" and "she"/"they" appear. The senior widow contended in her appeal that they should have been " her " and " she " only. After the death of the Maharaja the senior widow obtained an order for " dakhil kharij," or mutation of names, in the Revenue Register at the Collectorate, in her favour, as being entitled to the property under the will. She obtained a certificate also under Act XXVII of 1860 to collect the debts. And on the 8th November 1883 she publicly adopted the minor Udit Narain Singh, the son of Guman Singh, who already, on the previous 26th October, had executed a deed by which he made a gift of his son for the purpose of his being so adopted under s. 22, cl. 8 of Act I of 1869. By that deed Guman agreed that the senior widow should retain control of the estate, and should have the power, if need should arise, of ejecting his son, and of adopting some one else in his place.

On the 5th December 1883 the senior widow executed a deed acknowledging the adoption, and registered it. It stated: "The said adopted son will be the proprietor of the said estate [730] and property both moveable and immoveable, like a real son." On the 28th March

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however she executed another document stating that the adopted son would only succeed to the Bulrampur estate after her death; and on the 8th April 1884, Guman Singh executed a deed acknowledging that what was stated in the last document, in regard to the succession, was correct.

Meanwhile, the junior widow filed her plaint, stating that her husband held bequeathed to his wives, both of them, the proprietary right for life in the entire estate, giving permission to them both to adopt; that, therefore, the adoption was illegal; and that the plaintiff was entitled to (*a*) partition of the moveables into two equal shares, and delivery to herself of one share; (*b*) joint proprietary possession in equal shares of the immoveable property; and (*c*) mesne profits of the latter share from the date of the Maharaja's death. The written statement of the senior widow relied on the non-registration of the will, and an exclusive bequest to herself. She alleged that the power to adopt was to her alone, the Maharaja having, as he was competent to do in regard to the general estate, barred the operation of the ordinary Hindu law by his will; and that under the Oudh Estates Act I of 1869 the plaintiff could not claim to inherit any part of the taluqdari. The defendant Udit Narain Singh, through his guardian *ad litem* the other defendant, repeated the above defence, adding that, even if the action of the late Maharaja in barring the operation of the ordinary Hindu law could be disregarded, still the plaintiff's claim, so far as it was based upon Hindu law, must fail by reason of the fact that by the immemorial custom of the family none of the family property was partible; also that the plaintiff was not competent to challenge the validity of his—Udit Narain Singh's—adoption, nor could his status, or his rights to the property, be matter for adjudication in this suit; and that he had been validly adopted.

The District Judge fixed issues raising the main questions, whether the junior widow was entitled to the moiety claimed by her upon the construction of the will and in regard to non-registration, and also whether the adoption of Udit Narain by the senior widow was invalid on account of its having been effected by her alone.

[**731**] In his judgment he stated that it was admitted by both parties, and accorded with the decision in *Abdul Razzak* v. *Amir Haidar* (1), that the will had not been registered as s. 13 required, the mere deposit at the registration office not having been sufficient. In regard to the effect of non-registration he held that the junior Maharani was a person who would have succeeded to an interest in the Maharaja's estate if he had died intestate, referring also on this point to the last mentioned case, and to *Ajudhia Baksh* v. *Rukmin Kunwar* (2). Going through the will, he remarked that the testator appeared to have sought to render it easy of construction, and that it was not going too far to say that if he had directed the servant, Ram Shunker, to write of the senior widow as "Bari Maharani," this suit would not have been occasioned by the parties attempting to establish their own meaning for the words "Maharani Sahiba."

As to the meaning of those words, he had regard to the ordinary notions of Hindus in respect of the following, *viz.*, that the widow is considered half of the husband bodily; that if he dies, leaving more than one widow, they share his property, though it is considered as vesting in one individual; and that, in the Sanskrit texts, widows are spoken of, in the singular number, as one person. He referred to Macnaghten's Hindu

(1) 11 I.A. 121=10 C. 976. (2) 11 I.A. 1=10 C. 482.

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Law, Chap. II, Inheritance; Viramitrodaya, Chap. III, part 1; Colebrooke's Dayabhaga, Chap. XI. But he was of opinion that other considerations outweighed the effect of these. Admitting extrinsic evidence to remove what he considered to be a latent ambiguity, there being two persons, in fact, to whom the description applied, he held that it applied to the senior widow alone.

He accordingly decreed to the junior widow the annuity of Rs. 25,000 from the date of the adoption, and dismissed the residue of her claim against both defendants.

An appeal to the Judicial Commissioner against this judgment and decree was made by both parties, the appeal of the senior Maharani and of the adopted son Udit Narain being limited to [732] the award of the annuity which they contended had not been asked for by the respondent in the suit, and if asked for could not have been granted to her by reason of ss. 13 and 24 of Act I of 1869.

On the 30th June 1885 the Judicial Commissioner, under s. 566 of the Code of Civil Procedure, remitted the case for the trial of certain additional issues which he thought necessary, directing the District Judge to take such further evidence as might be required, and he allowed the junior widow to be heard in support of her claim as based upon Hindu law.

These issues, in effect, were as to what part of the property in suit was governed by the provisions of Act I of 1869; whether the claim had reference to Hindu law; and whether the rights of the adopted son could be disposed of in this suit.

The District Judge returned a statement of the talukdari estate, and a further judgment that the claim was governed by family custom and by the will, with reference to the provisions of Act I of 1869; and that the rights of the adopted son could not be determined in this suit, they existing both as against the senior and the junior widow, the latter being only competent to dispute the validity of the adoption so far as to show that it was not in accordance with the will.

The above judgment and decree were reversed by the Judicial Commissioner, who found that the Maharaja, when he used the words "Maharani Sahiba" in his will, used them as a Hindu would use them in the general sense of the word "wife," and as including both his wives. It appeared to the Judicial Commissioner that the only contingency on which the junior widow would become entitled to the allowance of Rs. 25,000 was the Government's complying with the Maharaja's wish that it should take over the management of the estate on the adoption of a son.

After giving the meaning of "Maharani," the judgment continued thus:—"In the opening of the third part of the will the change from Khas Mahal Maharani Sahiba comes in, and from the way in which it is made it is plain that the Maharaja uses the words as an Englishman would have used the words 'my widow.' Should I have no issue by my [733] Khas Mahal, and in my 'lifetime find no opportunity to adopt, then in that case . . . let the Maharani Sahiba after me be, &c.' And in the language of the Shastras the word 'wife' (widow) designates the class. Thus we read in the Mitakshara (passage omitted in Colebrooke's translation, on which subject see note in Mayne, s. 468; the text is given in 3 Madras H. C. at page 451). 'There (in that order) the first to inherit is the wife (patni); is she who is made by marriage . . . . singular number, because the class is denoted.' And in the Viramitrodaya (Chapter III, Part I, s. 2) we read: 'The singular number (in the term

'patni' in Yajnavara's text, s. 1) implies the class.' And again (*ibid*, s. 10); 'The wives of the same class with the husband shall take the estate, dividing it amongst themselves.' Hence the singular number in the term 'wife' is to be taken to be used with the intention of designating the 'class.'

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"It seems to me impossible to read the letters addressed by the Maharaja to his two wives without feeling that, although he treated the senior Maharani with respect, his fondness was greater for his younger wife, and that the Maharaja, when making his will, was favourably disposed towards the junior Maharani is evident from the provision which he made for her maintenance in the fifth part of his will. Few were better acquainted with the provisions of Act I of 1869 than the Maharaja, and the last clause of s. 25 of that Act provides that, 'in the case of a junior widow of the deceased, the maximum amount of the annuity shall be one-half of the maximum amount to which a senior widow of the deceased would be entitled under the former part of this section.' The Maharaja, however, when allotting the Rs. 55,000, which he assigned to 'the two Maharani Sahiba,' gave the junior Maharani only Rs. 5,000 less than to the senior Maharani. He gave the senior Maharani Rs. 30,000, and the junior Maharani Rs. 25,000. Under the Hindu law a widow to whom a power to adopt has been given cannot be compelled to execute that power—*Bamun Das Mukerjea* v. *Musammat Tarinee* (1) and *Uma Sunduri Debi* v. *Surobini Debi* (2); and the Maharaja showed by appeal to Government to see his wishes carried out, that he felt the precariousness of his position in this respect. On the theory of the respondents, if the senior Maharani had died without adopting, the junior Maharani could not have adopted; and the Maharaja died testate, having provided by his will (fourth part) that if the Maharani Sahiba died without adopting, the next heir, according to the custom of the family, should take the estate. Even if the senior Maharani did adopt, it was by no means certain—the event has shown it to have been improbable—that Government would comply with the Maharaja's wishes, and take over the estate on the adoption of a son, the only contingency on the occurrence of which the junior Maharani would become entitled to her [734] allowance of Rs. 25,000 a year. In no case was it likely that for at least two years would even this remote contingency occur. "Is it then conceivable that the Maharaja, with his evident wish to treat his younger wife favourably, would have executed a will which, if the contention of the respondents regarding its meaning be correct, would have left the junior Maharani—certainly for two years, probably for ever—to the pittance, not exceeding Rs. 3,000 a year, which the provisions of s. 26, Act I of 1869, would procure for her? To me this seems inconceivable; and in face of the fact that when the Maharaja (in the fifth part of his will) was allotting his widows' allowances he alloted to the junior Maharani Rs. 25,000 per annum, I find it impossible to hold that this was the Maharaja's meaning. The only construction of the will which makes it consistent throughout is, as it seems to me, that which supposes the Maharaja's intentions to have been that, till the event contemplated by the fifth part of the will, both the widows should enjoy the estate.

"The securing a male heir by adoption on failure of actual issue is the central idea of the Maharaja's will. At the time of the execution of the will the age of the Maharaja was about 60, and (assuming their ages to be correctly stated in their mukhtarnamahs filed in this suit) the ages of

(1) 7 M.I.A. 169 (190). (2) 7 C. 288=9 C.L.R. 83.

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the Maharanis were,—senior maharani 41, junior Maharani 19. The Maharaja had not then met with the accident which ended in his death, and probably looked forward to another ten or fifteen years of life. By that time his elder widow would have become old and his younger widow would have reached mature age. The Maharaja was most careful to provide for all possible contingencies in his will, and one cannot suppose that these contingencies, did not strike him. Is it conceivable that, with two persons capable (the one on failure of the other) of performing his wishes as to the adoption, the Maharaja would have excluded one of those persons, and so reduced the chances of his wishes being fulfilled? And yet that is what we must suppose if we hold that the words ' Maharani Sahiba ' in the third part of the will denote the senior Maharani only. If, on the other hand, we read the words Maharani Sahiba as meaning ' my wife (widow) in the ordinary Hindu sense of the words, *i.e.*, as comprising the class, there is no difficulty at all, and the will is consistent throughout.

" It has been said the Maharaja was careful to explain that by Khas Mahal he meant both ladies; why then, if by Maharani Sahiba he also meant both ladies, was he not equally careful to protect his meaning as regards the words ' Maharani Sahiba '? The answer is obvious. The words ' Khas Mahal,' ' Chief Consort,' left unexplained, might, contrary to the Maharaja's intentions, have not unnaturally been restricted to the senior Maharani. As regards the words ' Maharani Sahiba ' a term common to both the ladies, there was no such danger, and no explanation was therefore needed."

Regarding the adoption, the Judicial Commissioner was of opinion that the junior widow could dispute it, but only so far as to show that the adoption was not in accordance with the Maharaja's will. His judgment continued thus:—

" I am of opinion that the plaintiff is not competent to challenge the validity of adoption, so far as the fact that it was effected without her consent is [**735**] concerned, but that it is open to her to show, if she can, that it was otherwise invalid. I think that the plaintiff is not competent to challenge the validity of the adoption on the ground that she did not consent to it, because adoption is a religious ceremony, and the senior widow is therefore the proper person to perform it."

" The point as regards co-widows, and their powers in the matter of adoption, seems never to have been directly raised in the Courts of the North-Western Provinces, Bengal, or Madras; but as regards the right of the elder widow to precede the younger in the performance of religious duties, we have authority in the text books current in those provinces. Thus we read in Jagannatha's Digest of Hindu Law, translated by Colebrooke (Edition Madras 1874, Vol. II, page 124)—' Yajnyawalkya: If there be several wives of his own class, such duties are lawfully performed by no other than the eldest. Chandeswara and Vinyaneswara: If the first married wife be alive she must be preferred in all matters relating to religion. Vishnu: If many wives of his own class be living with the eldest alone should the husband conduct business relating to acts of religion, even though his younger wives be dearer to him.'

" The point as regards co-widows has been raised in Bombay in the case of *Rakhmabai* v. *Radhabai* (1). Messrs. West and Buhler give (3rd Edition, Vol. I, page 412) the following *bywashtha*: ' *Question*.—A

(1) 5 B.H.C. 181.

deceased man has left two widows . . . . . . The property of the deceased has passed into the hands of the elder widow. Can the younger widow claim a share of the property? and who has the right to adopt a son? *Answer.*—The younger can claim a share. The right of adoption belongs to the elder.' And again, in Vol. II, page 977, Messrs. West and Buhler gave the following *placita* of the Shastras: 'The eldest of several widows has the right to adopt. On the death or disqualification the right passes to the next widow in order of marriage.' 'A man having directed an adoption, the elder widow may adopt against the wish of the junior.' And this view was the view taken by the High Court of Bambay in *Rakhmabai* v. *Radhabai* (1)."

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On the question whether the adoption of Udit Narain was duly effected, the judgment was as follows:—

"That the boy was a fit subject for adoption is not now denied. That the ceremonies of the adoption were not duly performed is *prima facie* in the last degree improbable; and it has, I consider, been established by the defendants by good and sufficient evidence (which is entirely [736] uncontradicted) that all was rightly done. The evidence of Pundit Jugal Kishore is particularly clear as to the unconditional gift and acceptance of the boy, according to the forms of the Shastras, as a son to the Maharaja. And this being so, in my opinion *factum valet.*"

The result of his judgment was thus stated:—

"I have now to find the relief to which the plaintiff is entitled. I consider that from the date of the Maharaja's death until such time as the Government shall see fit to take action in the terms of the fifth part of the Maharaja's will, under the provisions of s. 162 of the 'Oudh Land Revenue Act, 1876,' the plaintiff is entitled to equal beneficial enjoyment with the senior Maharani—see *Bhagwandeen Doobey* v. *Myno Bayi* (2) and *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*, and *Boyi Saiba* v. *Jijoyaimba Bayi Saiba* (3)—of the estate, but I am unable to hold that she is entitled to a partition of the moveables. The moveables must, I consider, follow the Raj, which is impartible. It may be said, 'but in the will (third part), although the Maharaja carefully forbids the alienation of the immoveable property, he makes no such provision as regards the immoveable property. This is true, but the Maharaja was no doubt sensible of the difficulties in the way of forbidding the alienation of the moveables. These largely consist of elephants, horses and cattle, and to have barred their alienation would have caused great practical inconvenience. That the Maharaja did not contemplate a dissipation of the moveables of the estate is plain from the fact that he provides in the fifth part of his will for their being taken over by the Court of Wards. I consider that her position as the elder widow gives the senior Maharani, as in the case of coparceners, a preferable claim to the care and management of the joint property. I think further that, under all the circumstances of the case, the costs of this litigation should be taxed as between solicitor and client, and be charged against the estate. The respondent's objection is decreed and the decree of the District Judge of Fyzabad, awarding the plaintiff Rs. 25,000 per annum, is set aside."

From this decree all parties appealed, and their appeals were ordered to be heard together.

On these appeals,—

(1) 5 B.H.C. 181. (2) 11 M.I.A. 487. (3) 3 M.H.C. 424.

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Sir *Horace Davey*, *Q. C.*, and Mr. *R. V. Doyne* (Mr. *C. W. Arathoon* with them) for the Maharani Indar Kunwar, the senior widow, argued that, as the devolution of the talukdari property of the late Maharaja, had he died intestate, would have been governed by s. 22 of the Oudh Estates Act, 1869, and as the junior widow could not have come in to the succession under the rules prescribed by that section, she was not a person who would have succeeded to any interest in the Maharaja's talukdari estate within the meaning of s. 13. She therefore, could not [737] take any bequest of such estate under a will not registered as that section required.

Neither under that Act, nor under the ordinary law "to which persons of the testator's tribe or religion were subject," could she have come in, the talukdari estate having been entered, and remaining, in lists II and V, prepared under s. 8. Moreover, even if under the ordinary law the junior widow could have come in, she was not a person entitled to succeed, within the meaning of the words, "would have succeeded to such estate, or to a portion thereof, or to an interest therein," used in s. 13, those words expressing "following immediately after." This the junior widow would not do, as she would only be entitled to maintenance under s. 24, relating to the maintenance of surviving relatives of a Talukdar. Maintenance was not an interest in the estate within the meaning of s. 13, and the person entitled to it was not entitled, by force of s. 24, to any charge on the estate, having only a personal claim against the owner for the time being. A mere hope of succession was not included. No one in fact, was entitled to "succeed," after the Maharaja's death, except the senior Maharani. Thus the junior widow was excluded, and the estate having been entered in list II, the necessary presumption was that it devolved upon a single heir, in this case the senior widow, until such time as the effect of the adoption under the will should operate. The will not having been registered in compliance with the requirements of the Oudh Estates Act 1869, the junior widow not coming within the exceptions of s. 13, any disposition made by it of talukdari property in her favour failed. Reference was made to *Ajudhia Baksh* v. *Rakmin Kuar* (1) and *Abdul Razzak* v. *Amir Haidar* (2).

As regarded the junior widow's claim to an interest in the non-talukdari property, it was untenable upon the true construction of the will, which gave to the senior widow all the estate for [738] her life, or until adoption by her of a son to the Maharaja. The junior widow was not entitled jointly with the senior, nor entitled to anything but maintenance, taking no interest under the bequest. This rested upon the construction of the whole will, which left no doubt of the meaning of "Maharani Sahiba." In these words there was at most a latent ambiguity, and extrinsic evidence was therefore admissible to explain them. The senior widow alone was intended to be referred to by these words, which were in the singular number, and not used, as they were in another part of the will, with the qualification of "donor." Without, however, relying on the testimony as to the Maharaja's probable intention, his intention was plainly visible upon the dispositions of the will, *viz.*, that an adopted son should inherit his possessions with an intermediate estate to his senior widow, the junior widow receiving only maintenance.

Reference was made to the Indian Succession Act, X of 1865, ss. 62,

(1) 11 I.A. 1=10 C. 482. (2) 11 I.A. 121=10 C. 976.

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67; Act XXI of 1870; Act I of 1869, ss. 3, 8, 13 and 22; Act I of 1877, s. 3, illustration (*a*): *Doe d Gord* v. *Need* (1); *Doe d Allen* v. *Allen* (2).

As regards the adoption, whilst it was contended that it had not been invalidated by the junior widow's having had no part in it, it was submitted that it did not concern the senior widow's case as against the junior, the intention of the testator having been shown to be, upon the true construction of the will, in favour of the senior widow alone. Reference was made to *Ramasami Aiyar* v. *Vencataramaiyan* (3); *Chitko Raghanath Rajadiksh* v. *Yanaki* (4).

Sir *Charles Russell* Q. C. and Mr. *J. Rigby*, Q. C. (Mr. *J. Brook Little* with them), for the appellant, Udit Narain Singh, contended that he had been duly adopted to the Maharaja according to the terms of his will; so for maintaining the case of the senior widow as to rely on her having been the sole donee of the power to adopt, and having made a valid adoption, although without the concurrence of the junior widow. Reference [**739**] was made to Act I of 1869, s. 8; and it was argued that even if the authority to adopt had been given to the junior widow jointly with the senior (which, however, was not admitted) the adoption would have been valid as made. The construction of the will, as placed upon it by the Court of first instance, that the senior widow was solely empowered to adopt, was correct, the late Maharaja having contemplated speedy adoption, and there being no ground for supposing that he would have wanted the junior widow to be included in the power. It was admitted that two persons might not unusually, and not improperly, be described by a collective term: but here there was no ground or occasion for resorting to the construction that the two widows were meant. And the adoption, made by a proper person, had been plenary and unconditional; the estates of the adoptive father having thereupon vested in the adopted son, who stood in the line of succession from that moment, no omission having occurred in the requisite ceremonial. Where Act I of 1869 applied, the adoption was under it, and as to the property to which it was inapplicable the succession, in virtue of the adoption, followed by the operation of the ordinary law. Reference was made to *Kalliprossuno Ghose* v. *Gocool Chunder Mitter* (5).

The conditions which the senior widow afterwards sought to impose were of no effect; and whether resort was had to the Hindu law, or to Act I of 1869, the adopted son's title was superior, and upon it the Judicial Commissioner should have adjudicated as between him and the junior widow. Correct as the judgment was in holding the junior widow disentitled to have the adoption invalidated in order that she might have part in it, still it should not have been held that she was entitled to the joint beneficial enjoyment, together with the senior, until the Court of Wards should assume management of the estate. The minor's title by his adoption was independent of any action on the part of that authority and the Court's undertaking the management could not be made a condition precedent to his taking the ownership as adopted son. He had, having been adopted, already come in with a complete title.

[**740**] Mr. *R. B. Finlay*, Q. C., and Mr. *J. D. Mayne* (Mr. *T. T. Forbes* with them) argued that the appeals of the senior Maharani and of Udit Narain Singh should be dismissed; but that at the same time the judgment and decree of the Judicial Commissioner were incorrect upon

(1) 2 M. and W. 129. (2) 12 Ad. and E. 451.
(3) 6 I.A. 126=2 M. 91. (4) 11 B.H.C. 199. (5) 2 C. 295.

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some points, and should be varied in favour of the junior widow, the Maharani Jaipal Kunwar. The suit required and admitted an adjudication as to the rights of Udit Narain Singh as the adopted son so far as those rights affected the claim of the plaintiff, because her contention was that his adoption was invalid, and the first ground of its invalidity was want of concurrence in the act of adoption on the part of the junior widow. For this reason the judgment should have declared the adoption invalid. The probabilities were against the testator excluding one of his widows from the power to adopt, which was connected with binding usages, all of which regarded the widows as one for this purpose. He had used words that might include both widows. Then it was for those who would exclude the junior to show the ground for so doing. As to the argument derived from "capriciousness" and the improbability of the power being entrusted to two, the probabilities were all the other way. Reference was made to West and Buhler's Hindu Law, 3rd Edition, 977, Book III, s. 3; Steel's Law of Castes; *Rakhambai* v. *Radhabai* (1). The ambiguity of the expression "Maharani Sahiba," with the absence of any indication as to which of the widows was meant, went far to show that both were intended. The words "khas mahal" ordinarily denoted the first married wife, but the testator used it to denote both his wives, whom he distinguished, when he wished to distinguish them, by using the adjectives "Bari" and "Choti." But as regards the testator's intention, it was improbable that he intended the junior Maharani to be left out; yet the construction contended for by the appellants would have left her without any provision for her maintenance, from the date of her husband's death until such time as an adoption over which she was to have no control should take place, the annuity not coming into effect till the adoption should be made. Moreover, there being no gift of a power to the survivor of the [**741**] widows, this did much to show that both were intended. The adoption, moreover, was bad for other reasons, *viz.*, as having been made under restrictions and conditions inconsistent with a complete giving and receiving and not in pursuance of the authority given by the will; also because the ceremony was not completed by a writing as required by Act I of 1869, s. 22, cl. 8; also, because the provisions in the will as to adoption, and the consequent devolution of the property, could not operate for want of registration under s. 13. Reference was made to *Vinayak Anandrav* v. *Lakshmibai* (2); *Chitko Raganath Ragadiksh* v. *Yanaki* (3); *Ramasami Aiyan* v. *Venkata Narayan* (4); *Thakurain Ramanand Koer* v. *Thakurain Raguhnath Koer* (5). [Sir R. COUCH referred to *Raja Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshimi Narsayya* (6).] Taking the will as a whole, the contention was that under it the two Maharanis received equal rights of management and possession of all the estate of the late Maharaja. And the Court below was wrong in holding that the moveable property, and such part of the immoveable property as was non-talukdari, followed the rule of succession applicable to the taluk. This by no means followed so far as impartibility was concerned; and as to such property at all events the junior Maharani was entitled to her share. Nor was it correct to say that her rights would be determinable upon the Government, as Court of Wards, at any time taking possession of the talukdari on behalf of the minor; for such possession could hardly be taken under the autho-

(1) 5 B.H.C. 181 (193). (2) 1 B.H.C. 117. (3) 11 B.H.C. 199.
(4) 6 I.A. 196=2 M. 91. (5) 9 I.A. 41=8 C. 769. (6) 4 I.A. 1=1 M. 174.

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rity of a will that was not registered within s. 13 of Act I of 1869; and if and when taken, would be subject, by the effect of the rules binding on the Court of Wards, to the provisions of the will in favour of the widows. So far the judgment of the Court below required modification. But that Court was right in holding that the will, as far as it conferred any rights on the junior Maharani, was not invalid for want of registration. The provisions as to registration did not apply to any but the [**742**] talukdari property held under Act I of 1869; and, as applicable to talukdari property, they did not exclude a widow. The object of s. 13 was to prevent the talukdar from bequeathing his estate by an unregistered will to a stranger. Within the line of succession he might confer estate by an unregistered will upon such a relation as a widow, who was qualified to take in spite of non-registration; first, under sub-s. 9 of s. 22 of Act I of 1869; secondly; as having an interest in the estate within the meaning of S. 13. Moreover, had the talukdar died intestate, the junior widow would have had an interest expectant upon the death of her co-widow, there being in the case of intestacy a kind of statutory settlement on the first widow for life, on the second in default of adoption and contingently on her surviving—see s. 22 of Act I of 1869. The right to maintenance was an "interest" in a certain sense. For the meaning of this term, see Act I of 1877, the Specific Relief Act, s. 3; *Jumoona Dassya Chowdhrani* v. *Bamasoonderi Dassya Chowdhrani* (1), *Anand Koer* v. *Court of Wards* (2).

Act I of 1869 made maintenance a charge on the estate, as also did the general law under certain circumstances—see *Juggernath Sawant* v. *Odhoranie Narain Koomaree* (3).

As to the widow's power to adopt and its nature in general, see *Sri Raghunatha* v. *Sri Brojo Kishore* (4).

Mr. *J. Rigby*, Q. C., replied contending that the junior widow could have no right to dispute the adoption as made, not having shown that she took a joint estate with the senior widow under the will, and not being referred to on the authority given by the husband. He also cited *Sri Raghunatha* v. *Sri Brojo Kishore* (4).

On a subsequent day, 10th March, their Lordships' judgment was delivered by

JUDGMENT.

LORD MACNAGHTEN.—The question in these consolidated appeals turns mainly on the construction and effect of the will of the late Maharaja Sir Digbijai Singh. The parties to the contest are the two [**743**] widows of the Maharaja, and an infant adopted by the senior widow. The litigation was commenced by the junior widow, who challenged the validity of the adoption and claimed joint proprietary possession of the immoveable property and one-half share of the moveable property of the late Maharaja, of which the senior widow had taken sole possession. The junior widow founded her claim on the contention that the expression "Maharani Sahiba" was used in the will as a collective term comprehending both widows. The senior widow maintained that it applied to her alone. The District Court held that the junior widow's claim was not well founded, and that she was only entitled to maintenance under the will. The Judicial Commsisioner, on the other hand, held that the junior widow was included in the expression "Maharani Sahiba." He treated the

(1) 3 I.A. 72=1 C. 289. (2) 8 I.A. 14=6 C. 764.
(3) 20 W.R. 126. (4) 3 I.A. 154=1 M. 69.

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adoption as valid. He held that the moveables followed the raj, which was impartible. But he considered that the junior widow was entitled to equal beneficial enjoyment with the senior widow until the Government should take action by assuming the management of the estate in accordance with the request contained in the will. In the meantime the management of the estate was to remain in the hands of the senior widow. The conclusion of the Judicial Commissioner has not given satisfaction to any of the parties to the litigation. The senior widow and the adopted son have both appealed from the whole decree. Up to a certain point the case of the adopted son is the same as that of the senior widow. They differ only in their views as to the consequence of the adoption and the present rights conferred thereby—matters which cannot come into question in this suit. The junior widow has also appealed. She appeals from the decree so far as it holds the adoption valid and the moveables impartible, and so far as it commits the management of the estate to the senior widow.

In order to construe the will it is necessary to understand the testator's position. The testator was one of the few Oudh chieftains who remained loyal to the British Government during the troubles of 1857 and 1858. At that time he was Raja of Bahrampur. His services were acknowledged by the Government. He was excepted by name from the Proclamation which confiscated [**744**] proprietary rights in the soil of Oudh, and named first in the exception. He received the title of Maharaja and large grant of land. He seems to have been a person of considerable intelligence. As President of the Oudh Talukdars' Association, he took an active part in framing the Oudh Estates Act, 1869. He was also for a time, and at the time when that Act passed, Member of the Legislative Council of India. His name was entered in Lists Nos. II and V mentioned in s. 8 of the Act. List No. II is "a List of the Talukdars whose estates, according to the custom of the family on and before the 13th day of February 1856, ordinarily devolved upon a single heir." List No. V is "a List of Grantees to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised therein shall thereafter be regulated by the rule of primogeniture." On both those lists his name remained during his life.

In 1860 the Maharaja married the Maharani Indar Kunwar, who is generally referred to in these proceedings as the senior widow. In July 1877 he married the Maharani Jaipal Kunwar, who is the plaintiff in the suit.

On the 15th of March 1878 the Maharaja executed his will. The Maharani Indar Kunwar was then 41, and the younger Maharani 19. The will was deposited in the Registration Office of Lucknow, but owing to a misapprehension of the law which seems to have been prevalent at the time, it was not duly registered under the Act of 1869. It is evident, however, that it was the intention of the Maharaja to comply with all the formalities required to give full effect to the dispositions of his will.

On the 27th of May 1882 the Maharaja died, leaving his two wives surviving. He died without legitimate issue, and without having adopted a son in his lifetime. Besides his talukdari estates he left non-talukdari property and moveables of considerable value.

Their Lordships now proceed to consider the testator's will. The effect of non-registration in the view which their Lordships take of the true construction of the will, will be considered afterwards.

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[745] The scheme of the will, apart from the bequest which has given rise to the present controversy, is clear and consistent throughout. In the various contingencies which it contemplates the will shows no little thought and consideration. The testator observes that at the time of writing his will he was childless, but not without hope of issue—when all hope of issue became lost he might adopt a son, and he proposes to do so if opportunity should occur—after adoption a son might be born to him. These events might happen in his lifetime. After his death, in default of issue, natural-born or adopted by himself, he authorizes the adoption of a son. The son so adopted might die in minority, and then there would be occasion for a second adoption; lastly, in default of issue, and in default of an adopted son, it was his wish that his property should devolve on the person lawfully entitled according to the custom of the riasat. The testator provides for all these different events. And in each case he is careful to repeat and emphasize his wish that the estate shall devolve in its integrity, and that his successor, whoever he may be, shall, like himself, be seated on the guddee, the owner of the entire riasat, and of all the property belonging to it, moveable and immoveable. So far there seems to be the most anxious desire on the part of the testator that the principle of succession which had prevailed in his family for generations, and which was recognized in the talukdari lists, the rule of single heirship—one owner at one time—should be maintained unimpaired.

Turning now to the passages of disputed meaning, it is to be observed that the expression "Maharani Sahiba" occurs there in connection with three different purposes which present themselves to the mind of the testator. In the first place, it is to be found in the bequest of the estate contingent on the testator leaving no natural born or adopted son. In that case the testator declares his will as follows: "Let the Maharani Sahiba after me be during lifetime the owner of the entire riasat, and of the property moveable and immoveable." Before the word translated "lifetime" there is in the original a possessive pronoun, but it may be translated either "her" or "their," and so it throws no light on the question. Maharani is a Hindi word, signifying the wife [746] of a Maharaja; Sahiba is Arabic for "lady." Both words are in the singular number. They are, however, throughout used as governing verbs in the plural. No stress was laid on this circumstance. It was not disputed that the plural verb might properly be used out of courtesy, as a mark of respect. The use of the word malik, "owner," in the singular is more significant. The learned Counsel for the junior widow suggested that the word was used like an adjective, and that it would not be in accordance with the idiom in which the will was written to use the plural, malikan. But no proof was offered in support of this suggestion. And though the use of the word malik in the singular is certainly not conclusive, it is not without weight, especially as it is the same word that is used by the testator in reference to the position of the single heir, on whom, whether a natural-born son, or an adopted son, or the heir according to the custom of the riasat, the property was to devolve in its entirety. On the whole their Lordships are of opinion that the language of the bequest rather points to the exclusive possession of one than to the joint possession of two.

A similar observation applies to the provisions relating to adoption after the testator's death. "There is to the Maharani Sahiba full authority to select and within two years to adopt" a male child of the testator's

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family. In the event of the child so adopted dying in his minority, " again there is authority to the Maharani Sahiba to make a second adoption." The testator expresses a wish that " Government may have a care that... a son be adopted by the Maharani Sahiba within two years. Should, peradventure, the Maharani Sahiba die without adopting any son," the estate is to go to the person lawfully entitled according to the custom of the riasat. The nature of the case seems to require that the donee of the power should be one individual. The language rather points in that direction. If the testator intended to commit the selection and adoption to his two widows jointly, it is certainly singular that no provision should be made for the not improbable event of their disagreeing. If he intended to give the power to the survivor after the death of one, it would have been more natural that he should have said so. It was urged that a joint power of adoption is in accordance with [747] Hindu notions, that in some parts of India, when adoption has not been forbidden by a husband, the power falls to the widows jointly, and that the law provides for the case of a disagreement. That is true in Western India, but there is no evidence that such a custom is known in Oudh. It seems hardly applicable to the case of a family where the custom is single heirship and not joint possession.

The third passage, where the expression occurs, is in the clause relating to the provision to be made for the administration of the estate under the Court of Wards during the minority of an infant heir. The testator expresses a wish that in the management there should be associated " the district officer and the Maharani Sahiba, and some agent who is fit and a well-wisher of the riasat, . . . in order that the settlement of the riasat and welfare of the ryots may prosper." It is difficult to conceive that a man of the testator's experience and knowledge of the world could have proposed that his two widows should both sit on this council, or that he could have seriously imagined that the settlement of the riasat and the welfare of the ryots would be promoted by an arrangement so calculated to foster jealousies and encourage intrigues.

Though no one of these passages taken by itself may be conclusive upon the question, it seems to their Lordships that they all point in the same direction, and that taken together they lead almost irresistibly to the inference that one person, and one person only, was intended by the designation Maharani Sahiba where the meaning is in dispute.

This inference is much strengthened by the passage in the will where the testator provides maintenance for his widows. There he uses the same words, " Maharani Sahiba " but to prevent any mistake he adds the word " two," and speaks of " the two Maharani Sahiba." It was said that in this passage the word " two " was added because the intention was that the allowance should not be joint, but that each should have a separate share. But it is to be observed that this explanation hardly accounts for the use of the word " two " in the first sentence, where the allowance, which is afterwards divided between the two ladies, is lumped together at one sum of Rs. 55,000.

[748] Again, in that passage in which the testator speaks of his hopes of issue where he uses the expression " Maharani Sahiba," he does not leave the expression unexplained.

We find then that in connection with the three purposes—of succession to the estate, selection and adoption of an heir, and representation on an administrative council during the heir's minority—in each of which a great noble in the testator's position might be expected to have in view

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one person, and one person only, the testator uses the expression "Maharani Sahiba" without qualification and without addition. In the two passages in which he must have had both his wives in view, in connection with the possibility of issue and in connection with the usual provision for widowhood, he qualifies the words "Maharani Sahiba" by other words which leave no doubt as to his meaning.

It is not disputed that, if one person only is intended, that person must be the senior widow, who was, for some years before the Maharaja's marriage with the plaintiff, the only person entitled to the style and dignity of Maharani Sahiba, and who after that marriage still retained the pre-eminence of an elder wife.

One argument which was urged on behalf of the junior widow remains to be noticed. It was founded on the maintenance clause. It was argued that according to the true construction of this clause, having regard to its language and its position in the will, no allowance by way of maintenance was payable until an adoption was made. It was said too that it would be absurd to give an allowance out of the income of a property to a person entitled to a life estate in the whole. Starting from this position, the learned Counsel for the junior widow contended that, if the appellants were right, the result would be that there would be no provision for their client so long as the senior widow chose to keep the estate. But nothing, they said, was more unlikely than that the testator could have intended to leave his favourite wife, as they termed the junior widow, either dependent on the miserable pittance to which she would be entitled under the Act of 1869, or a pensioner on the bounty of a jealous rival, especially considering that both widows were ultimately to be placed almost on an equality as [749] regards their maintenance. The only way to escape from a conclusion so improbable was to hold that the testator intended to give a joint life estate to both widows.

There would be much force in this argument if it rested on a sound foundation. But their Lordships think that it depends upon an erroneous construction of the provision for maintenance. That provision is no doubt apparently bound up with the clause which deals with the expenses of the riasat during the minority of an infant heir. But their Lordships consider that, upon the true construction of the will, it is a substantive and independent provision, and that maintenance runs from the death of the testator. There is no difficulty in the concurrent gifts to the senior widow of an allowance for maintenance and a life estate in the whole property. The life estate was not intended to continue at farthest beyond two years, and the duty of the senior widow would be to adopt as soon as possible. So long as the life estate might last, her allowance for maintenance would of course merge in the life estate.

Their Lordships desire to add that, in their opinion, this is not a case in which it would be proper to admit extrinsic evidence of the testator's intention. It is rather a case in which the difficulty created by the particular expression ought to be solved by adopting the construction which bespeaks a reasonable and probable intention, and rejecting that which would indicate an intention unreasonable, capricious, and inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will which are not open to controversy.

The rule is laid down by Lord Cranworth in words which have often been cited with approval: "When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to

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the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most grammatically accurate"—*Abbott* v. *Middleton* (1). Here the argument from reasonable and probable [**750**] intention is in favour of the construction which is rather the more obvious of the two.

Their Lordships have already expressed their view as to the right of the junior widow to maintenance from the testator's death. They think that the maintenance is payable out of the whole estate, talukdari as well as non-talukdari, notwithstanding the non-registration of the will. If the Maharaja had died intestate, the junior widow would have succeeded to a life-estate in the talukdari property expectant on the determination of the life estate of the first married widow, but subject to be defeated by an adoption made by the first married widow, with the consent in writing of her husband. It seems impossible to say that that is not an interest in the estate within the meaning of s. 13, sub-s. 1 of the Act of 1869. Their Lordships do not think it necessary to express any further opinion on the construction of this most difficult section.

Although their Lordships hold that the claim put forward by the junior widow is not well founded, and that the order of the Judicial Commissioner granting relief on the footing of that claim must be discharged, they think it will be proper to make a declaration as to the allowance for maintenance to which they consider the junior widow entitled under the will.

As regards costs, the difficulty has been created by the testator himself, and under the circumstances, having regard to the position of the parties, their Lordships think it right that the order of the Judicial Commissioner as to costs should not be disturbed, and that the costs incurred in the execution proceedings in the Court of the Judicial Commissioner and the costs of all parties in these consolidated appeals should be paid, as between solicitor and client, out of the testator's estate. The appeal in the execution proceedings does not call for any observation beyond this, that the appeal seems to have been necessary, and that no blame of any sort is to be attributed to any of the parties who appeared before their Lordships on the application for special leave to appeal. The order of the 22nd June 1886 will be discharged.

Their Lordships will therefore humbly advise Her Majesty that an order be made to the following effect: Discharge [**751**] the order of the Judicial Commissioner, except so far as it provides for costs. And in lieu of the decree of the District Court, and of so much of the order of the Judicial Commissioner as is discharged, declare that according to the true construction of the will of the testator the junior widow is entitled only to an annuity during her life of Rs. 25,000, commencing from the day of the testator's death, and that such annuity is charged upon and payable out of the income of the entirety of the testator's estate. Discharge the order of the 22nd June 1886. Direct that the costs of all parties incurred in the execution proceedings in the Judicial Commissioner's Court be taxed as between solicitor and client, and paid out of the testator's estate.

The costs of all parties of these consolidated appeals will also be taxed as between solicitor and client, and paid out of the testator's estate.

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(1) 7 H.L.C. 89.

Solicitors for the appellants Maharani Indar Kunwar and Udit Narain Singh: Messrs. *T. L. Wilson & Co.*

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PRIVY COUNCIL.

Solicitors for the Maharani Jaipal Kunwar in the consolidated appeals: Messrs. *Watkins & Lattey.*

C. B.

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15 C. 751 (P.C.)=12 Ind. Jur. 255.

15 C. 725 (P.C.)= 15 I.A. 127=12 Ind. Jur. 377=5 Sar. P. C. J. 150= Rafique & Jackson's P.C. No. 102.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

SHAM KISHEN DAS AND OTHERS (*Decree-holders*) v. RUN BAHADUR SINGH (*Judgment-debtor*). [6th March, 1888.]

Decree, Construction of—Construction of decree for money payable by instalments—Term making the entire sum payable on default in payment of some of the instalments at certain dates.

A decree for money payable by yearly instalments made the full amount payable on both the first instalment being unpaid on the due date, and two consecutive instalments being in default and unpaid at the same time. Dafaults were made, and questions as to rate of interest on what amounts, and for what periods, by reason of the debtor's delay, interest was payable, were dealt with in an order of Her Majesty in Council, which made declarations as to the allowances of interest to which the decree-holder would be entitled on the adjustment of accounts between the parties. The accounts having been taken in the Court executing the order, the decree-holder applied for execution to the [752] full amount. *Held,* that the instalments having been paid, though not at due date, and applied in payment of interest, be was entitled to such execution, because the contingency, on the happening of which he would have been entitled thereto, had not happened.

APPEAL from an order (11th February 1885) of the High Court, reversing an order (18th August 1884) of the Subordinate Judge of Gya, made upon an application for execution of a decree.

This appeal related to the proper construction of a decree for money with interest, based upon the terms of a compromise which decree directed payment by instalments; and the question raised had reference to the effect, according to that decree, of payment of an instalment after its due date, in regard to the right of the decree-holder to execute the decree for its full amount.

The order made by the Court of first instance was that execution should issue against the judgment-debtor, the present respondent, for Rs. 1,29,781, that sum having been found to be due upon a decree of 31st March 1873, as the result of accounts taken in the serishta of the Court between the parties, in conformity with an order of Her Majesty in Council of 9th July 1883.

The High Court, on the respondants' appeal, reversed the above order, and dismissed the application for execution. The Judges (MITTER and TREVELYAN, JJ.) said "We are of opinion that the order of the lower Court is wrong. Upon the face of the application which was made by decree-holder, and upon the account which was prepared by the lower Court, it does not appear that the decree-holder was entitled to execute the decree, because the contingency, on the happening of which the decree-holder would be entitled to execute the whole decree, has not happened.

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The present petition for execution must therefore be dismissed, and the order of the lower Court set aside."

The Judges also noted that an error, which they found in the account, could be rectified, the application being dismissed on another ground.

The decree of 31st March 1873, abovementioned, was in favour of Narain Das, the appellant's grandfather, and was based on [753] the terms of a solehnama, whereby yearly instalments of Rs. 30,000 were to be paid on the last day of Bhadon, in each Fusli year, in satisfaction of the principal amount of Rs. 2,38,000 and interest, the first instalment to be paid on the 30th Bhadon 1281 or 25th September 1874. The third clause of the solehnama was as follows:—

" If the first instalment be not paid on the 20th Bhadon 1281 Fusli, and two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree, and realize his entire decretal money with interest at the rate of Re. 1 per cent. per mensem from your petitioners, defendants, and their properties. In case of default, the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of Re. 1 per cent. If the first instalment be not paid on the 30th Bhadon 1281 Fusli, then the decree-holder shall have the power to realize the principal with interest at the rate of Re. 1 per cent. per mensem from the date of this solehnama, to which your petitioners, defendants, shall have no objection."

Before the present proceedings there was other litigation between the parties, or those whom they represented, in regard to the construction of the solehnama, and the father of the present appellants preferred the appeal to Her Majesty in Council which resulted in the order above mentioned, of 9th July 1883.

That was the appeal of *Balkishen Das* v. *Run Bahadur Singh* (1), and in the judgment in that case the following was pointed out:—

" Their Lordships think it right in this place to refer to that part of the judgment in order to point out that, in their opinion, the decree-holder could not, under the first paragraph of the third clause of the solehnama, issue execution for the full amount of the judgment with 12 per cent. interest, unless both the first instalment should not be paid on the 30th Bhadon 1281 Fusli, and two consecutive instalments should be in default and unpaid at the same time."

[754] The defaults which led to the previous litigation were, as appears from the judgment of the Judicial Committee (2), the non-payment until the 31st August 1876 of the instalment which should have been paid on the 25th September 1874, and a further default in payment at due date of the third instalment. The decree-holder had, in that litigation, in its stages in the Indian Courts, contended that these defaults had given him the right to execute his decree for the full amount, but that contention had been disallowed by these Courts in concurrence, and the decree-holder had not appealed to Her Majesty in respect of the decision of the High Court in that matter. Consequently there was no question in the former appeal before the Judicial Committee as to the right to execute in full; and the questions disposed of in 1883 related only to the rate of interest.

(1) 10 C. 305=10 I.A. 162. (2) 10 C. 311 (313)=10 I.A. 166 (168).

to which the decree-holder was entitled, on what amounts, and for what periods, by reason of the judgment-debtor's delay in paying the instalments. The judgment, with the order which followed it, contained declarations as to the allowance of interest to which, in the adjusting of the accounts between the parties, the decree-holder would be entitled by reason of the delay in payment of the instalments then in question. Nor was there anything to indicate that the terms of the decree of 31st March 1873 upon the solehnama and the provisions of the latter in regard to the right to execute in full did not continue, as before, to bind the parties.

On the 15th September 1883 the present respondent paid the decree-holder the instalment then due of Rs. 30,000 as admitted in the account filed in the Court of first instance on 13th March 1884, at the time when the application for execution in full was pending. And there was not after that any default which, according to the terms of the compromise, would alter the decree-holder's position in regard to his right to execute.

However, on the 13th February 1884, the decree-holder filed the petition giving rise to the present question, in the Court of the Subordinate Judge, to be allowed, in accordance with the order in Council of 1883, to execute the decree for the entire amount of it, which he stated to be Rs. 1,40,878. The Court [**755**] then ordered the judgment-debtor to file his account; and, after several orders had been made, directed that an account should be taken between the parties by the Court mohurrir, who reported the amount due, upon the decree of 1873, on the 18th August 1884, on which date the abovementioned order, subsequently reversed by the High Court, was made.

On this appeal,—

Mr. *J. D. Mayne and* Mr. *C. W. Arathoon*, appeared for the appellants.

Mr. *R. V. Doyne*, for the respondent.

For the appellants it was argued that the High Court had failed to construe correctly the order in Council of 1883 and to give effect to the appellants' rights. It should have been held that the preparation of the account in the lower Court, and the issue of execution, was in accordance with the order made on the former appeal.

Mr. *R. V. Doyne*, for the respondent, was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Their Lordships are of opinion that the High Court was correct in the view which it took that execution could not be issued. The plaintiff under the decree received the yearly instalments of Rs. 30,000, and according to the stipulation in the original arrangement they were to be applied in the first instance to the payment of interest, and the balance in reduction of the principal. He might have issued execution if the last instalment had not been paid; still, when it was paid, it was to be applied, according to the stipulation, in the first place in discharge of the interest.

As to the opinion which the High Court expressed with reference to the payment made on 31st August 1875, there is not sufficient on the record to enable them to say whether that opinion was correct or not. It is merely an opinion of the High Court not having reference to the decree, and therefore the parties ought not hereafter to be bound by it. The matter will be open for consideration on any future occasion.

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[756] Their Lordships, under the circumstances, will humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *S. G. Stevens.*

C. B.

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15 C. 751 (P.C.) = 12 Ind. Jur. 255.

15 C. 756 (P.C.)=15 I.A. 97=12 Ind. Jur. 297=5 Sar. P.C.J. 211.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and *Sir B. Peacock.*

[*On appeal from the High Court at Calcutta.*]

RADHAMADHUB HOLDAR AND ANOTHER (*Plaintiffs*) *v.* MONOHUR MUKERJI (*Defendant*). [15th March, 1888.]

Res-judicata—Civil Procedure Code, 1882, *s.* 13—*Matter adjudged in a former suit —purchase* pendente lite.

A zemindar, having granted a putni lease, mortgaged the zemindari to the putnidar, who having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest, subject to the mortgage.

Before that purchase, though after the attachment, another holder of a decree against the zemindar brought the right, title and interest in the zemindari to sale in execution of his decree, and himself became the purchaser. He then, claiming to have obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lease had ceased on the purchase by the latter.

The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held,* that the dismissal of the rent suit, which involved the title, barred the present one; and the opinion was expressed that the plaintiff had been rightly adjudged in the rent suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made.

[F., 25 C. 136; 17 C.W.N. 413 (415)=18 Ind. Cas. 177 (179); 104 P.L.R. 1913=85 P.W.R. 1913=18 Ind. Cas. 278 (279); 9 C.L.J. 96 (103)=13 C.W.N. 226; **Rel. on,** 11 C.W.N. 828 (830); **Cons;** 5 Bom. L.R. 185; **R.,** 18 B. 597; 17 A 174=15 A.W.N 47; 2 N.L.R. 94 (96); 8 O.C. 37 (40); 10 C.W.N. 820 (822); 24 C. 62 (**F.B.**); 22 B. 939; 27 B. 266 (270)=5 Bom. L.R. 21; 26 A. 447 (**F.B.**)=1 A.L.J.. 65 (79)=A.W.N. (1904) 61; 29 M. 426 (**F.B.**)=16 M.L.J. 372 (384)=1 M.L.T. 145; 14 C.L.J. 220=12 Ind. Cas. 9. (10); 15 C.L.J. 137 (138)=11 Ind. Cas. 464 (465); 15 C.L.J 653 (657)=13 Ind. Cas. 40; 7 Ind. Cas. 15; 10 Ind. Cas. 363 (364); 19 Ind. Cas. 632 (634); 16 O.C. 148 (153)=20 Ind. Cas. 458 (460); **D.,** 24 C. 569 (574); 6 C.W.N. 66 (67).]

APPEAL from a decree (27th April 1885) of the High Court, reversing a decree (14th March 1883) of the Subordinate Judge of Hughli.

The question was whether a decree made by the High Court in 1874 was a conclusive adjudication upon the right of the [757] plaintiff, who now appealed, to redeem a mortgage upon, and obtain possession of, a zemindari estate in a three annas and four gundas share in pergunnah Shankhali in the Hughli district. He claimed title to the zemindari as purchaser, at an execution sale of the estate of the mortgagor, against the mortgagee, who had previously attached the property under a decree

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upon his mortgage, and who subsequently, and after the date of the sale to the plaintiff, bought, at a sale in execution of his own decree, the right, title, and interest of the zemindar who had mortgaged to him.

Before the proceedings giving rise to this dispute, Srimati Matangini Debi, then owner of the zemindari, granted a putni of her share in Shankhali to the late Rajkrishna Mukerji, father of the defendant, the present respondent, thus limiting herself to receiving the rent reserved. Afterwards, she executed, on the 16th May 1864, a bond and mortgage to the same Rajkrishna, charging her zemindari estate with Rs. 999 and interest.

Matangini having afterwards been sued by one Dinonath Bose, the latter attached her interest in Shankhali, in execution of a decree, on the 7th November 1871.

On the 30th December 1871 Rajkrishna Mukerji sued Matangini on the mortgage, and on 22nd February 1872 obtained a decree "that the plaintiff should realize Rs. 1,291 from the mortgaged property with interest," and on 3rd April 1872 attached the right of Matangini to receive the putni rent. On the 18th of the same month of April, the interest of Matangini in Shankhali having been put up for sale by the Court in execution of Dinonath Bose's decree, Radhamadhub Holdar, the present appellant, became the purchaser for Rs. 5,350.

On the 14th May 1872, Rajkrishna Mukerji, at a sale in execution of his own decree against Matangini, purchased for Rs. 1,590 her zemindari interest, *i.e.*, her right to receive the putni rent from him.

After that date he paid no further rent except the sum of Rs. 250 under a decree of the High Court, that sum being due for the period from 18th April to the 14th May 1872.

The decree of the High Court under which that sum was paid was made upon the appeal in a rent suit, brought in 1873 by **[758]** Radhamadhub Holdar in the Court of the Subordinate Judge of Hugli, to recover Rs. 1,488 as rent due from the defendant as putnidar from the 18th April 1872, the date of the plaintiff's purchase to the institution of that suit. In defending that suit, Rajkrishna Mukerji admitted that he was in possession of the property, but alleged that the relation of landlord and tenant did not exist between him and Radhamadhub.

The Subordinate Judge (19th March 1873) expressed his opinion that, in a rent suit, such a question of title could not be decided, and he decreed the rent, referring the defendant to a regular suit if he wished to establish his title to the zemindari interest, and holding that, till he did so, he must be treated as a tenant. A regular appeal to the District Judge was dismissed (3rd July 1873), the Appellate Court being of the same opinion. On this Rajkrishna Mukerji preferred a special appeal to the High Court.

The High Court (Sir R. Couch, C. J. and Glover, J.) in giving judgment (11th March 1874) observed that there was no reason why in a suit for rent, where the defendant repudiated the relation of tenant, that question should not be tried; considered what were the rights of the parties arising out of the state of things stated above; and concluded that the defendant had shown that, as against the plaintiff, he had a right to be no longer treated as a tenant from the time when he purchased the property. If any rent had become due between the two periods of their respective purchases, that might be decreed; and the Court accordingly inquired whether any, and what, rent became due between these

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dates. The parties then agreed that this came to Rs. 250; and for that sum, with interest, the Court made a decree.

In the present suit (14th March 1883) Radhamadhub Holdar alleged the same title as before, claiming a declaration of his right to redeem. The defence was: First, that the disputed property was already under attachment in execution of the decree obtained by the defendant's father, when it was sold in execution of the decree obtained by Dinonath Bose, and the latter sale could not confer a title; and, secondly, that the decree of the High Court, of the 11th March 1874, was conclusive.

[759] The Subordinate Judge held that the trial of this suit was not barred by the adjudication of 1874, as the question of title was only tried for the purpose of deciding a rent suit; and that no question of the right to redeem had been, or could be, raised in a suit for arrears of rent. He was also of opinion that the plaintiff's purchase on the 18th April 1872 was not affected by any *lis pendens*, regard being had to the provisions of s. 333 of the Code of Civil Procedure; and, further, that Rajkrishna Mukerji ought to have made Dinonath Bose a party to the suit of 1873; and that the plaintiff, that not having been done, was not bound by the decree of 1874; and, having purchased the equity of redemption which Matangini had in the property, was entitled to redeem. The Court, however, disallowed a claim for an account against the defendant.

Monohur Mukerji, who had succeeded Rajkrishna, appealed to the High Court, Radhamadhub filing objections under s. 561 to so much of the decree as disallowed an account.

The High Court (Cunningham and O'Kinealy, JJ.) reversed the decree of the Subordinate Judge. They were of opinion that the question substantially raised between the parties in the suit decided in 1874 was identical with the one now raised, and involved the point whether the plaintiff had such a proprietary right purchased at the sale of 18th April 1872 as would entitle him to redeem. The suit was dismissed with reference to s. 13 of the Code of Civil Procedure.

From this decree Radhamadhub Holdar, together with one Nawadip Chunder Chowdhry, who had been added as a respondent in the appeal to the High Court on account of his having acquired some interest from the original plaintiff, preferred the present appeal.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the sale of the 18th April 1872 was complete on that date, including the right to redeem the mortgage. The purchaser at a sale in execution was affected only by decrees actually obtained, and no doctrine of *lis pendens* applied to bind this prior judgment-creditor, whom the mortgagee should have made a party defendant, or who, at least, was entitled to notice [760] of the execution proceedings by the other decree-holder, if he was to be held bound by the latter.

In the next place the question whether the appellants were or were not concluded by the decree of 1874, must be decided in their favour, for that decree did not cover the ground of their claim, the subject-matter of it not having been identical with that in the present suit; nor the actual point decided the same with that now raised. Moreover, the jurisdiction of the Courts had to be considered, the Court of first instance in 1874 having had only authority indirectly to determine title.

Run Bahadur Singh v. *Luchoo Koer* (1) was referred to.

(1) 12 I.A. 23=11 C. 301.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *R. V. Doyne*, for the respondent, were not called upon.

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JUDGMENT.

Their Lordships' judgment was delivered by

Lord Hobhouse.—Their Lordships think that this case is a very clear and simple one when once the numerous proceedings and dates are ascertained.

The material circumstances are these: Matangini was the proprietor of the estate in question, and she granted the estate in putni to one Mukerji, the father of the present defendant. No difference is made by the change of title; and it may be considered that the putnidar has remained one and the same person. After that Matangini mortgaged her proprietary interest to Mukerji. Mukerji's position therefore was this; that he was putnidar of the estate with a charge upon what we should call the reversion of the proprietary interest. Under those circumstances a creditor of Matangini sues for his debt, gets a decree, attaches the property, and sells it in the month of April 1872; and under that sale the plaintiff Radhamadhub became the purchaser. What did he get by his purchase? He got Matangini's proprietary right, subject to the putni, and subject to the charge. But in the meantime Mukerji had been enforcing his charge against Matangini and he got a decree, and in the month of May 1872 about a month after the sale to the plaintiff, a sale took place under his decree, and he himself purchased at that sale. Now if Matangini herself had [761] remained the owner of the proprietary interest she would be clearly excluded by that sale from all interest in the property. It is equally clear that the plaintiff must be excluded, he having purchased only the right, title and interest of Matangini, unless he can show that after the purchase in April 1872 he was not bound by the proceedings in Mukerji's suit. That very question has been raised and decided between the parties. After the two sales Radhamadhub, as claiming to be proprietor, sued Mukerji as putnidar for the rent due upon the putni, and his claim was that he stood in the shoes of Matangini. On the other hand Mukerji defended himself by saying: "It is not you, but I, who stand in the shoes of Matangini, and therefore you have no claim against me," and the decision was that, inasmuch as Mukerji's suit to enforce his charge was pending at the time of the sale to Radhamadhub, Radhamadhub was bound by the proceedings against Matangini. On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally; Who is the true representative of Matangini? Therefore their Lordships conceive that the matter was expressly decided by the High Court in the rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came.

Their Lordships are therefore of opinion that the appeal must be dismissed, and that the appellants must pay the costs; and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

C. B.

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AUG. 21.

CIVIL
REFER-
ENCE.

15 C. 762.

15 C. 762.

[762] CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tottenham.

IN THE MATTER OF BADAL SINGH AND OTHERS (*Judgment-Creditors*) *v.* BIRCH (*Judgment-Debtor*).* [21st August, 1888.]

*Execution of decree—Civil Procedure Code, Chapter XX—Insolvency—*Ex parte *decree subsequent to insolvency—Attachment—Receiver in insolvency.*

An insolvent, to whose estate no receiver under Chapter XX of the Code of Civil Procedure had ever been appointed, entered in his schedule the names of certain persons as creditors for a sum of Rs. 210-9-3. These creditors subsequently obtained against the insolvent an *ex parte* decree for the sum so entered in the schedule, and in execution attached certain pay which the insolvent was then earning, but which he was not in receipt of at the time his schedule was filed, and did not appear therein as an asset of his estate. *Held*, that the judgment-creditors were entitled to take out execution, and were not prevented from so doing by reason of the insolvency proceedings.

REFERENCE under s. 617 of the Code of Civil Procedure.

In or about the month of October 1887 one Birch applied under the provisions of Chapter XX of the Civil Procedure Code to be declared an insolvent. This application was granted, and Birch thereupon filed his schedule, in which, amongst the names of other creditors, were entered the names of Badal Singh and others as creditors for an amount of Rs. 210-9-3. In these insolvency proceedings no order was made appointing a receiver of the property of the insolvent.

On the 21st May 1888 Badal Singh and others obtained against Birch an *ex parte* decree for Rs. 210-9-3, and in execution thereof attached half the salary payable to Birch as Secretary to the Darjeeling and Himalayan Railway Company, which appointment Birch first obtained subsequently to the filing of his schedule in insolvency. No application was ever made to set aside this decree. Birch thereupon applied to have the order of attachment set aside, on the ground that the judgment-creditors could not proceed in execution against him in consequence of the insolvency proceedings. The judgment-creditors [763] contended on such application that Birch's salary, not being included in his schedule, was liable to seizure for any of the scheduled debts as long as the insolvency application remained undisposed of and a receiver had not been appointed to the property of the insolvent.

The Judge of the Small Cause Court held that the judgment-creditors could only proceed under the provisions of Chapter XX of the Code of Civil Procedure for the recovery of their claim, and set aside the attachment, contingent on the opinion of the High Court on the question whether the judgment-creditors could recover the amount of their *ex parte* decree otherwise than under the provisions of Chapter XX of the Code.

On this reference no one appeared for the judgment-creditors.

Mr. *C. D. Linton* for the judgment-debtor.

OPINION.

The opinion of the Court (PETHERAM, C.J. and TOTTENHAM, J.) was delivered by

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* Civil Reference No. 19-A of 1888 made by A. Rattray, Esq., Judge of the Court of Small Causes at Darjeeling, dated the 13th of June 1888.

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CIVIL REFERENCE.

15 C. 762

PETHERAM, C. J.—This is a reference from the Judge of the Small Cause Court at Darjeeling, and the question is, whether the plaintiff is entitled to proceed with the execution proceedings under a decree which he has obtained. The plaintiff in the suit is a person called Badal Singh and the defendant is a Mr. Birch.

The facts of the case are these, that in the month of October or November 1887 Mr. Birch had filed an application to be declared an insolvent in the proper Court at Darjeeling and filed his schedule. That having been done, Mr. Birch was declared an insolvent, but nothing further was done in the matter, because, so far as we are told, there were no assets to divide, and no receiver was ever appointed. After that, in the month of May last the plaintiff Badal Singh having brought a suit in the Small Cause Court at Darjeeling against Mr. Birch to recover a sum of money in respect of which his name had been scheduled in Mr. Birch's schedule, the case came on for trial. But Mr. Birch did not defend that suit; he did not appear and put in a written statement, and accordingly the plaintiff proved his case and obtained a decree *ex parte*, and having obtained his decree, he proceeded to attach Mr. Birch's salary, which he is now earning as the Secretary of the Darjeeling-Himalayan Railway, and an order [**764**] has been made attaching half of Mr. Birch's salary under that application, and the present application is by Mr. Birch to set aside that attachment on the ground that the plaintiff cannot proceed under that decree in consequence of the insolvency proceedings.

As I said just now, no receiver has ever been appointed to the insolvent's estate, and none of the other creditors intervene and object to this proceeding in any sense whatever. The decree was obtained long after the insolvency proceedings in a suit in which Mr. Birch did not think it worth his while to appear, and the decree, on the face of it, is perfectly regular, and there is no application to set it aside. Under these circumstances we do not see any reason why, as against Mr. Birch, this decree should not be executed. If a receiver had been appointed, and appointed for the whole body of creditors, then it might be that he might object to his salary being attached on the ground that if any body, was entitled to get it, he was entitled on behalf of the general body of creditors. No one here represents any of the other creditors, and so far as we can tell all the other creditors have been settled with in some way or other. But the question here is whether Mr. Birch, having allowed this decree to go against him, can now avoid payment of this debt altogether by setting up this insolvency proceeding in which practically nothing whatever has been done. We think he can do nothing of the kind, and that until that decree has been set aside, and if that is to be done it must be done in some other form, it is binding against Mr. Birch, and any property which he may acquire, and which is not claimed by the receiver on behalf of the general body of creditors, is liable to attachment.

We think then that the plaintiff's proceedings are perfectly regular, and that this question must be answered by saying that the order made by the Small Cause Court Judge of Darjeeling in favour of the debtor must be set aside, and the execution allowed to proceed at the suit of the plaintiff.

Order set aside.

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Appel-late Civil.

15 C. 765.

15 C. 765.

[765] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

Nadiar Chand Singh and others (*Defendants*) v. Chunder Sikhur Sadhu and another (*Plaintiffs*).* [16th July, 1888.]

Sonthal Pergunnahs Settlement Reg. (III of 1872). *ss.* 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights—Onus of proof —Civil Procedure Code (Act XIV of* 1882), *s.* 568—*Additional evidence, Production of, in Appellate Court.*

In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Reg. III of 1872, and to recover *khas* possession of a mouzah, alleging that the defendant held the lands as *chakran*, and that services for which he held them had ceased, the defendant pleaded that the tenure was *durmokurari*, that the lands had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. The plaintiff sought to set aside the settlement on the ground of the non-publication of the record of rights and fraud of the defendant, and both the lower Courts found that the record of rights had not been published by its being posted conspicuously in the village as required by s. 24. On second appeal it was contended on behalf of the defendant that such publication was not essential, but that it was open to the Settlement Officer to publish the record in such manner as might be convenient.

Held, that posting the record conspicuously in the village is an essential part of the publication, and that the suit was not barred by limitation.

It was further contended that the onus of proving the tenure to be *durmokurari*, which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree.

Held, that the onus of proving the validity and propriety of the settlement proceedings upon which he relied had been properly thrown on the defendant.

Circumstances under which an Appellate Court will *not* allow additional evidence to be produced, at the hearing of an appeal, under s. 568 of the Civil Procedure Code.

[F., 19 C.L.J. 29 (33)=18 C.W.N. 271 (273).]

The plaintiffs, who were the *mokuraridars* of taulk Jamjari, brought this suit to obtain *khas* possession of mouzah Sarisbad which was situate within that taulk, and which was in the [766] possession of the defendants. They alleged that the mouzah was in the possession of the defendants, and had been in the possession of their father during his lifetime as a *chakran* tenure in consideration of certain services performed for the plaintiffs and their father, and that those services had been terminated in the year 1291 (1883-1884), when they dismissed the defendants from their service. They accordingly claimed to be entitled to recover *khas* possession.

The defendants stated that the mouzah had been in the possession of themselves and their father for the last 50 years, not as *chakran*, but as *dur mokurari* tenure, and they attempted to prove that fact by the production of a pottah. They further stated that at the time when the settlement was made under the Sonthal Pergunnahs Settlement Regulation (III of 1872,) the tenure had been recorded as a *dur mukurari* tenure, 14 annas being recorded in the name of their father and 2

* Appeal from Appellate Decree No. 161 of 1888, against the decree of R. Carstairs, Esq., Deputy Commissioner of Sonthal Pergunahs, dated the 4th of October 1887, affirming the decree of F. J. Monahan, Esq., Subordinate Judge of Jamtara, dated the 13th of August 1887.

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annas in the name of the defendant No. 3, and they contended that, inasmuch as the settlement was made on the 5th June 1877 and this suit was not instituted till the 12th January 1887, it was barred by the special limitation provided by s. 25 of that Regulation.

They further pleaded that, as they and their father before them had been in possession for more than 12 years before suit, the plaintiffs were not entitled to recover *khas* possession.

The plaintiffs on the other hand in their plaint stated that they had come to know of the alleged settlement in the year 1875, and charged that the defendants had obtained the settlement by fraud, defendant No. 1 stating that the *dur mokurari* rent was Rs. 7 per annum, and they denied that the record of rights had been published as required by the provisions of s. 24 of the Regulation. They also denied that the defendants had ever paid any rent for the mouzah.

The other contentions of fact pleaded by the defendants are not material for the purpose of this report, as both the lower Courts decided the case on its merits against them.

The first Court found that the record of rights had not been published by posting it conspicuously in the village, and as it considered on the authority of *Ram Narain Singh* v. *Ram Runjun* [767] *Chuckerbutty* (1) that this was essential to the due publication, it held that the suit was consequently not barred by the period of limitation provided by s. 25 of the Regulation. It further found that there was sufficient evidence of fraud on the part of the defendants in causing the settlement to be made within the meaning of s. 18 of the Limitation Act; that the fraud first became known to the plaintiffs in Falgoon 1290 (February-March 1884); and that the suit had been instituted within the three years allowed. Upon the question as to whether the suit was barred by 12 years limitation under art. 144 of sch. II of the Limitation Act, it held that there was no proof that the defendants' possession became adverse to the plaintiffs' before the year 1291 (1883-84), and consequently that the suit was not barred. It found all the issues on the merits in favour of the plaintiffs, and amongst them held that the pottah relied on by the defendants, but which was not produced [the defendants accounting for the non-production of the original thereof by stating that it had been stolen in the year 1283 B. S. (1876-77)] had not been proved. It further held that the defendants had failed to prove the tenure to be *dur mokurari*, and that, although the evidence on behalf of the plaintiffs to prove it to be *chakran* was not strong, still that they had made out their right to obtain *khas* possession, and accordingly gave them a decree.

On appeal the Deputy Commissioner confirmed the finding of the lower Court as to the non-publication of the record of rights under s. 24 and as to the suit not being barred by the limitation prescribed by s. 25 of the Regulation, nor by the period of 12 years prescribed by art. 144.

On the merits the Deputy Commissioner came to the same conclusion as the lower Court, holding that the onus of proving the tenure to be *dur mokurari* had been rightly cast on the defendants, and that they had failed to discharge it, and further holding that the plaintiffs had proved the tenure to be *chakran*.

He accordingly dismissed the appeal with costs. The defendants now appealed to the High Court.

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(1) 13 C. 245.

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Mr. *O'Kinealy* and Baboo *Karuna Sindhu Mukerji*, for the appellants.

[768] Mr. *Bell*, Dr. *Rash Behary Ghose*, Babu *Jogendro Nath Bose*, and Babu *Juggut Chunder Banerji*, for the respondents.

JUDGMENT.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was delivered by

NORRIS, J.—This suit was brought by the plaintiffs, who are *mokuraridars* of a certain taluk called Jamjari, to obtain *khas* possession of mouzah Sarisbad, which lies within the taluk. The mouzah is at present in the possession of the defendants, and was before that in the possession of their father, Tara Churn Singha. The plaintiffs' case was that the lands were in the possession of the defendants, and of their father before them, as *chakran* lands, *i.e.*, that they were held by the defendants in consideration of certain services to be rendered by them; and they allege that these services were terminated in 1291, when the defendants were dismissed from the plaintiffs' service; and that at that time the plaintiffs became entitled to *khas* possession of the mouzah.

The defendants' allegation was that the mouzah had been in their possession and the possession of their predecessor in title for the last fifty years, not as *chakran* lands, but in *dur mokurari* tenure; and they attempted to prove their *dur mokurari* right by the production of a pottah purporting to create that tenure. They further alleged that the plaintiffs' suit was barred by the ordinary law of limitation, that is to say, by adverse possession of twelve years, and by the special law of limitation prescribed by s. 25 of Regulation III of 1872.

Both the lower Courts have decreed the plaintiffs' suit; and on second appeal it has been argued by the learned counsel for the defendants, appellants, that the decision of the lower Appellate Court is erroneous in law, and the following among other points have been relied upon: In the first place it was contended that both the lower Courts have put an erroneous construction upon s. 24 of the Regulation. That section says: "After the Settlement Officer shall have made the record of rights for any village, he shall notify and publish the contents of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient."

[769] The learned counsel contends that the true construction of this section is to leave it to the discretion of the Settlement Officer to publish the record of rights in any manner that he may deem convenient. In fact, Mr. O'Kinealy's argument is that the conjunction "*and*" between the words "village," and "otherwise" should be read "or." We think that this is an erroneous view. What the section says and means is that a record of rights must (that is, it is compulsory on the Settlement Officer to do it) be notified and published in the manner directed therein, that is, by posting it conspicuously in the village; and that it is discretionary with the Settlement Officer to publish it in any other manner that he may think convenient for the purpose of informing persons interested in the settlement proceedings of the result of the inquiry which he had made.

The second point urged by the learned counsel is, that the burden of proof has been wrongly placed upon the defendants in this case. It is contended that this is substantially a suit brought by the plaintiffs to set aside a decree, because s. 11 of the Regulation is in these words: "Except as provided in s. 25, no suit shall lie in any Civil

Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules regarding the rights and interests abovementioned shall have the force of a decree of Court;" and Mr. O' Kinealy contends that this is practically a suit to set aside a decree, and the onus ought to have been placed on the plaintiffs. We think that this is not a correct view to take of the suit. The plaintiffs came into Court alleging that these lands were in the possession of the defendants as *chakran* lands; that the service in respect of which the lands had been granted had terminated; and that they, therefore, became entitled to *khas* possession; and the defendants' answer to that was the settlement proceedings; and thereupon it became, we think, clearly the duty of the defendants to establish the plea which went to defeat the plaintiffs' claim. I think that the illustration which I suggested to Mr. O'Kinealy in the course of the argument is an apt one, that the nature of the defence is substantially equivalent to a plea [**770**] of *res judicata;* and under these circumstances, it is admitted that it would be on the defendant to establish the decree upon which he relied as operating as *res judicata.* So is it, we think, here. The onus was properly placed on the defendants to substantiate the validity and propriety of the settlement proceedings upon which they relied. These two objections are really the only points of law which have been argued. The other objections taken by the learned counsel are nothing more than questions of fact.

Mr. O'Kinealy complains of the finding of the Deputy Commissioner with regard to the defendants' contention that they were *dur mokuraridars;* and he impugns the reasons which have induced him to come to that conclusion. These reasons may be right or wrong; but there is the finding of the Deputy Commissioner where he says: "I must agree with the lower Court that the *dur mokurari* tenure has not been proved," and there is an end, as far as we are concerned as a Court of second appeal, of that question. Similarly, we think that the finding of the lower appellate Court with regard to the affirmative case made by the plaintiffs, that these lands were *chakran* lands, is a finding of fact with which we cannot interfere on second appeal.

There remains only one more point to be considered, and it is this: The defendants in the Courts below relied upon a pottah. The Deputy Commissioner has found that the pottah never existed, that it was a fabrication. Mr. O'Kinealy asks us to give his client an opportunity of adducing further evidence to show that this pottah really had an existence, and was not altogether a myth; and he relies upon an affidavit of his client which states that, while this case was pending in the lower Courts, a list was sent to the deponent in which mention was made of a suit and a decree of about the year 1841, in which this pottah was referred to. The affidavit states that the deponent went to the Beerbhoom Court; and upon inquiry in the record office he was told that no such record existed. Then it states that the deponent subsequently showed the list to a friend, who told him that he was misinformed; that when the number of the case and date are given, there must be such [**771**] a record existing; that subsequently search was made under the orders of the District Judge, and such record discovered.

In the first place it seems to us very doubtful whether, under s. 568 of the Civil Procedure Code, we have the power to admit this evidence; and, in the second place, if we have the power, we do not think sufficient

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cause has been shown to render it wise for us to exercise it. The statements in the affidavit appear to be of an extremely strange character. One would have thought that the party who had this list sent to him would, in the first instance, have shown it to his pleader, and that his pleader would have taken steps to have the record office at Beerbhoom searched in order to find out whether the record in question existed. It is not necessary for us to express any opinion as to whether the documents now sought to be put in are or are not genuine. It is sufficient to say that no ground has been made out for the application, which indeed is a novel one, to put in these documents at this stage of the case.

The result is that the appeal will be dismissed with costs.

H. T. H. *Appeal dismissed.*

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15 C. 771.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

DURGA CHURN RAI CHOWDHRY (*Defendant*) *v.* MONMOHINI DASI (*Plaintiff*).* [18th June, 1888.]

Civil Procedure Code (Act XIV of 1882), *ss.* 276, 295—*Claim under s.* 295—*Attachment—Assignment.*

A claim under s. 295 of the Civil Procedure Code is not enforceable as an attachment against which an assignment is rendered void by the provisions of s. 276. *Ganga Din* v. *Khushali* (1) followed.

In June 1883 *A*, *B* and *C* obtained separate money decrees against, amongst others, *T* as executor under the will of his father. Some time in 1884 *B* attached the whole of the testator's properties in execution of his decree; and *A* and *C* applied for rateable shares in the sale proceeds. On the 2nd June 1884 the parties came to an arrangement, by which it was agreed that *B*'s claims should be satisfied by means of all the attached properties with the [772] exception of one, which should be left free for the benefit of the other judgment-creditors. By a deed, dated the 16th June, but which was found to have been actually executed on the 17th, *T* conveyed this property to *A*; and on the 17th June all the other attached properties were sold in execution of *B*'s decree; and on the same day *B* put in an application for the removal of his attachment from this property. *D*, another decree-holder on the 16th June, applied to be included in the rateable distribution of the properties attached by *B*; and on the 30th June *D* attached the property sold to *A* in execution of his decree. *A* preferred a claim to the property, which was disallowed; and *A* thereupon brought a suit to establish her right to it on the ground *inter alia* that *B*'s attachment had ceased to exist on the date of her purchase, and that the sale was a valid one.

Held, that the sale to *A* was vaild as against *D*.

[**F.**, 25 A. 431 (434)=23 A.W.N. 93; **R.**, 81 P.R. 1908=148 P.W.R. 1908; 25 M.L.J. 601 (602)=21 Ind. Cas. 869 (870); **D.**, 16 B. 91. (104).]

MONMOHINI DASI (the plaintiff), Radha Mohan Mondul (defendant No. 2) and Radika Pershad Mondul had each obtained a money decree on the 25th June 1883 in the Court of the District Judge of the 24-Pergunnahs against one Kunjo Behary Bose personally and Thacurdas Kur (defendant No. 3) as executor of the estate of his father Mohesh Chunder

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* Appeal from Appellate Decree, No. 1561, of 1887, against the decree of C. B. Garret, Esq., Judge of 24-Pergunnahs, dated the 13th of April 1887, reversing the decree of Baboo Kristo Chunder Chatterji, Subordinate Judge of that district, dated the 28th of December 1885.

(1) 7 A. 702.

Kur. In execution of Radha Mohun's decree, all the properties belonging to the estate of Mohesh Chunder Kur, including Bownia Abad (the property in dispute in this suit), were attached and ordered to be sold on the 7th May 1884. Before the day fixed for the sale, Monmohini, the plaintiff, and Radika Pershad Mondul applied to have their respective decrees satisfied by a rateable distribution of the sale proceeds of the attached properties, but made no application for attachment. These parties then seem to have come to an arrangement, by which Thakurdas undertook to satisfy the claim of Radha Mohun by means of all the other properties except Bownia Abad, which was to be left free for the other judgment-debtors; and on the 2nd June a petition was presented for the adjournment of the sale to the 17th. This arrangement was embodied in the petition of the 2nd June, in which Thacurdas promised to satisfy Radha Mohun's claims within fifteen days, and agreed that in default Radha Mohun should be at liberty to proceed with the sale of all the attached properties with the exception of Bownia Abad. To this arrangement Radha Mohun signified his assent to the Court through his pleader; and the sale was postponed to the 17th June.

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[773] Thacurdas having failed to pay off Radha Mohun, all the attached properties, excepting Bownia Abad, were sold on the 17th June; and on that day Radha Mohun put in an application for the release of Bownia Abad from attachment.

On the 14th June Durga Churn Rai Chowdhry (defendant No. 1) made an application for the execution of the money decree he also held against Thacurdas; and on the same day this decree was transferred to the Judge's Court for execution. On the 16th June Durga Churn applied to be included in the rateable distribution of the sale proceeds of the properties attached under Radha Mohun's decree; and on the 30th June Durga Churn attached Bownia Abad in execution of his decree. Meanwhile, by a deed of sale, bearing date the 16th June 1884, Thacurdas conveyed Bownia Abad to the plaintiff Monmohini Dasi.

On the strength of this deed of sale Monmohini Dasi preferred a claim to Bownia Abad against Durga Churn's attachment, which was disallowed.

Monmohini Dasi, thereupon, brought this suit on 1st November 1884 in the Court of the First Subordinate Judge of the 24-Pergunnahs, for a declaration of her rights to Bownia Abad on the ground, amongst others, that the attachment of Radha Mohun had ceased to exist on the 16th June, the date of her purchase, and that the sale was valid. The defendant Durga Churn on the other hand contended that the property had not been released from attachment on the date of the conveyance to the plaintiff and prior to his attachment, and that the sale was illegal and void.

The Subordinate Judge found that the deed of sale was actually executed on the 17th June and that it had been fraudulently antedated and was a fabricated document. He held that there was no valid or legal attachment on Bownia Abad on the date of the plaintiff's purchase; but dismissed the suit on the ground that it was based on a fabricaed deed of sale.

The plaintiff preferred an appeal to the District Judge of the 24-Pergunnahs, who agreed with the Subordinate Judge on the question of the existence of any attachment on the property on the date of the plaintiff's purchase, and as to the date of execution of the deed of sale,

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but differed from him [774] "in thinking that the conveyance was intrinsically vicious;" and as no fraud had been actually committed on Durga Churn by it, he was of opinion that the deed was good as against him. He accordingly allowed the appeal.

The defendant Durga Churn appealed to the High Court.

Mr. *Evans* and Baboo *Jogesh Chunder Roy*, for the appellant.

Mr. *Woodroffe* and Baboo *Tarapodo Chowdhry*, for the respondent.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

JUDGMENT.

We do not think it necessary to call upon the learned counsel for the respondent. We have already intimated that as to the question of fraud, the lower appellate Court was right upon the matters argued before it. A question of fraud, which might perhaps have been a substantial and serious one, *viz.*, that under s. 53 of Transfer of Property Act, was not taken by the parties or by the Court in either of the Courts below; and, following the ordinary rule, we think ourselves unable to entertain it here, although it is raised in the first paragraph of the memorandum of appeal.

As to the second point, *viz.*. the construction of s. 276, Code of Civil Procedure, we are driven to adopt the same rule as the Allahabad Court has done in the case of *Ganga Din* v. *Khushali* (1). In truth, to reverse the decision of the lower appellate Court upon this point, it would be necessary to do that which the Legislature has abstained from doing, that is, to provide that a petition presented under s. 295 shall have the same effect as an attachment. To hold that claims under s. 295 are claims enforceable by attachment against which assignments made under s. 276 are void, would perhaps be carrying out the intention that may have been in the mind of the Legislature when the old Code, which did not provide for a rateable distribution, was suddenly modified by the introduction of that perfectly new principle. Unfortunately the sections of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things, and it appears [775] to us that in this respect s. 276 had not been successfully framed with the object of protecting rateable distribution amongst claimants under s. 295. We need say no more than express our concurrence in the decision in *Ganga Din* v. *Khushali* (1), and, that being so, we dismiss the appeal with costs.

C. D. P. *Appeal dismissed.*

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15 C. 775.

CRIMINAL MOTION.

Before Mr. Justice O'Kinealy and Mr. Justice Rampini.

IN THE MATTER OF THE PETITION OF DIN TARINI DEBI.*
[15th August, 1888.]

Criminal Procedure Code (Act X of 1882), s. 503—"Purdahnashin" woman—Examination by commission—Personal appearance in Court.

A Hindu lady having been summoned as a witness on behalf of an accused applied under s. 503 of the Code of Criminal Procedure to be examined by commission on the ground (*inter alia*) that she was a "purdah-nashin," and

* Criminal Miscellaneous Motion, No. 31 of 1888, against the order of summons issued by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 3rd of August 1888.

(1) 7 A. 702.

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that her enforced appearance in a Criminal Court would entail a forfeiture of her dignity and position in Hindu society.

Held, that such application was properly made under the section, and that under the circumstances of the case the order prayed for could be made.

[**Expl.**, 24 C. 551 (555); **R.**, 12 A. 69 (72)=9 A.W.N. 202; 2 Weir 659; 169 P.L.R. 1903=19 P.R.1903 (Cr.)]

THE facts upon which the rule was issued are as follow:—

The Chief Presidency Magistrate having framed a charge of attempting to cheat against four persons arraigned before him for having committed that offence, one of the four persons so accused applied for the issue of a subpœna to one Din Tarini Debi, a Brahmin widow, as a witness on his behalf. The subpœna being duly issued was served upon the lady on the 7th of August; she thereupon on the 8th August applied to the Magistrate for an order dispensing with her attendance in his Court, and for the issue of a commission to take her evidence under s. 503 of the Code of Criminal Procedure. In support of this application it was alleged on her behalf that she was a *purdah-nashin* lady not in the habit of appearing in public, that she resided in her native village of Goverdanga at a distance of 37 miles from [**776**] Calcutta, and that her attendance at the Court of the Chief Presidency Magistrate would therefore entail upon her "inconvenience" of a kind contemplated by the provisions of the section on which her application was based. It was further alleged on behalf of the applicant that, in the event of the Magistrate not feeling himself justified in granting such application, she was ready and willing to travel to Calcutta and submit herself for examination as a witness in a house she would secure for that purpose if the Magistrate would be pleased to attend at such house for the taking of her evidence on a day to be hereafter fixed by him. The Magistrate refused to make the order prayed for or entertain the alternative proposal made.

On the 9th of August the applicant moved the High Court (Wilson and Rampini, JJ.) under the provisions of s. 435 of the Code of Criminal Procedure for a rule to be issued upon the Chief Presidency Magistrate to show cause why the order for the issue of a commission for the purpose of taking her evidence under s. 503 of the Code of Criminal Procedure should not be granted. The material averments in the petition on which the motion was made were as follow:—

"That your petitioner is a resident of Goverdanga in the sub-division of Barasat in the district of the 24-Pergunnahs, which is about 37 miles distant from the Court of the said Chief Presidency Magistrate of Calcutta.

"That your petitioner is a Hindu *purda-nashin* lady of rank, living on income derived from her own zemindari and other sources exceeding the sum of Rs. 5,000, and that your petitioner is connected with other respectable zemindars, and that according to Hindu manners and customs your petitioner never appears before the public.

"That your petitioner has never up to this time attended any Court of Justice anywhere, either civil or criminal, to give evidence or for other purposes, and that if your petitioner be compelled to appear in the said Presidency Magistrate's Court she will for ever lose her dignity and position in society.

"That your petitioner, should she be forced to appear in a Criminal Court of a Chief Presidency Magistrate of Calcutta, will suffer degradation in the eyes of her own associates and [**777**] in the society to which she belongs, of a kind which nothing your petitioner shall

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hereafter do will ever remove or even modify. In running the risk of experiencing such degradation by a literal compliance with the order contained in the summons issued by the Court of the Chief Presidency Magistrate, a true copy of which is hereto appended and marked A, your petitioner submits that she, as she alleges through no fault of her own, but entirely through her misfortune, will suffer such inconvenience, as is specified in s. 503 of the Criminal Procedure Code, as will entitle her to the relief to be hereafter asked for in the prayer attached to the petition."

Upon that application the High Court (Wilson and Rampini, JJ.) on 9th August issued the following rule:—

"In this case, as far as we can judge, it does seem to be a hardship that this lady should be required to give evidence in Court. The better course would be to issue a rule upon the Magistrate to show cause, which he will do by a letter to us, why it should not be ordered that this lady should not be required to appear in Court. We intimate to the Magistrate that we think he should not enforce her attendance under the subpœna, provided she does what she says she is willing to do, that is, comes to Calcutta and gives her evidence in such suitable place, either within the Court building or not, under such circumstances to be arranged by the Magistrate as to secure that she may be examined in the presence of the accused, and at the same time not be exposed to the inconvenience of coming into the public Court room.

"We would ask the Magistrate to let us know what arrangements he proposes to make in this matter, and if, as we have no doubt will be the case, those arrangements seem to us suitable, no further order will be necessary."

The rule now came on to be heard.

The Advocate-General (Sir *Charles Paul*), for the Crown.

Mr. *Reily*, Dr. *Guru Dass Banerji* and Baboo *Surendro Nath Dass*, for the petitioner.

The Chief Presidency Magistrate, in a letter addressed to the High Court, contended that the Code of Criminal Procedure did not contemplate a Magistrate being called upon to take the evidence of a witness under commission or otherwise other than in his [778] Court; that the expense and inconvenience which would be caused should any innovation of this rule be permitted by the High Court would be very great, and would encourage innumerable applications of a similar kind being made in the Criminal Courts. The Magistrate further alleged that the the petitioner apparently was frequently in the habit of travelling between Goverdanga and Calcutta, that she was not a lady of exalted rank, and that she had been granted the privilege of attending Court and giving her evidence in a palki—a practice invariably followed in the Court of the Magistrate.

The *Advocate-General*.—Section 503 of the Code of Criminal Procedure, applies to all people, whether males or females, irrespective of rank or position; it may apply to the condition of a witness as included within the term "circumstances of the case" but does not relate to the privileges and immunities of witnesses, and therefore does not apply to a *purdanashin* woman. Her case must depend on the general law under which she claims exemption. This exemption has not been allowed within the term of living memory either by the High Court in its Criminal jurisdiction or in the Police Court. It has always been deemed a necessary condition to a criminal trial that the Court should hear the evidence of the witness, and no inconvenience worth consideration has been supposed to apply to the

case of a woman coming into a Court of Justice in a palki and giving her evidence therefrom. The petitioner avers that the fact of her being forced into entering a Criminal Court would be degrading to her position; the Court will be careful not to encourage this belief by any undue regard for her susceptibilities. The Court should not encourage such a belief or notion, as numbers of highly respectable native ladies have given evidence in Court from palkis.

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Mr. *Reily*, for the petitioner.—The word "inconvenience" has already been held to apply to the case of a *purda-nashin* lady who can furnish substantial reasons for her reluctance to appear in a Criminal Court—see *In the matter of the Petition of Farid-un Nissa* (1); also *In the matter of the Petition of Hurroo Soondery* (2). This reluctance may be a matter of mere prejudice, but is nevertheless a sentiment on which native society as at present [**779**] constituted sets great store. The Legislature has expressly recognized the existence of this feeling by giving immunity to certain persons from appearing in Civil Courts. The petitioner in this case is the widow of a Brahmin, a lady of some means, and in order to give proof of the genuineness of her objections is willing to pay the costs which may be incurred in connection with the issue of the commission.

The judgment of the High Court (O'KINEALY and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This was an application made by Srimati Din Tarini Debi asking that she might be examined by commission and not examined on oath in Court under s. 503 of the Code. In her application she sets forth that she was a *purdah-nashin* and a Brahmin, connected with a family of acknowledged respectability and possessed of considerable property, and she prayed that what had been done in some previous cases might be done in her case, namely, that she might not be compelled to appear in Court. On that application a rule was issued to show cause, and cause has been shown by the Presidency Magistrate of Calcutta and by the Crown. The Crown objects, because the lady in her petition said that it was a degradation for her to appear in a public Court, and the learned Advocate-General argued that it would be intolerable to allow such a principle to receive the sanction of this Court. No doubt the phrase is objectionable, and it would be impossible, as the learned Advocate-General says, to admit the fact that merely appearing in Court is a degradation. Yet we do not think that disposes of the case.

There is no doubt that such applications have been granted under s. 503, and granted on the principle that in matters of procedure the customs and habits of the people should be taken into consideration. The learned Presidency Magistrate has shown cause by saying that it is the invariable custom for *purdah nashin* ladies to be examined in palkis in Court, but that is not exactly the question. The question is whether a commission ever issued in regard to *purdah-nashin* ladies in his Court. Of that he makes no mention. He also says that this lady travels from Goverdanga to Calcutta, but he does not say that she does so publicly. So far therefore as cause has been shown by the [**780**] learned Magistrate, it does not seem that the facts stated by him affect the reasons upon which such commissions have been granted. Looking to the nature of the application and to the fact that the lady has actually taken

(1) 5 A. 93 (2) 4 C. 20.

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a house in Calcutta not far from the Magistrate's Court where she can be examined; that no possible inconvenience can arise to any person; and further that the lady has volunteered to pay the expenses of the commission, and even the defence do not require her to be examined in open Court, we can see no reason why this rule should not be enforced and we make it absolute.

We further direct by consent that the petitioner shall be bound to pay all costs consequent on the issue of the commission in Calcutta, which the learned Magistrate in the Court below shall deem reasonable and proper.

J. V. W. *Rule made absolute.*

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15 C. 780.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

HURI DAS BUNDOPADHYA (*One of the Defendants*) *v.* BAMA CHURN CHATTOPADHYA AND ANOTHER (*Plaintiff*).*
[7th June, 1888.]

Hindu Law—Inheritance—Dayabhaga School—Brother's daughter's son—Great-grandson of paternal grandfather.

A brother's daughter's son does not succeed in preference to a great-grandson of the parternal grandfather of the deceased.

[**R.**, 26 C. 285 (291).]

THIS was a suit brought to recover possession of a three annas four gundas' share in certain immoveable properties.

One Ramkishore Bundopadhya, the original proprietor of the estate, portion of which formed the subject of this suit, died leaving him surviving four sons and one grandson, Issur Chunder (a daughter's son), leaving to his said grandson a one-fifth share in his estate and to his four sons the remaining four-fifth shares.

[**781**] Ramnarain, the fourth son of Ramkishore, died leaving him surviving two sons, Gopal Chunder and Nobin Chunder, on whom the one-fifth share of their father in the estate of Ramnarain devolved.

Gopal Chunder died leaving him surviving Bama Churn and Benode Behari (the plaintiffs), sons of a deceased daughter, him surviving; and with the consent of the plaintiffs Nobin Chunder took charge of his own and the plaintiffs' share in the property. Nobin Chunder died in 1281 (his wife having predeceased him), leaving no issue.

At the time of the death of Nobin Chunder, the plaintiffs and Huri Das Bundopadhya (defendant No. 1), Beeharam Bundopadhya (the husband of defendant No. 2), grandsons by a son of a brother of Ramnarain, were alive. On the plaintiffs endeavouring to take possession of their own share and that formerly belonging to Nobin Chunder the defendants forcibly prevented them from so doing. The plaintiffs therefore brought the present suit to recover possession.

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* Appeal from Appellate Decree, No. 2020 of 1886, against the decree of Baboo Sharoda Prosad Chatterji, Subordinate Judge of Hooghly, dated the 18th of May 1886, reversing the decree of Baboo Ashini Coomar Guha, Munsif of Hooghly, dated the 26th of May 1885.

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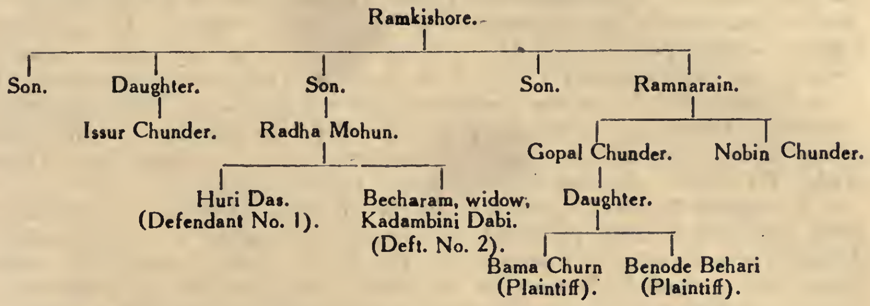
The following genealogical table shows the position of the parties to this suit:—



The defendants alleged that Nobin was a lunatic, at the time the succession opened out, and contended that beyond this they, being the great grandsons of Ramkishore, were his heirs in preference to the plaintiffs.

The Munsif held that if Nobin had not been a lunatic at the time of his father's death, then the plaintiffs as his brother's daughter's sons would have been his heirs in preference to the father of the defendants, but finding him to have been a lunatic dismissed the suit.

The plaintiffs appealed to the Subordinate Judge, who found that Nobin was of sound mind when his father died, and holding [782] the plaintiffs to be preferential heirs to the defendants reversed the decision of the Munsif.

Defendant No. 1 appealed to the High Court.

Dr. *Troylokyanath Mitter* and Baboo *Grish Chunder Chowdhry*, for the appellant.

Dr. *Guru Das Banerjee*, Babu *Krishna Kanai Bhattacharjee* and Baboo *Mohit Chunder Bose*, for the respondents.

Baboo *Troylokyanath Mitter* (for the appellant),—I contend that the appellant is a preferential heir to the brother's daughter's sons of the deceased Nobin. The cases in support of my contention are; *Gobind Talookdar* v. *Mohesh Chunder Surmah Ghuttack* (1); *Juggut Narain Singh* v. *Collector of Manbhoom* (2); *In re Oodoy Churn Mitter* (3); *Gopal Chunder Nath Coondoo* v. *Haridas Chini* (4); *Onia Chund Biswas' case* (unreported), Sp. App. 2640 of 1875, decided on the 6th June 1887 by Mitter and Birch, JJ., in which a brother's daughter's son and an uncle's daughter's son were excluded by the grandfather's great-grandson; *Dwarka Nath Sircar's case* (unreported), Sp. App. 754 of 1880, decided on the 22nd June 1881, and Sp. App. No. 1747 of 1880, decided on the 6th July 1882, by Field Bose, JJ. *Pran Nath Surma Jowardar* v. *Surat Chundra Bhuttacharjee* (5) does not apply; the competition there was between a brother's son's daughter's son and an uncle's daughter's son. There the former was preferred. There is also the unreported case of *Abhoy Chunder Dey* v. *Huro Sundary*, decided on the 25th April 1884 by Garth, C. J., and Beverley, J. The case of *Hureekar* v. *Woomesh Chunder Roy* (6) holds the passage of Dayakrama Sangraha to be an interpolation and the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (7) shows that those who offer funeral cakes to the paternal ancestors of

(1) 15 B.L.R. 35=23 W.R. 117. (2) 4 C. 413 (note).
(3) 4 C. 411. (4) 11 C. 343.
(5) 8 C. 460. (6) W.R.F.B. 176. (7) 13. W.R.F.B. 49 (59)=5 B.L.R. 15.

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the deceased [783] are preferred to those offering cakes to his maternal ancestor only. The precise position of the brother's daughter's son is not determined in that case—see p. 62. In the case of *Kery Kolitani* v. *Monee Ram Kolita* (1) Jagannatha is expressed by Mitter, J., to be the highest authority in Hindu law. As to the right of daughter's sons to inherit, see Dayabhaga, Ch. XI, s. 6, para. 9; Dayakrama Sangraha, Ch. 1, s. I, para. 4. As to the brother's right to succession, see Dayakrama Sangraha, Ch. I, s. 7, paras. 1 and 4. The performance of the *sradh* is not the sole ground for right of succession—see 2 Colebrooke's Digest (Calc. Ed.), 544; Sarvadhikari's Tagore Lectures, 763.

As regards the text authorities on the question whether a grandfather's great grandson is to be preferred to a brother's daughter's son, a brother's daughter's son cannot be forced into the list of heirs given in the Dayabhaga before a grandfather's great grandson. The list of heirs in the Dayabhaga is exhaustive; it goes through the heirs from the widow down to the great grand-father's daughter's son—see Dayabhaga, Ch. XI, s. 1, para. 1. First comes the son, then grandson, then great grandson, and then widow. Para. 44 shows that the reason for succession is spiritual benefit and not performance of the *sraddha*. Section 2, para. 1 of Ch. XI, Dayabhaga, deals with daughter's right; s. 2, paras. 29 and 25, with daughter's sons; and a son's daughter's son and grandson's daughter's son are excluded. Section 3, para. 1, deals with the father's right; s. 4, paras. 1 to 6, with the mother's right; s. 5, paras. 1, 8, 9 and 12, with the brother's right; s. 6, para. 1 with the brother's son; s. 6, paras. 5 and 6, with brother's grandson. In s. 6, para. 7, the brother's great grandson is excluded. If it had been intended to include in the list of heirs a brother's daughter's son he would have been named here. Section 6, para. 8, deals with a father's daughter's son; paras. 9 and 10 with the grandfather's descendants including the daughter's son. Para. 12 gives the heirs in the maternal line, and para. 11 shows that women inherit by express texts. To bring in a brother's daughter's son and nephew's daughter's son before a grandfather you must bing in a son's daughter's son, grandson's daughter's son before the father, but [784] for that there is no place in the Dayabhaga; Sree Krishna's Commentaries on the Dayabhaga.

The Dayatatwa in Ch. XI, paras. 4, 13, 24, 25, 26, 28, 29, 58, 65, 67, 68, gives the following order of succession to a person who leaves no male issue: "Male issue;" wife; daughter; maiden and married daughters; daughter's son; parents; brothers; brother's son; grandfather; grandfather's descendants; great-grandfather's descendants. Paras. 67 and 68 make para. 64 clear, *viz.*, that the list does not go further down than daughter's son. The Dayakrama Sangraha is in my favour, excepting the interpolated passage. Ch. 1, s. 10, paras. 9 and 13, must be interpolated, as a son's daughter's son and grandson's daughter's son ought to have come in before the father, which s. 5 does not note. Further, a brother's son's daughter's son, uncle's son's daughter's son, and greatuncle's son's daughter's son should have been mentioned to make the thing logically complete—see also Colebrooke's Digest, Vol. IV, p. 227 (Calc. Ed). The Dayakrama Sangraha is not always followed as regards the efficacy of *pindas*. *Pindas* to paternal ancestors are more efficacious than those to maternal ancestors—4 Colebrooke's Digest (Calc. Ed.), 230, and *Gooroo Gobind Shaha* v. *Anund Lall Ghose* (2). Originally only three paternal ancestors got *pindas;* maternal ancestors never—Menu.

(1) 13 B.L.R. 1=19 W.R. 367 (394). (2) 13 W.R.F.B. 61.

Ch. IX, s. 186, p. 269, quoted in Dayabhaga, Ch. XI, s. 1, para. 40; see also Sarvadhikari, 766, 767; and the Dayakrama Sangraha, Ch. I, s. 10, para. 8, shows that the uncle's grandson is preferred to the grandfather's daughter's son, because the former is a *sapinda* and the latter not so. Then as to the effect of performance of the *sraddha*, the *Parvana Sraddha* first to the paternal ancestors, next to the maternal ancestors.

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As a conclusive test, suppose there to be a father, grandfather, and great-grandfather living, the maternal ancestors being dead, then no *pindas* to the latter are given; but if the latter are living and the former dead, then *pindas* to the former are given—see the Sraddha Tattawa, 139. Another test is that in the paternal line full *pindas* to three ancestors are given, divided *pindas* to three ancestors higher in succession, water to seven higher, [**785**] but in the maternal line after the three ancestors no higher ancestors are at all benefited. If two brothers related by the half blood are living in joint mess, the eldest performs the *sraddha* of their paternal ancestors and also of his three maternal ancestors. The younger brother cannot claim to perform the *sraddh* of his three maternal ancestors. See the Sraddha Tattwa (Seram. Ed.), p. 160, as to *pindas* to maternal ancestors. A brother's daughter's son may never give *pind* to his maternal grandfather whose property he inherits, because his father may be living, and he is thus incapable of performing *porban*.

If the respondent's contention is correct, then the whole course of the Hindu law of successsion as at present obtaining becomes unsettled. For example, commence with the late owner's own descendants; then (*a*) a daughter's son would equal a son so far as spiritual benefit is concerned, and (*b*) a son's daughter's son would equal a grandson, and (*c*) a grandson's daughter's son would equal a great-grandson, but (*b*) and (*c*) do not succeed according to any authority of Hindu Law before the descendants of the great grandfather. If there were no difference in the *pindas*, how is it that Dayakrama Sangraha prefers the mother's grandson, who gives one *pinda* to the sister's son who gives three *pindas*, and to the brother's daughter's son who gives two *pindas*?—see Dayakrama Sangraha, Ch. I, ss. 9 and 10. Further, a long course of decision, even if wrong, the Courts will not as a rule set aside—see *Lungessur Kooer* v. *Sookha Ojna* (1); also *Thakoorain Sahiba* v. *Mohun Lall* (2); *Kooer Goolab Singh* v. *Rao Kurun Singh* (3); *Abilakh Singh* v. *Khub Lall* (4).

Dr. *Gurudas Banerjee* (with him Baboo *Krishna Kamal Bhattacharjee* and Baboo *Mohit Chunder Bose*), for the respondents.

A brother's daughter's son is a *sapinda;* this is settled by the cases of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (5) and *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (6); and the only point for argument is whether his position in the order of [**786**] succession is higher than that of the paternal grandfather's great-grandson. The authorities bearing on this question bearing out my argument that a brother's daughter's son succeeds in preference to a great-grondson of the paternal grandfather may be considered under three heads: (*a*) original authorities; (*b*) later text-writers, both European and Native; and (*c*) decisions of Courts of Justice. Under the first heading may be quoted Dayabhag, Ch. XI, s. 1, paras. 32-40; Ch. XI, s. 2, para. 17; Ch. XI, s. 3, para. 3; Ch. XI, s. 6, paras. 5-32; the Dayatatwa, Ch. XI, paras. 27, 61-65 (Golap Chandra Sarkar's translation). In the translation para. 64

(1) 3 C. 151 (161). (2) 11 M.I.A. 403. (3) 14 M.I.A. 196.
(4) 10 C. 1102 (1109). (5) 13 W.R.F.B. 49=5 B.L.R. 15. (6) 9 C. 563.

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is somewhat different from the original—see Raghunandana's work, the Sraddha Tattwa (Serampur Ed.), Vol. II, p. 109; and the same work (Serampur Ed.), Vol. I p. 123. The Dayakrama Sangraha, Ch. I, s. 2, is expressly in point, and the only question is as to the authenticity of this passage; as to this see *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1); Halhed's Gentoo Law, 35; Colebrooke's Digest (Mad. Ed.), Vol. II, p. 566; Macnaghten's Pr. of H. L., p. 29; 1 Strange, H. L. 148; 2 Strange H. L., 253-258; the Vyavastha Darpana (last Ed.), pp. 94-95; and on the main point Srinatha's Comm. on the Dayabhaga (Bharat Chandra Siromani's edition), p. 302.

Under the second heading the following authorities may be referred to: Halhed's Gentoo Law, p. 35; Colebrooke in the note to the translation of the Commentary on Ch. XI, s. 6 of the Dayabhag; Macnaghten's Pr. of H. L., 29-31; Elberling, p. 79; Prasannakumar Tagore Vyav. Darp. (2nd Ed.), 274 Shamacharan Sarkar's Vyav. Darp. (2nd Ed.), 279—287; Mayne's Hindu Law, paras. 469—499; Rajkumar Sarvadhikari's Tagore Law Lectures, pp. 810 *et seq*.

The only writer who takes an opposite view is Jagannatha (2 Col. Dig.), 567, but he is not an original authority, and even as a text-writer his opinion has often been disregarded. See Macn. Com. H. L., Preface VIII; 1 Strange's H. L., XVII-XIX; Colebrooke's Letters to Strange, Vyav. Darp., Prf. XXV; *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1); *Kery Kolitani* v. *Moneeram Kolita* (2).

[**787**] Under the third heading I cite the following: *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1); *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (3). And of the cases against me that of *Gobind Pershad Talookdar* v. *Mohesh Chunder Surmah Ghuttack* (4) is the only case in which the question was discussed, the other cases simply following that case, and some of these latter cases were cases under Act XXVII of 1860, in which the question of title was only summarily considered. As for the case of *Gobind Pershad Talookdar* v. *Mohesh Chunder Surmah Ghuttack* (4); that is based upon a misconception as to the effect of a *pinda* offered to a maternal ancestor, and it is supported only by the authority of Jagannatha, and I submit that is not sufficient to outweigh the authority of Srikrishna.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

JUDGMENT.

The property in dispute in this case belonged to one Nobin Chunder Bundopadhya; and the question raised before us in appeal is whether or no the plaintiff, who is the brother's daughter's son of the said Nobin Chunder, is preferential heir to the defendants, who are his (Nobin's) paternal grandfather's great grandsons. The parties are governed by the Dayabhaga school of law.

This question is indeed a difficult one. In the case of *Gobindo Hureekar* v. *Womesh Chunder Roy* (5) it was held by a Bench of three Judges of this Court that a father's brother's daughter's son is no heir according to Hindu Law. This decision was subsequently overruled in the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1), it being then held that according to the true interpretation of the Dayabhag, and the " principle of

(1) 13 W.R. (F. B.) 49 (57).
(2) 19 W.R. 367 (405)=13 B.L.R. 1.
(3) 9 C. 563.
(4) 15 B.L.R. 35=23 W.R. 117.
(5) W.R. 8 F.B. 176.

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spiritual benefit which constitutes the fundamental basis of the Law of Inheritance, propounded by the Dayabhaga," a father's brother's daughter's son, who occupies a position analogous to that occupied by a brother's daughter's son, was a *sapinda* and an heir. The precise position which he was entitled to occupy in the rank of heirs was, however, left undertermined in that case.

[788] The question as to whether a brother's daughter's son is entitled to suceed as against a great grandson of the paternal grandfather, and which is the very question we have to determine in this case, was subsequently discussed in the case of *Gobind Pershad Talookdar* v. *Woomesh Chunder Surmah Ghuttack* (1) before a Bench of two Judges, consisting of Sir Richard Couch and Mr. Justice Ainslie, and it was held that a brother's daughter's son though an heir according to the Full Bench decision in the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose*, could not have a preferential title to the great grandson of the paternal grandfather. And it appears that this decision has been followed in several cases—see *Oodoy Churn Mitter, In re* (2); *Juggut Narain Singh* v. *Collector of Manbhoom* (3); *Gopal Chunder Nath Coondoo* v. *Haridas Chini* (4); also three unreported cases, Special Appeal No. 2640 of 1875, decided on the 6th June 1877 by Mitter and Brich, JJ.; Special Appeal No. 1747 of 1880, decided on the 6th July 1882 by Field and Bose, JJ., and Special Appeal No. 754 of 1880, decided on the 22nd June 1881. In the case of *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (5), decided by a Full Bench of this Court, the question was raised as between a brother's daughter's son and a great-great-great-grandson of the great-great-great-grandfather of the deceased owner, and it was held that the latter, being only a *sakulya*, was not entitled to succeed in preference to a brother's daughter's son, he being a cognate *sapinda*.

We have it then, as decided by two Full Bench decisions, that brother's daughter's son is a *sapinda* and heir, and that he is entitled to succeed in preference to a *sakulya;* but that, as held by several Division Benches, his succession is to be postponed to agnate *sapindas*, such as a great-grandson of the paternal grandfather of the deceased owner.

The decisions of the Divisional Benches which have taken this latter view of the matter have, however, been questioned before us by Dr. Guru Das Banerji for the respondent, his contention being that if " the principle of spiritual benefit which constitutes," [789] according to the Full Bench decision in the case of *Guru Gobind Shaha*, " the fundamental basis of the Law of Inheritance propounded by the Dayabhaga," is to be followed, the brother's daughter's son is entitled to preference as against the paternal grandfather's great grandson. This contention is mainly based upon the following considerations: First, that a brother's daughter's son offers three *pindas* to his maternal ancestors, in two of which the deceased owner participates; whereas the great grandson of the paternal grandfather offers only one *pinda* to his paternal ancestors, in which the deceased participates; second, that of the two *pindas* participated in by the deceased, as offered by the brother's daughter's son, one is offered to the *father* of the deceased; whereas no such *pinda* is offered by the grandfather's great grandson, but that the *pinda* he gives is to a remoter ancestor; third, that according to Dayakrama Sangraha,

(1) 23 W.R. 117=15 B.L.R. 35. (2) 4 C. 411.
(3) 4 C. 413 (note). (4) 11 C. 343. (5) 9 C. 563.

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and various text-writers of modern times which have adopted the authority of that treatise, the brother's daughter's son is entitled to succeed after the father's daughter's son.

It has been further contended that the decision of Sir Richard Couch and Mr. Justice Ainslie in the case of *Gobind Pershad Talookdar* v. *Mohesh Chunder Surmah Ghuttack* (1), which is the foundation of the later decisions upon the same point, proceeds mainly upon a misreading of some of the observations of Mr. Justice Mitter in the Full Bench case in the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (2) as to the comparative religious efficacy of *pindas* offered to maternal and paternal sides respectively; and also upon the unsupported opinion of Jagannath Tarkapunchanun in his treatise known as Vivada Bhungarnuva as to the *pindas* offered to paternal ancestors being primary, and those offered to maternal ancestors being of secondary importance. It was further argued that upon the same principle under which the daughter's son, father's daughter's son, grandfather's daughter's son and great grandfather's daughter's son succeed in preference to agnate *sapindas* of remoter lines, the brother's daughter's son is also entitled to preference as against the grandfather's great grandson.

[790] The question raised before us, as already remarked, is indeed a different one, and the difficulty to our mind arises from the circumstances that the brother's daughter's son, although not mentioned anywhere in the Dayabhaga, as an heir, has been held by a Full Bench to be so, according to the principle of spiritual benefit as propounded by the Dayabhaga, without however assigning to him any definite position in the rank of heirs.

While recognizing, as laid down by the Full Bench in the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* referred to above, that the law of succession propounded by the Dayabhaga is based upon the principle of spiritual benefit, several Divisional Benches of this Court found themselves unable to give to the brother's daughter's son a place above an agnate *sapinda*, such as the grandfather's great grandson. And we may say that ever since the year 1874, this Court has invariably followed one course, *viz.*, it has recognized the latter as an heir preferential to the former. That being so, before we come to a different conclusion, and disturb the law as settled for so many years by those rulings, we should be perfectly satisfied that they are wrong.

Now, addressing ourselves in the first place to the question of spiritual benefit, we do not find in the Dayabhaga any express texts drawing any distinction as regards efficacy between *pindas* offered by heirs in the female line and those offered by heirs in the male line. All that it seems to lay down in substance is that the rule of succession is to be governed by the amount of spiritual benefit conferred upon the deceased, or upon his ancestors, by which he, the deceased might himself be benefited by participation or otherwise. And one would not expect to find in a treatise like the Dayabhaga, which does not deal with the ceremonial part of the Hindu Law, any such details as to the comparative efficacy of the *pindas* offered by the agnate and cognate *sapindas*. But that a distinction like this does exist, and must have been present in the mind of the author of the Dayabhaga is disclosed by the fact that between an agnate *sapinda* and a cognate *sapinda* of equal degree of propinquity the former is preferred to the latter, although the latter is the giver of a

(1) 23 W.R. 117=15 B.L.R. 35. (2) 13 W.R F.B. 49 (57)=5 B.L.R. 15.

larger number of cakes in which the deceased would participate than the former; and also by the fact that agnate *sapindas* in any [791] line are always preferred to the cognate *sapindas* of the same line. For instance, the father's son's son (*i.e.*, a brother's son) of the deceased owner offers three *pindas*, one to his own father, and the other two to the grandfather and great grandfather respectively of the deceased, and in which *two* pindas only the latter participates. The father's daughter's son (*i.e.*, a sister's son) offers three pindas, *viz.*, to the father, grandfather and great grandfather of the deceased, and in *all* which *pindas* the latter participates. And yet the brother's son is preferential heir to the sister's son. Then, again, as between the father's great grandson (brother's grandson) and father's daughter's son (sister's son), the former is the preferential heir, although he is more removed from the father of the deceased, and offers only one *pinda* (*i.e.*, to the father) in which the deceased participates, whereas the father's daughter's son offers a larger number of *pindas* in which the deceased participates.

That the *pindas* offered to paternal ancestors are primary, and those offered to maternal ancestors are secondary in importance, and that there is a difference between the efficacy of the two classes of *pindas*, is not only laid down in distinct terms by Jagannath (see Vol. 11, Colebrooke's Digest, p. 576), but is to be well deduced from Rughunundun's Sraddha Tattwa.

Referring to the subject of *Parvana Sraddha*, which, according to the ceremonial law, a Hindu is bound to perform in the case of a man who dies on the day of *amaboshya* (new moon) or *pretpukha* (dark half of the lunar month of Bhadro). Rughunundun quotes in the first place the following text of Sankha: " One who dies in *amaboshya*, or in the *pretpukha*, his annual *sraddha* should be performed in the *parvana* form after his *sapindakurun* (sixteenth *sradh* from the date of death), wherein oblation to the deceased is to the mixed with that of his father, grandfather and great grandfather." And he then observes as follows:

" Accordingly, when the annual *sraddha* of one who died in the *pretpukha*, &c., is performed in the *parvana* form, no other *parvana* is to be again begun for the sake of the performance of the *sroddh* of the maternal grandfather, &c., because the latter *sraddha* depends upon the *sraddha* of [792] the father as laid down in the text of Vrihaspati. ' Where fathers are worshipped the maternal grandfathers (are) surely to be (worshipped)'; and also by the text: ' A wise man should in the same manner perform the *sraddha* of the maternal grandfather also."

" In the same manner, if either of two step-brothers, living in commensality, performs *sraddha* in the *porvana* form, the other should not again perform the *parvana sraddha* of his maternal grandfathers. Hence it is also laid down in Dwaitanirnaya that, if a *shagnikournsh* (the son begotten, who maintains a sacred fire) performs the *sraddha* of his three ancestors from father up to great-grandfather on the date of his father's death, he is not again to begin another *porvana* for performing the *sraddha* of his maternal grandfathers." (Rughunundun's Sraddha Tattwa, Serampur Edition, p. 160).

There is also a passage in the Dattaka Chandrika which bears upon the same subject, and it is as follows:—

" In the same manner, as on the anniversary of the decease of a father (who died during the first half of *asvina*, denominated *pretpukha*) the ceremonials of a *parvana* rite having been contemplated in honour of the father and other two paternal ancestors in ascent above him, a *parvana*

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rite is not recommended on account of the funeral repast in honour of the maternal grandfather and other two male ancestors (on the mother's side); for the commencement of the same depends on the funeral repast in honour of the paternal ancestors (which, in this instance, would have been already completed)." (Dattaka Chandrika, Baboo Kishen Kishore's Ed., s. 1, v. 24).

It has, however, been said that according to the principle, which is to be gathered from the Dayabhaga, the person who offers *pindas*, whether primary or secondary, to the deceased, comes in first among the rank of heirs; that the succession then goes to the ascending line, *viz.*, the father and those who offer *pindas* to him in the order of proximity; and on failure of such heirs it goes to the grandfather and those who confer benefits on him, and then in like manner to the great-grandfather and his descendants; and that in this view of the matter, the brother's daughter's son is entitled to succeed in preference to the grandfather's great-[**793**] grandson, because the latter offers no *pinda* to the *father* of the deceased, whereas the latter does. And in this connection reliance is placed upon Dayabhaga, Ch. XI, s. 6, v. 5, which treats of the relative claims of the uncle and nephew of the deceased owner.

The principle as enunciated above may no doubt be well applied in a contest between two persons who present funeral cakes of the same description but there appears to be no authority that it also applies in a case where the rival claimants are presenters of cakes, primary and secondary, respectively. On the other hand, the contrary appears from the respective positions assigned in the Dayabhaga itself to the father, grandfather and great grandfather in relation to daughter's son, father's daughter's son and grandfather's daughter's son respectively. For instance according to the Dayabhaga, in default of daughter's son, the succession devolves on the father (*see* Colebrooke's Dayabhaga, Ch. XI, s. 3, vs. 1 and 3), whereas, according to the contention now raised, there ought to come in after the daughter's son at least two other heirs, *viz.*, the son's daughter's son and grandson's daughter's son, before the father can succeed. And similarly, according to the same contention, after the father's daughter's son, the brother's daughter's son, the brother's son's daughter's son ought to come in before the succession goes to the grandfather; whereas Ch. XI. s. 6, vs. 8 and 9, point to the contrary. The same remark applies to the relative position of grandfather's daughter's son and the great grandfather. But it has been contended that the expression "daughter's son," as occurring in Chap. XI, s. 3, v. 1, and s. 6, vs. 8 and 9, should not be read literally as denoting the son of the daughter of the deceased or of the father or grandfather, but it ought to be read as including the daughter's son of the son and grandson of the deceased, and the father's son's daughter's son and grandson, and so on.

No valid reason has been adduced before us in support of the contention that in the above passages the expression "daughter's son" should have a more extended signification than what it ordinarily bears. On the other hand, the well-known commentator Sree Krishna Tarkalunkar commenting on vs. 34 to 37 [**794**] of s. 6, Ch. XI of the Dayabhaga, gives a recapitulation of heirs, and he clearly understands the expression "daughter's son" in its literal sense. It appears from several passages in the Dayabhaga itself that the expression "daughter's son" was used in its literal sense. For instance, in s. 2, Ch. XI, v. 17, the author of the Dayabhaga says: "Vrihaspati recites the gift of the funeral oblation as the sole cause (of right) in the instance of both (the daughter and the grandson) " as the

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ownership of her father's wealth devolves on her, although kindred exist, so her son likewise is acknowledged to be heir to his maternal grandfather's estate." As the daughter is heiress of her father's wealth in right of the funeral oblation which is to be presented by the daughter's son, so is the daughter's son owner of his maternal grandfather's estate in right of offering that oblation, notwithstanding the existence of kindred such as the father and others." (Colebrooke's Dayabhaga, Ch. XI, s. 2, v. 17).

Now it is clear from the above passage that the expression "daughter's son" was used to denote only the daughter's son of the deceased owner, and not to include his son's daughter's son and grandson's daughter's son, because the text of Vrihaspati cited above, and the observation made upon it by the author of the Dayabhaga, speak of "his maternal grandfather's estate." The pronoun "his" cannot apply to the son's daughter's son, or the grandson's daughter's son, because it is followed by the words maternal grandfather," and the deceased owner could not be characterized as the maternal grandfather of his son's daughter's son or grandson's daughter's son. The same observation applies to the text of Menu cited in v. 19 of the same chapter and section. The text says: "Let the daughter's son take the whole estate of his own father who leaves no other son, and let him offer two funeral oblations—one to his own father, the other to his maternal *grandfather*. Between a son's son and the son of a daughter there is no difference in law, since their father and mother both spring from the body of the same man."

It is clear that this text cannot apply to the son's daughter's son or the grandson's daughter's son.

In s. 3, v. 3 of the same chapter, the author of the Dayabhaga, treating of the father's right of succession, says that [**795**] his right "should be after the daughter's son and before the mother, for the father, offering two oblations of food to other manes in which the deceased participates, is inferior to the daughter's son who presents one oblation to the deceased and two to other manes in which the deceased participates."

Here the "daughter's son" mentioned cannot include son's daughter's son or grandson's daughter's son, because neither of them presents "one" oblation to the deceased, and two to other manes in which the deceased participates.

In v. 8, s. 6, Ch. XI, the author of the Dayabhaga says: "But on failure of heirs of the father down to the great grandson the succession devolves on the father's daughter's son (in preference to the uncle) in like manner as it descends to the owner's daughter's son (on failure of the male issue in preference to the brother)." (Colebrooke's Dayabhaga, Ch. XI, s. 6, v. 8.) The author here speaks of the "owner's daughter's sons," which expression cannot include his son's daughter's son and grandson's daughter's son.

For these reasons we are unable to give to the expression "daughter's son," as occurring in s. 3, Ch. XI, v. 1, an extended meaning as contended for. In like manner we do not think that the expression "the daughter's son" in Ch. XI, s. 8, vs. 8 and 9, could be stretched as to include father's son's (*i.e.*, brother's) daughter's son, and grandfather's son's daughter's son.

Reliance was also placed before us upon the Commentary of Srinath Acharya Chudamony on Ch. XI, s. 4, vs. 4 to 6, which treat of the succession in default of the mother "together with her offspring." There are two readings of the said commentary; one is as follows:—

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"Here the phrase 'together with her offsring,' implying even a brother's daughter's son, the heritable right of the grandfather, is expressly mentioned."

The other reading is: "Though the word 'offspring' in the expression (সসন্তান) (sasantana) 'together with her offspring' may include the brother's daughter's son, yet it is said that the grandfather is to succeed."

But whatever may be the correct reading, and although it be that the expression "together with her offspring" may imply [796] or include a brother's daughter's son, still there can be no doubt that according to the Dayabhaga, as understood by Srinath himself, the grandfather succeeds in preference to the brother's daughter's son.

It was further contended that the translation, as given by Mr. Colebrooke to paragraphs 9 and 10 of s. 6, Ch. XI, is not quite correct. But taking the translation as it was contended for, we do not think that, so for as the author of the Dayabhaga was concerned, it was his intention to place the brother's daughter's son just after the father's daughter's son; but on the contrary, reading vs. 8, 9 and 10 together, it would appear that he intended to say that the succession of the grandfather and great-grandfather respectively, their sons, grandsons and great-grandsons, as also their daughter's sons, would be in the same order as in the case of the father, his son, grandson and great-grandson, and his daughter's son, as laid down in the earlier parts of the same chapter; and in this view the brother's daughter's son would find no place just after the father's daughter's son.

Stress was also placed before us upon Dayatattwa, Ch. XI, para. 64. But as to this there are two readings; one is as follows:—

"Accordingly, as on failure of the deceased proprietor's lineage, including the daughter's son, others succeed, similarly in default of the brother's son, the father's lineage ending with his (or the) daughter's son takes the heritage."

Another reading is: "As in default of one's own lineage, ending with daughter's son, another is entitled, so in default of brother's son, ending with his daughter's son, the father's lineage is entitled."

These two different readings are due to two different editions of the above work. We have been unable to discover which of those editions is correct; and we do not therefore think that we should be justified in acting upon either of them.

The last argument that was raised in this connection was with reference to the construction of v. 12, s. 6, Ch. XI. It was said that according to this verse, in default of the lineal descendants of the paternal great-grandfather, including the [797] daughter's son, the maternal uncle and the other heirs in the maternal line succeed and that therefore the brother's daughter's son has no place at all, if he is to come in after the agnate *sapindas*. But the Full Bench in the case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1) considered v. 19 of the same section, and from the reasons given therein came to the conclusion that the word "&c.," after the expression "father's daughter's son" in that verse is comprehensive enough to include such relatives who are, like the father's daughter's son, competent to offer oblations to the paternal ancestors of the deceased. This conclusion virtually overrules the contention raised before us as to v. 12.

(1) 13 W.R. (F.B.) 49=5 B.L.R. 15.

We observe that Jagannath, the author of Vivad Bhungarnuva, while commenting upon v. 20, s. 6, Ch. XI, and which is substantially the same as v. 12, referred to above, advocates the claim of, among others, the brother's daughter's son, &c. (See Colebrooke's Digest, Vol. II, p. 567.) And this leads us to suppose that the words as used in v. 12 do not debar a brother's daughter's son from claiming succession in preference to the material uncle, &c.

We have next to consider the passage in the Davakrama Sangraha favouring the claim of the brother's daughter's son as entitled to succeed immediately after the father's daughter's son. It was contended, as already mentioned, that there were several copies of this treatise in existence which contained the above passage, and that it was not right in this Court to hold in the case of *Govindo Hureekar* v. *Womesh Chunder Roy* (1) that it was an interpolation. Now, in the first place, it must be observed that Sri Krishna Tarkalunkar, the author of the said treatise, while recapitulating in his commentary the order of succession according to the Dayabhaga, did not mention the brother's daughter's son, or the uncle's daughter's son, who are mentioned in certain copies of the Dayakrama Sangraha as heirs. And if these copies are correct, how is it that we do not find any mention made of many other cognate *sapindas*, such as son's daughter's son, grandson's daughter's son, brother's son's [798] daughter's son, and others who occupy positions analogous to that which a brother's daughter's son and uncle's daughter's son occupy. That being so, it seems to us that the passages in the Dayakrama Sangraha that are relied upon are of doubtful authority, and that we should not be justified in acting upon them. And if we cannot act upon these passages, it follows that we cannot accept the opinion expressed by certain modern writers based upon the authority of the Dayakrama Sangraha.

As regards the argument pressed upon us that the decision of Sir Richard Couch in *Govind Pershad Talookdar* v. *Mohesh Chunder Surmah Ghuttack* (2) proceeds upon a misreading of the remarks of Mr. Justice Mitter in the Full Bench case of *Gooroo Gobind Shaha* v. *Anund Lal Ghose* it seems to us that there is some force in it. Mr. Justice Mitter, as we understand him, in the passage quoted by Sir Richard Couch in page 47 (15 B. L. R.) and relied upon in the following page, referred evidently to the *pindas* offered to the paternal ancestors of the deceased in which he participated, and *pindas* offered to his maternal ancestors which he, the deceased, was bound to offer, but in which he does not participate. And in speaking of these two classes of *pindas* Mr. Justice Mitter observed that the former were of superior religious efficacy. He did not apparently mean to refer to the *giver* of the *pindas* but to the *deceased*, while he alluded to the efficacy of the *pindas* as offered to the paternal and maternal ancestors, respectively.

But however that may be, this inaccuracy does not affect the true merits of the conclusion at which Sir Richard Couch arrived; for if there be a difference as to the efficacy of the two classes of *pindas* offered by a person to his paternal and maternal ancestors, respectively, there can be very little doubt that the decision cannot be impeached, although some of the reasons given may be questioned.

With reference to the argument that was pressed upon us that upon the same principle, *viz.*, of spiritual benefit, according to which the

(1) W.R.F.B. 176. (2) 23 W.R. 117=15 B.L.R. 35.

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daughter's son, father's daughter's son, grandfather's daughter's son and great-grandfather's daughter's son succeed in preference to agnate *sapindas* of remoter lines, a brother's [**799**] daughter's son is entitled to preference as against the grandfather's great grandson, we have to observe that it is no doubt true that the spiritual benefit conferred upon the deceased by the daughter's son, father's daughter's son, &c., is mentioned by the author of the Dayabhaga as the cause for their succession; but there are several passages in the Dayabhaga itself which clearly indicate that it is not the *only* cause. Referring to Ch. XI, s. 2, vs. 19 and 20 (Colebrooke's Dayabhaga), we find that the author says as follows:—

" Accordingly Menu propounds the daughter's origin from the person of the maternal grandfather as the reason of the daughter's son having a right to the succession, not her appointment to raise a son; else he would have specified this cause. Let the daughter's son take the whole estate of his own father who leaves no (other) son, and let him offer two funeral oblations, one to his own father, the other to his maternal grandfather. Between a son's son and the son of a daughter there is no difference in law, since their father and mother both sprung from the body of the same man."

" Thus this very author expressly declares that the daughter's son. born of one not appointed to continue the male line, has the right of succession. 'By that male child, whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes in law the father of a son. Let that son give the funeral oblation and possess the inheritance'."

In the above passages it is expressly mentioned that " between a son's son and the son of a daughter there is no difference in law," and that " the maternal grandfather becomes in law the father of a son."

Then again the Dayabhaga, referring to the succession of the father's daughter's son in Ch. XI, s. 6, vs. 8 and 9, says as follows:—

" But on failure of heirs of the father down to the great-grandson it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle) in like manner as it descends to the owner's daughter's son (on failure of the male issue) in preference to the brother." " The [**800**] succession of the grandfather's and great-gandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering, since the reason stated in the text—' for even the son of a daughter delivers him in the next world, like the son of a son '—is equally applicable; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss by offering oblations of which he may partake."

In the above passages the author says: " In like manner as it descends in the owner's daughter's son:" and " since the reason stated in the text—' for even the son of a daughter delivers him in the next world, like the son of a son'—is equally applicable," the special reasons stated in the verses quoted are not applicable to a brother's daughter's son, uncle's daughter's son, &c.

Upon all these considerations we are unable to hold that the plaintiff, who is a brother's daughter's son, is a preferential heir to the defendants, who are the great-grandsons of the paternal grandfather of the deceased Nobin Chunder.

The result is that this appeal will be allowed with costs.

T. A. P. *Appeal allowed.*

15 C. 800 (P.C.)=15 I.A. 106=12 Ind. Jur. 255=5 Sar. P.C.J. 214=Rafique and Jackson's P.C. No. 103.

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PRESENT:

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

AMANAT BIBI AND OTHERS (*Plaintiffs*) *v.* IMDAD HUSAIN (*Defendant*).* [15th and 16th March, 1888.]

Res judicata—*Civil Procedure Code,* 1877, *ss.* 13 *and* 43—*Act XII of* 1879, *s.* 6—*Act VIII of* 1859, *s.* 7—*Inclusion of the whole claim in suit.*

The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgage.

The first suit, in which he with another claimed as under-proprietors, was dismissed in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional sale which had become absolute.

[801] Another suit was then brought to recover the talukdari right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held,* that the present suit to redeem the same property under a morgage was not barred under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879. The claim to redeem did not arise out of the former cause of action within the meaning of the sections of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before, it could not be regarded as a "portion of his claim," and he was not precluded, by having omitted it, from bringing it forward.

[**F.**, 27 B. 379 (388); **Cons.**, 26 M. 760=13 M.L.J. 448; **Rel. on.** 15 C.L.J. 258=12 Ind. Cas. 684 (685); **R.**, 32 A. 625 (628)=7 A.L.J. 738=7 Ind. Cas. 289; 16 C. 137 (147); 9 Bom. L.R. 1020 (1024); 5 A.L.J. 192=A.W.N. (1908) 96 (98); 29 M. 153 (154)=16 M.L.J. 48 **(F.B.)**; 10 Ind. Cas. 75 (79)=21 M.L.J. 344 (351)=10 M.L.T. 533; 17 Ind. Cas. 445 (450)=23 M.L.J. 543 (553)=12 M.L.T. 500= 1913 M.W.N. 1; 2 Ind. Cas. 115, 28 M. 406 (409).]

APPEAL from a decree (26th September 1884) of the Judicial Commissioner, affirming a decree (13th April 1883) of the District Judge of Fyzabad, which was made upon an order (1st August 1882) of the Judicial Commissioner, reversing a decree (27th October 1881) of the District Judge of Fyzabad, and remanding the suit to the Court of the District Judge.

This was a suit for the redemption from mortgage of ten villages, with Chaks appertaining, in Ilaka Jaipur, in the Fyzabad district. The mortgage money was Rs. 2,000, on payment of which redemption was to take place, one-seventh of the rents and profits of the estates to be paid annually as naukar, and the rest to be credited for interest.

The questions now were whether the issue as to the right to redeem had been substantially determined in prior proceedings; and whether the plaintiff, having been bound to bring forward his claim to redeem on a former occasion, if he was to insist upon it, was now precluded by reason of his omission.

The appellant Amanat Bibi, the defendant in the suit, was the widow and representative of Malik Hidayat Husain, deceased, who was the

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brother and successor in the talukdari of Jiapur, of Malik Tafazzal Hussain. The other appellants Lachman Persad and Narotam Das were mortgagees from Malik Hidayat Husain.

Ilaka Jiapur, the mortgaged property, originally formed part of the estate of two brothers, Abbas Ali and Hafiz Ali, and upon a partition between them in 1251 Fusli, corresponding to 1843 A. D., became the share of Hafiz Ali, who was the father of the present plaintiff. It was ground common to both parties [802] to this suit that Jiapur passed into the possession of Malik Tafazzal Hussain by way of mortgage. Also it was admitted that the settlement of Jiapur was made with Tafazzal, having been included in the sanad relating to Taluka Samanpur. The difference between the parties was in this, that the plaintiff asserted that the mortgage took place about the 1st June 1854, and fixed no term for redemption, while on the other hand the defendants maintained that the mortgage was of earlier date, and having been by way of conditional sale had become absolute upon non-payment of the mortgage money within eight months, the period fixed for re-payment.

Ilaka Jiapur became, in and after 1866, the subject of several distinct litigations, carried on against Hidayat Hussain by members of his uncle's family.

In 1866 Imdad Ali joined his cousin Mehdi Ali in suing to establish sub-proprietary rights in the villages which had by that time been included in the taluka of Hidayat Hussain. The Settlement Officer's order (16th March 1866) contained a finding that Jiapur had originally belonged to the family of the claimants, and that the case of the defendant accounting for the change of possession was weak. But he held himself bound to dismiss the claim, in reference to the agreement made by the Government with the talukdars, that only those would be recognized as sub-proprietors who were proved to have held under them on a sub-proprietary basis within limitation, while the plaintiffs admitted that they never held as sub-proprietors under the talukdars during the nawabi. This decision was affirmed by the Commissioner on the 20th June 1886, and by the Financial Commissioner on the 25th October 1866.

Both claimants then applied to the Financial Commissioner, under Circular 4 of 1867, known in Oudh as the "Hard Case Circular," which provided for the hearing of claims preferred by persons who had suffered in the re-adjustments of property operated in the province after the general confiscation of rights in land ordered by Lord Canning in 1858. The result, however, was the same; the Financial Commissioner remarking that, putting aside other reasons as regards Mehdi Ali's application, he had not held since 1255 F., about 1847, and the petition was [803] rejected, an order which was affirmed on review on the 27th February 1868.

Imdad Husain's case was referred to an Assistant Settlement Officer for report, and the Financial Commissioner (11th April 1868), upon the investigation, dismissed his claim also.

Imdad Husain then made a third attempt under Book Circular 106 of 1867, "which prescribed that, when proprietors had been ousted, and their lands transferred to another proprietor on account of arrears of revenue by order of the former Courts of Oudh, such transfer should be considered temporary only, and the ex-proprietor should have a claim to re-enter into possession on payment of the moneys advanced by the temporary transferee, and that the lien of the latter should be held to be of the nature of a redeemable mortgage."

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His petition was dismissed by the Settlement Officer on the 26th November 1868, the Financial Commissioner confirming the dismissal on the 17th April 1869.

Mehdi Ali commenced another suit in 1877 against Hidayat Hussain and this respondent Imdad Husain and others, in which he asserted that in 1854 Hafiz Ali, as his Manager, had mortgaged Jiapur to Tafazzal for Rs. 2,000, and that on the 12th June 1854 Tafazzal had executed an agreement to Hafiz Ali, acknowledging his right to redeem at any time on payment of the mortgage amount. This respondent, in his written statement, admitted the mortgage agreement, but asserted that it had been granted to his father, Hafiz Ali, in his own right, and not as agent for Mehdi Ali, and that the document had been lost during the minority of the sons of Hafiz Ali. It was then, in effect, found that Hafiz Ali had not acted in the transaction as agent for Mehdi Ali, who therefore had no title to sue; and this suit was also dismissed finally on 29th July 1879.

The present suit was instituted on the 25th February 1881. The plaintiff, Imdad Husain, stated that the claim for a sub-settlement was preferred in ignorance that the property now in suit had been mortgaged by his father, and that the power to redeem subsisted. He alleged that, according to the agreement dated 4th Ramzan 1270 H., corresponding to 1st June 1854, it was clear that the whole mortgage money was paid out of [**804**] the seventh part of the income; and he claimed to redeem under s. 6 of Act I of 1869, the Oudh Estates Act, and that accounts should be taken.

It was held in the Court of first instance that this suit for redemption of the villages in Jiapur was barred by the former proceedings in the settlement Courts. This judgment was, however, reversed on appeal, and the suit was remanded for decision on the merits.

The issues then recorded raised the two questions whether the suit was barred as *res judicata* and whether the property had been mortgaged in 1854. The District Judge (Colonel F. E. A. Chamier) decreed in favour of the plaintiff for redemption of the property on payment of Rs. 2,001.

An appeal from this decree was dismissed by the Judicial Commissioner (Mr. W. Young). In his judgment upon the question of *res judicata* after stating the previous proceedings, he said: "The procedure was in my opinion altogether defective even on the materials then before the Courts, but it is obvious that the case then before those Courts was of a wholly different character from the present suit. That was a claim based on orders of the Government. This relies on a private bargain of the parties.

On the second point he summed up his examination of the evidence as follows: "On the whole, I think, that this agreement (1st June 1854) must be accepted as genuine, and taking it with the other evidence for the plaintiff, it seems to me that his contention, that the estate was mortgaged to the Malik in 1261 F. (1854) and not before, and that the mortgage was redeemable as set forth by the terms of the agreement, must be held to be established."

Mr. *J. Graham*, Q. C., and Mr. *J. H. A. Branson*, for the appellants, argued that the proceedings in the Settlement Courts barred the present suit. They referred to *Thakur Shankar Baksh* v. *Daya Shankar* (1); *Phosphate Sewage Company* v. *Malleson* (2); *Hunter* v. *Stewart* (3);

(1) 15 I.A. 66=15 C. 422. (2) L R. 4 App. Ca. (H.L.) 881.
(3) 4 De G.F. & J. 168.

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Toiponidhee Dhirij Gir Gosain v. *Sreeputty* [**805**] *Sahanee* (1); *Moonshee Buzlor Ruheem* v. *Sham Soonnessa Begum* (2); *Mootoo Vijaya Raghanada* v. *Katama Natchiar* (*Shivaganga case*) (3); *Soorjomonee Dayee* v. *Suddanund Mohapattur* (4): Act VIII of 1859, ss. 6 and 13; Act X of 1877, ss. 43 and 623.

Mr. *J. D. Mayne*, for the respondent, contended that the decision of the Judicial Commissioner was correct upon the question of *res judicata*. There were also concurrent findings of both Courts that the property was held under a redeemable mortgage. The cause of action was not identical with that in the former proceedings. The plaintiff was not bound to include the present claim in his former suit, and in fact was in ignorance of it at the time of the proceedings in the settlement; nor could he have succeeded in making good his claim until after the passing of the Oudh Estates Act, 1869.

Mr. *J., Graham*, Q.C., in reply, referred to *Krishna Behari Roy* v. *Brojeswari Chaodhrani* (5).

[SIR B. PEACOCK referred to the *Raja of Pittapur* v. *Venkata Mahipati Surya* (6).]

JUDGMENT.

Their Lordships' judgment at the conclusion of the arguments was delivered by

LORD MACNAGHTEN.—This is an appeal from a judgment of the Judicial Commissioner of Oudh, affirming a decision of the District Judge of Fyzabad, by which he granted a decree for redemption of certain property said to be on mortgage. The mortgage deed is not produced, but there has been produced a memorandum under the seal of a predecessor in title of the appellants, which stated upon the face of it that the property had been mortgaged and was subject to redemption. That memorandum has been held by two Courts to be a genuine document, and to be sufficient evidence of the alleged mortgage. The sole ground of appeal is that the respondent's suit ought to have been held barred [**806**] by what took place in certain settlement proceedings, for two reasons: (*a*) because the issue in this suit was substantially determined by the determination of an issue in those proceedings; and (*b*) because the respondent was bound to have brought forward, in the previous proceedings, the mortgage transaction on which he relies in the present suit.

The settlement proceedings may be stated very shortly. The respondent in 1866 brought a claim to establish an alleged sub-proprietary right. That claim was dismissed on an admission by the respondent that he never had held as sub-proprietor under the talukdar during the native rule, or during the term of limitation, that is, the period from 1844 to 1856. The dismissal was confirmed by the Commissioner and also by the Financial Commissioner, Colonel Barrow. After that proceeding had come to an end a Government Circular was issued, Book Circular 4 of 1867, which is known as "The Hard Case Circular," and thereupon the plaintiff applied for a review of his case. The Financial Commissioner entertained the application, and remanded the matter to the Settlement Officer. The Settlement Officer made a most minute and elaborate examination into all the circumstances. He found that the property had been conveyed to the talukdar by a conditional deed of sale, under which the purchase

(1) 5 C. 832. (2) 11 M.I.A. 551=8 W.R. (P.C.) 12. (3) 11 M.I.A. 73.
(4) I.A. Sup. Vol. 212=12 B.L.R. 304. (5) 2 I.A. 283.
(6) 12 I.A. 116=8 M. 520.

1888 March 16.

Privy Council.

15 C. 800 (P.C.)=15 I.A. 106=12 Ind. Jur. 255=5 Sar. P.C. J. 214=Rafique & Jackson's P.C. No. 103.

money was to be repaid within the period of eight months, and that on the expiration of that period the sale became absolute. He also found that the talukdar had paid up certain arrears of Government revenue which ought to have been paid by the respondent or his predecessors-in-title. The Financial Commissioner accepted the report of the Settlement Officer, and refused to disturb the previous orders. Their Lordships are of opinion that proceedings under the "Hard Case Circular" cannot be treated as judicial proceedings. It appears from the Circular that the talukdars had engaged to take cases of proved hardship into their favourable consideration. But relief was to be granted not as a matter of right enforceable by process of law, but as a matter of concession in a spirit of fairness and liberality. His appeal on the ground of hardship having been rejected, the respondent then sought to avail himself of another Circular. Adopting the finding of the Settlement Officer that the [807] talukdar had paid arrears of Government revenue, he sought to treat those arrears as paid on his account, and he brought a suit to recover the property under the terms of Circular No. 106 of 1869. That suit was dismissed. But it may be assumed for the purposes of this judgment that in that suit—which was a judicial proceeding—the Settlement Officer re-affirmed his previous findings, and determined that the property had been transferred to the talukdar by a deed of sale, which was dated in February 1853, and became absolute eight months after its date.

Is that determination a bar to this suit, founded, as the suit is, on a mortgage recognized as subsisting in 1854?

The section of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms: "No Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court." Now what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on re-paying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor. But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all?

Then comes the question, was the respondent bound to have brought forward his present claim in the former suit? Section 7 of Act No. VIII of 1859 is in these terms: "Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim, in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the [808] portion so relinquished or omitted shall not afterwards be entertained." That section has already been under the consideration of this Board in the case of *The Raja of Pittapur* v. *Venkata*

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Mohipati Surya (1), and the commentary upon it at page 119 is: "That section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought." The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit.

Moreover, it appears to their Lordships that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of the section in question.

On the whole, therefore, their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that the appeal ought to be dismissed, and they will humbly advise Her Majesty in accordance with that view. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

TRILOKI NATH SINGH (*Plaintiff*) *v.* PERTAB NARAIN SINGH (*Defendant*). [20th March, 1888.]

Res judicata—Code of Civil Procedure, s. 13—Identity of cause of action with that of prior suit, to which the plaintiff in a subsequent suit had been a party—Effect of judgment, that a will had been revoked, to bar, between the parties, any claim founded solely on the will.

The widow of a talukdar, acting under his supposed will, appointed the present appellant to succeed to the taluks and other estate which had belonged to the deceased.

[809] The heir of the deceased, under the Oudh Estates Act, I of 1869, obtained the judgment of the Judicial Committee, declaring that he was entitled to the taluks as against the present appellant, whose title was under the will, which had been revoked, as the Committee found. Another suit brought by the present appellant for a decree declaring that, in virtue of his appointment by the widow under the will, he was entitled to the whole of the estate of the deceased, talukdari and non-talukdari, was dismissed by the Judicial Committee on the ground that he had no such title to the whole or any part of the estate.

Held, that this prior judgment was conclusive to bar the present suit, which, being founded entirely upon the appellant's appointment in pursuance of the will, was brought for possession of all the estate of the deceased, as well as a declaration of right thereto.

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(1) 12 I.A. 116.

Although the heir was not entitled to possession of the estate of the deceased other than talukdari, inasmuch as the widow took her estate therein, nevertheless the claim of the present appellant being only founded upon her appointment under the will, as if unrevoked, and not being a claim for property as descending to the widow upon her husband's intestacy, the prior judgment was binding in the present suit.

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[R., 20 B. 86 (96).]

APPEAL from a decree (26th November 1884) of the Judicial Commissioner, reversing a decree (25th September 1882) of the District Judge of Fyzabad.

This appeal, and the suit out of which it arose, followed previous proceedings in the Oudh Courts and on appeal to Her Majesty in Council, concerning the rights of the present appellant, Triloki Nath Singh, nephew of the late Maharajah Man Singh, K.C.S.I., who died without issue on the 11th October 1870. The respondent, Pertab Narain Singh, was the son of the Maharajah's daughter; and the question in the suit, which commenced these proceedings, was whether he or Triloki Nath, the Maharajah's nephew (brother's son), whose title was founded on the deceased having executed a will in 1864, was entitled to the taluks. The late talukdar's name had been entered in lists II and V under the Oudh Estates Act, I of 1869 (1). By the will of 1864 the Maharajah gave all his estates to his widow, the Maharani Subhao Kuar, with power to appoint his successor, and this power she exercised on the 16th August [810] 1872 by appointing Triloki Nath. But, as was decided in the judgment of their Lordships, of 19th July 1877, in the suit which was brought by Pertab Narain (making Triloki Nath, then a minor, a party), that will was orally revoked by the Maharajah in the month of January preceding his death.

The Maharajah's estates, which had, at his request, been brought under the management of the Court of Wards, were, on the petition of the Maharani Subhao Kuar, whose name was substituted in the Collectorate records for that of her deceased husband on the 27th January 1871, brought under management in pursuance of Act XXIV of 1870, the Oudh Talukdars' Relief Act, and so remained until the 30th September 1880, when the estates were made over to the present respondent, Pertab Narain.

Pertab Narain's suit—*Maharajah Pertab Narain Singh* v. *Maharani Subhao Kuar* (2)—was brought on the 21st November 1872 for a declaration of his title to the taluks under cl. 4 of s. 22 of Act I of 1869, and for the cancellation of the alleged will of the Maharajah of 22nd April 1864. The judgment of the Judicial Committee (19th July 1877) was that the will had been revoked, and the order declared that Pertab Narain was entitled to the talukdari and whatever passed with it under the Oudh Estates Act.

On an application by Triloki Nath for a re-hearing—*Ex parte Triloki Nath Singh, In the matter of Pertab Narain Singh* v. *Maharani Subhao Kuar* (3)—it was held that the appeal could not be re-heard, unless by some accident, without any omission, or default, on the part of the party seeking to re-open it, an order had been made without his having been heard. What might be Triloki Nath's case in this respect might be raised

(1) Mehdauna was the Maharaja's ancestral taluk. The confiscated taluk of Gonda was given to him by the Government after the events of 1857-1858.

(2) 4 I.A. 224=3 C. 626.

(3) 5 I.A. 177=4 C. 184.

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in another suit. An order (29th June 1878) followed accordingly, dismissing the application.

Afterwards, with reference to the above, Triloki Nath filed his plaint (3rd June 1879) for a declaratory decree that the proceedings in Pertab Narain's suit were not binding upon him, and that he might be declared to be the successor of the late [**811**] talukdar, and entitled to all his estate, on the strength of the appointment made by the Maharani under the will of 1864.

The suit was dismissed in the first Court in August 1881; but the Judicial Commissioner, on an appeal to him, being of opinion that the will had not been revoked, made a decree (22nd July 1882) granting what was claimed. An appeal from this decree was preferred by Pertab Narain, and on the 15th August 1882 the plaint in the present suit was filed by Triloki Nath, who, alleging himself to have been duly appointed under the will executed by the Maharajah in 1864, claimed the whole of his moveable and immoveable estate, with mesne profits. The plaint stated that " the property of the late Maharajah passed into the possession of the Court of Wards on or after the 23rd April 1870, and subsequently it was placed in the hands of a Manager appointed under Act XXIV of 1870, who retained possession thereof from the 3rd June 1871 till the 30th September 1880, when the debts of the said estate having been liquidated, plaintiff, as heir and successor to the said late Maharajah, became entitled to possession thereof, but the defendant obtained wrongful possession of the property in suit on the aforesaid date, and has retained unlawful possession of the same ever since; consequently the cause of action as to possession accrued to plaintiff on the 30th September 1880." With the plaint were filed copies of the deed of appointment executed by the Maharani on the 16th August 1872, and of another deed dated 20th May 1875, executed by her, and purporting to make over the proprietary possession in all the " property, moveable as well as immoveable, belonging to the Maharajah and myself."

Pertab Narain's defence in the main was that the order of Her Majesty in Council (13th August 1877), following the judgment of the Judicial Committee of that year, which etablished the revocation of the will, was final and conclusive, barring the present suit.

The District Judge held the suit not barred, and decreed to the paintiff possession of the late Maharajah's estate with all accretions.

From this decree Pertab Narain appealed to the Court of the officiating Judicial Commissioner, Mr. T. B. Tracy, on the 8th [**812**] October 1882 but as the Judicial Commissioner's decree (22nd July 1882) in Triloki Nath's claim for a decree of his right was then pending on appeal to Her Majesty in Council, the hearing was postponed until the arrival of the decision of their Lordships (23rd July 1884). This reversed the Judicial Commissioner's decree—see *Pertab Narain Singh* v. *Triloki Nath Singh* (1) —holding that the Maharani was the full representative of the estate in the former suit.

The Judicial Commissioner, with the latter judgment before him, decided as follows: " It is obvious that the present suit was brought in consequence of the declaratory decree passed in July 1882, and as this judgment has been reversed, the present decree awarding possession of the Maharajah's estate to Triloki Nath cannot possibly be maintained. It is,

(1) 11 I.A. 197=11 C. 186

therefore, useless to consider whether the suit was barred by ss. 12, 13, 43, or 373 of the Civil Procedure Code."

"The plaintiff-respondent's counsel have contended *inter alia* that the judgment of the Privy Council has reference only to the talukdari estate, and does not concern the personal estate of the late Maharajah. It seems a sufficient answer to this that the plaintiff respondent claimed the entire estate, both moveable and immoveable property, as the successor appointed under the will of the late Maharajah Sir Man Singh, and that it has been held by their Lordships of the Privy Council that the will was revoked by the Maharajah. The plaintiff-respondent's title to the moveable property is worth no more than his title to the talukdari estate."

"The appeal is allowed, and the judgment and decree of the lower Court are set aside."

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On this appeal.—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. Graham*, Q.C., Mr. *J. Rigby*, Q. C., and Mr. *J. H. A. Branson*, for the respondent.

In the argument for the appellant reference was made to the judgments above referred to, and it was argued that the judgment of 19th July 1877 gave no title to the respondent to have [813] possession delivered to him. The manager, who had been in possession under Act XXIV of 1870, was not authorized to make over the estates to any other than the Maharani or her transferee; and the appellant was entitled to all the residue of Man Singh's estate beyond that which was governed by Act I of 1869, by reason of the Maharani having by her deed of 20th May 1875 conveyed to him her interest therein.

Counsel for the respondent were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from a decision of the Judicial Commissioner of Oudh given on the 26th November 1884, and the question is whether that decision is correct with reference to the course of proceedings which had been previously taken in the various Courts of Oudh and also before Her Majesty in Council.

Sir Man Singh, who was one of the great talukdars of Oudh, died on the 11th October 1870. He left a widow, the Maharani Subhao Kunwar, and a daughter named Brij Raj Kunwar, by a deceased wife, and also a son of that daughter, Pertab Narain Singh, the present respondent.

The Maharajah made a will by which he gave all his property, moveable and immoveable, to his widow, with power to her to appoint a successor. Pertab Narain Singh, who was the son of the daughter, considering that he was entitled to the estates of the late Maharajah according to the rules of descent established by Act I of 1869, commenced a declaratory suit against the Maharani, and also against Triloki Nath, the present appellant, who had been appointed by the Maharani to be her successor, to have it declared that the will of the late Maharajah had been revoked by him, and consequently that the widow had no right to appoint Triloki Nath. In that suit the first Court decided that the will had not been revoked, and the Judicial Commissioner upheld that decision; but upon appeal to Her Majesty in Council it was held that the Maharajah had revoked the will, and that, consequently, the widow had no power to appoint Triloki Nath. That decision was in July 1877, and is reported in

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the 4th volume of the Indian Appeals, page 228. It is there said "It is now admitted on all sides, if it were [814] ever seriously disputed, that the appellant"—that is, the Maharaja Pertab Narain Singh, the present respondent—"can only succeed in his suit by establishing both the following propositions: (*a*) that the testamentary disposition which the Maharajah unquestionably had power to make and did make in April 1864 was revoked or became inoperative in his lifetime; (*b*) that the appellant is entitled to succeed to the taluk as the son of a daughter of the Maharajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of s. 22 of Act I of 1869, it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the taluk under the special canon of succession to intestate talukdars established by that section of the statute." Their Lordships then came to the conclusion that Pertab Narain Singh was the son of a daughter, and that he had been treated by the late Maharajah in all respects as his own son. They accordingly decided in his favour and said: "Upon the whole, then their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under cl. 4 of s. 22 of Act I of 1869, was entitled to succeed to the taluk; and that he has made out his claim for a declaratory decree to that effect." But then they add: "The declaration, however, must, their Lordships think, be limited to the taluk and what passes with it. If the Maharajah had personal or other property not properly parcel of the talukdari estate, that would seem to be descendible according to the ordinary law of succession." Their Lordships, therefore, merely declared Pertab Narain Singh's title to the taluks and whatever descended under Act I of 1869. As to other property which was not included in that Act, Pertab Narain would not have been the heir to the Maharajah during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act I of 1869.

Subsequently, Triloki Nath applied to her Majesty in Council for a review of that judgment, or for a re-hearing, his ground being that he had not been properly represented in the former suit; that the person who had appeared as guardian for him had not been properly appointed his guardian. Their Lordships [815] refused to advise Her Majesty to grant a review of the judgment, and stated that the only remedy which Triloki Nath had was to bring another suit, to try whether he was bound by the decision. Accordingly, in 1879, he brought a suit to have it declared that he was entitled to all the property, moveable and immoveable, of the late Maharajah. Previously to the commencement of that suit however, the widow had made a second appointment under the will, assuming it to be in force, appointing Triloki Nath to take the estate at once. It has been contended that that appointment vested in Triloki Nah not only the taluks, but also the right to the property to which the widow had succeeded upon the death of her husband. Whether that is so or not is not material. Triloki Nath brought his suit and he made reference to that document in the plaint. In that plaint he stated: "So far as the now plaintiff is aware, no further steps were taken in the prosecution of the said appeal until September 1875, and in the meantime,—that is to say, on the 20th of May 1875,—the Maharani executed another document recognising the now plaintiff as successor to the said Maharajah Sir Man Singh, and on the 31st August 1875 the Revenue authorities substituted the now plaintiff's name as the proprietor of the estates in place of the Maharani."

In the same record there is this statement: "The counsel for the defendant asks the plaintiff as a preliminary whether 'he is suing on the appointment executed by the Maharani on the 16th August 1872, or that mentioned in his 33rd paragraph of 20th of May 1875.' The counsel for plaintiff answers without reservation 'that of the 16th August 1872'." It is however to be remarked that in that suit, whether he was relying upon the document of 1872 or that of 1875, he asked to have it declared that he was entitled to the whole of the property, moveable and immoveable, of the Maharajah.

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The Judge by whom the second suit was tried found that the will had been revoked, following the decision of Her Majesty in Council, and dismissed the suit. On appeal to the Judicial Commissioner certain points were laid down as those upon which the Judicial Commissioner was to decide, the second of which [816] was: "Supposing the plaintiff-appellant to be confined to the document executed in his favour by the Maharani Subhao Kunwar on the 16th of August 1872 as the basis of his suit, has he, or has he not, any present *locus standi* in Court?" Then, thirdly: "Supposing the plaintiff-appellant not to be confined to the document of the 16th August 1872 as the basis of his suit, then has there, or has there not, been any such valid appointment of the plaintiff-appellant under the power conferred upon the Maharani by the will of the Maharajah as to give to the plaintiff-appellant cause of action?" Upon that the Judicial Commissioner decided that the will had not been revoked, and he held that the plaintiff was entitled to a declaration in his favour. The decree is stated as follows: "Claim for declaration of right to the talukdari estates and all property, moveable and immoveable, belonging to the late Maharajah Sir Man Singh." He therefore treated the suit of 1879 as a suit relating not merely to the talukdari but to all the property, moveable and immoveable, of the late Maharajah. He found that the will had not been revoked, and decreed "that the plaintiff-appellant be, and he is hereby declared to be, the appointed successor of the late Maharajah Sir Man Singh, and to be absolutely entitled to the said Maharajah's estates." There is no doubt that the second suit of 1879 was brought for a declaration of the right of Triloki Nath to the whole of the estates of the Maharajah, talukdari as well as non-talukdari, and that the decree of the Judicial Commissioner gave him a right to that property.

An appeal was preferred to Her Majesty in Council against that decision, but pending that appeal Triloki Nath, on the 15th August 1882, brought another suit, which is the suit now under consideration. In that suit he asked for possession of all the property of the late Maharajah. "Claim for possession of moveable and immoveable property left by the Maharajah Sir Man Singh, deceased." That case coming on for trial, the first Judge followed the decision of the Judicial Commissioner in the second suit, and held that the will had not been revoked. An appeal was thereupon preferred to the Judicial Commissioner, but he very properly postponed delivering his judgment [817] upon the appeal until after the decision of Her Majesty in Council upon the appeal which was then pending in the second suit. Upon that appeal, in which judgment was delivered in July 1884, Her Majesty in Council reversed the decision of the Judicial Commissioner and dismissed the suit of 1879. The judgment of their Lordships is reported in the 11th Vol. of the Indian Appeals, 197, and at page 210 they say: "In the result their Lordships will humbly advise Her Majesty to reverse the judgment appealed from,

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and to order that the suit of the respondent be dismissed, and that he pay the costs in the Courts below."

It therefore appears that Triloki Nath, the present appellant, has never claimed the property except under an appointment made by the widow in pursuance of an unrevoked will. He has never claimed to be entitled to the estate or any part of it as having been conveyed to him by the Maharani by the appointment of 1875 as property which had descended to her in consequence of the Maharajah's having died intestate. The second suit was brought in respect of the whole of the property upon the ground that the will had not been revoked, and that the Maharani had appointed the property to him. That suit was dismissed by Her Majesty in Council upon the ground that the plaintiff had no title to the whole or any part of the property in respect of which he was suing in that suit. The decree of Her Majesty in Council, in the suit in which Triloki Nath asked for a decree declaring that he was entitled to the whole of the property, must be and is binding in this suit, in which he is asking, not merely for a declaratory decree, but to be put into possession of the whole property.

The claim of the plaintiff in the present suit is founded entirely upon the will of the late Maharaja. Upon the strength of that will he is now asking to be put into possession of property to which Her Majesty in Council has decided that he has no title. It appears to their Lordships that Triloki Nath is bound by the decision of Her Majesty in Council of 1884, and that the Judicial Commissioner was perfectly right in acting upon that decision and dismissing the present suit.

[818] Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Judicial Commissioner and to dismiss the appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs *Barton, Yeates, Hart and Burton.*
Solicitors for the respondent: Messrs. *Watkins and Lattey.*

C. B.

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15 C. 818=13 Ind. Jur. 258.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Gordon.

SIDHESWARI DABI (*Defendant*) v. ABHOYESWARI DABI (*Plaintiff*).* [4th June, 1888.]

Receiver, Appointment of—Civil Procedure Code (Act X of 1882), s. 503—Discretion—Maintenance.

The appointment of a receiver is a matter resting in the discretion of the Court.

The powers of appointing a receiver conferred by s. 503 of the Code of Civil Procedure must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established.

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* Appeal from Order No. 323 of 1887, against the order of H. Luttman-Johnson, Esq., Judge of the Assam Valley Districts, dated the 29th of August 1887, affirming the recommendation of M. A. Gray, Esq., Deputy Commissioner of Dhubri, dated the 8th of August 1887.

1888 June 4. — Appellate Civil. — 15 C. 818=13 Ind Jur. 258.

The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out. *Owen* v. *Homan* (1); and *Clayton* v. *The Attorney General* (2) referred to (3).

[**F.**, 14 C.W.N. 252=5 Ind. Cas. 27 (28); **Appr.**, 22 C. 459 (464); **Rel. on**, 107 P.R. 1908=12 P.L.R. 1909=4 Ind. Cas. 694 (695); **R.**, 27 C. 279=5 C.W.N. 362 (363); 12 Ind. Cas. 198=4 Bur. L.T. 241; 21 M.L.J. 821=10 M.L.T. 490=(1911) 2 M W.N. 75=11 Ind. Cas. 870 (871); 73 P.R. 1902=59 P.L.R. 1902; 2 L.B.R. 222 (223); 1 S.L.R. 121]

Appeal from the order of the Judge of the Assam Valley Districts, passed on the 29th August 1887, appointing a receiver of property, the subject of a suit then pending in the Court of the Deputy Commissioner and Subordinate Judge of Dhubri.

[**819**] On the 9th March 1883, the Rajah of Bijni, Kumul Narain Bheep, died leaving two widows—Ranee Abhoyeswari Dabi, the plaintiff, and Ranee Sidheswari Dabi, the defendant in the case. The plaintiff was 19 years old when the Rajah died, and for about eight years previous to that she and the defendant lived with him. On the death of the Rajah, Ranee Sidheswari assumed the management of the entire estate, in which Ranee Abhoyeswari acquiesced; and in June 1883 appointed Baboo Jibon Ram Phookun her manager. The two Ranees continued to live on friendly terms for about three years after the Rajah's death, when they fell out, and the plaintiff left the defendant on the 27th August on the alleged ground of her ill-treatment and scandalous conduct.

About a year after, the plaintiff, Ranee Abhoyeswari, brought this suit in the Court of the Deputy Commissioner and Subordinate Judge of Dhubri, in which she claimed the entire estate of the Rajah on the grounds that the defendant Ranee Sidheswari, who claimed to be the elder widow, was not married to the Rajah, and that even if she had been married she had forfeited her rights by unchastity both before and after his death. She further, in the alternative, claimed a moiety of the estate as co-heiress with the defendant, or, should the defendant's exclusive title be established, that a suitable sum for her maintenance might be fixed and made a charge on the property.

The defendant contended that she was, and had been since the Rajah's death in exclusive possession of all his property under a title admitted on more than one occasion by the plaintiff herself; that she had been legally married to the Rajah; and as elder widow was his sole heiress, the estate being an impartible raj, to which the ordinary rules of the Hindu law of succession were inapplicable. She further generally contended that the plaintiff's claim was not made *bona fide*, and that there was no real foundation for it.

Subsequent to the filing of the suit the plaintiff made an application to the Subordinate Judge for the appointment of a receiver pending the final determination of the suit, on the ground that the defendant had grossly mismanaged the estate, and had wasted, and was wasting, large sums of money; and on the 15th July 1887 a rule was issued on the defendant calling upon her to show [**820**] cause why a receiver should not be appointed. The plaintiff filed her own affidavit and those of two other persons in support of her application. Her case contained grave charges against the defendant of immorality and fraud, of gross mismanagement and waste; and so far as she denied the defendant's title to any portion

(1) 4 H.L.C. 997 (1032). (2) Cooper's Cases in Chancery, Vol. 1, p. 97.
(3) See also *Prosonomoyi Devi* v. *Beni Madhub Rai*, 5 A. 556.

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of the property, her case shortly was that the defendant was the mistress and not the wife of the Rajah; that in both characters she had been unfaithful to him, and after his death continued to misconduct herself until her conduct became a public scandal; and that, while leading the plaintiff to believe she was managing the estate on her behalf, she (the defendant) set up a title claiming the entire estate, and supported it by forgery and false personation.

The defendant filed her own affidavit and those of seven other persons, denying the material allegations contained in the plaintiff's affidavits.

It appeared from the defendant's affidavits that within six days of the Rajah's death the defendant applied for the registration of an anumatipatra said to have been executed by the Rajah ten days before he died. By this document the Rajah recognized the defendant as his wife, and gave her power to adopt, postponing the plaintiff's power of adoption until after the death of the defendant. The document was registered before the Registrar of Calcutta, who went to the Rajah's house, where the plaintiff and the defendant were then residing. The plaintiff was present at the registration and signed her name as a consenting party.

On the 10th August 1883 the defendant got her name registered as the sole proprietor of the Rajah's estate. A consent petition, which admitted the exclusive title of the defendant, was filed under a muktearnamah executed by the plaintiff. On the 27th November 1884 the defendant took out a certificate under Act XXVII of 1860, when a consent petition was filed by the plaintiff under a vakalutnamah. The defendant's affidavits also showed that her marriage with the late Rajah had been performed according to the custom of the family. The rule came on for hearing on the 8th August 1887; and on the same day the Deputy Commissioner and Subordinate Judge of Dhubri, on the ground that the plaintiff had made out a *prima facie* [**821**] case, and that the existing management was so unsatisfactory and detrimental to the well-being of the estate as to render the appointment of a receiver expedient, submitted the names of certain gentlemen as being well fit and qualified for the appointment of *ad interim* receiver. On the 29th August 1887, the Judge of the Assam Valley Districts affirmed the recommendation of the Deputy Commissioner and Subordinate Judge; and appointed the Collector receiver of the estate pending the final determination of the suit.

The defendant appealed to the High Court.

The *Advocate-General* Mr. *Hill*, and Baboo *Hem Chunder Banerji*, Baboo *Iswar Chunder Chuckrabati* and Baboo *Kritanta Kumar Bose*, for the appellant.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *A. M. Bose* and Baboo *Baikanto Nath Dass*, for the respondent.

The judgment of the Court (MACPHERSON and GORDON, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the Judge of the Assam Valley Districts appointing a receiver of a large property which is the subject of a pending suit. The plaintiff in this suit is a widow of the Rajah of Bijni, who died on the 9th of March 1883, and she claims the entire estate of the Rajah on the grounds that the defendant, who claims to be the elder widow, was not married to the Rajah, and that, even

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if she was married, she has forfeited her rights by unchastity both before and after the Rajah's death. She further, in the alternative, claims a moiety of the estate as co-heiress with the defendant, or, should the defendant's exclusive title be established, that a suitable sum for her maintenance should be fixed and made a charge on the property. The appointment of a receiver is asked for on the ground that the defendant has grossly mismanaged the property, and had wasted, and would continue to waste, large sums of money. The defendant contends that she is, and has been since the Rajah's death, in exclusive possession of all his property under a title admitted on more than one occasion by the plaintiff herself; that she was legally married to the Rajah, and as elder widow is his sole heiress, the estate being an impartible raj to which the ordinary rules of the Hindu [**822**] law of succession are inapplicable. It is further generally contended that the claim is not made *bona fide*, and that it has no substantial foundation.

Now we must regard the defendant as in exclusive possession of the property claimed. She is the sole registered proprietor; and it is clear that ever since the Rajah's death, which occurred more than four years prior to the institution of the suit she has put forward the title which she now asserts. It is admitted in the plaint that the defendant was allowed to assume the entire management, though the admission is qualified by the assertion that the management was understood to be on the plaintiff's behalf. With this and with the allegations of fraud and immorality we shall deal hereafter; it is enough now to say that on the facts before us we must consider that possession followed the management, and if the possession has been disturbed, the disturbance has been by the plaintiff.

Both the Deputy Commissioner and the Judge seem to think that it is sufficient to justify the appointment of a receiver if the allegations of the plaintiff show a sufficient cause of action, and if the management of the estate has been and is such as to render the appointment expedient. Section 503 of the Civil Procedure Code certainly gives a wide discretion to the Court. It empowers the Court to appoint a receiver whenever it appears to be necessary for the realization, preservation, or better custody or management of any property the subject of a suit. This power is not however greater than that exercised by the Courts in England; and it must, we think, be exercised on the same principle, that is to say, with a sound discretion on a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. If a right was asserted to property in the possession of the defendant claiming to hold under a legal title, the Courts did not interfere by appointing a receiver unless a very strong case was made out. The principles to which we refer are stated in Kerr on Receivers (1), by Lord Cranworth in *Owen* v. *Homan* (2), [**823**] and in *Clayton* v. *The Attorney-General* (3) we see no ground for the contention that those principles are not applicable in this country. They were adopted to prevent a wrong to the defendant, which might equally be done here if they were not followed. It was indeed conceded that the plaintiff must at least show that her claim is honest and well

(1) 2nd Ed., p, 3. (2) 4 H.L.C. 997 (1032).
(3) Cooper's Cases in Chancery, Vol. 1, p. 97.

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Nor is there anything in Mr. Bose's argument that the principles referred to have been relaxed since the passing of the Judicature Act of 1873. It is only necessary to refer to the judgment of Brett, L.J., in *North London Railway Co.* v. *Great Northern Railway Co.* (1), and the dicta of learned Judges in other cases therein referred to. Those were cases of injunctions; but the words "just or convenient," which limited the power of the Court, applied also to receivers.

It is necessary, therefore, to consider the circumstances under which the claim is made, the evidence by which it is supported for the purpose of this application, and the conduct of the parties. Our observations are of course based on the limited materials before us, and can have no effect on the ultimate decision. The plaintiff has filed her own affidavit and that of two other persons; the defendant has filed her affidavit and that of seven other persons. All the material allegations of the plaintiff are contradicted in one or other of the defendant's affidavits. Now the plaintiff's case contains grave charges against the defendant of immorality and of fraud. So far as she denies the defendant's title to any portion of the property her case shortly put is this, that the defendant was the mistress and not the wife of the Rajah; that she was *enciente* at the time of her alleged marriage; that in either character she was so unfaithful to him that the Rajah, who was extremely fond of her, was driven to suicide; that she continued to misconduct herself after the Rajah's death till her conduct became a scandal; and that, while leading the plaintiff to believe that she was managing for her, she set up a title of her own and supported it by forgery and personation.

[**824**] Khagesseri is the only person who speaks to any fact denoting the unchastity of the defendant; and she gives neither time nor place. Putting aside the denials of what she says, it is extremely difficult to reconcile the conduct of the plaintiff with the truth of any one of her allegations. The defendant's affidavits show that a marriage ceremony was performed according to the custom of the family, and, whatever the decision may be as to the validity of the marriage, there seems hardly room for doubt that the defendant was recognized as the Rajah's wife and widow. The plaintiff was 19 years old when the Rajah died; and for some eight years previous to that she and the defendant had lived with him. The plaintiff does not say when she became aware of the defendant's position as mistress and of her immoral character; but the position must have been well-known, if what Khagesseri says is true, that the Rajah wanted to marry the defendant, but was dissuaded by his relatives, friends and priests. Was the plaintiff ignorant of this during her eight years of married life, or would she have been allowed to remain in ignorance after the Rajah's death? Again, the suicide of the Rajah in consequence of the defendant's infidelity, if that was really supposed to be the cause, must have created a great sensation in the family; and it would hardly have added to the popularity or strengthened the position of a woman who was not his wife. Yet we find the plaintiff an admitted wife, continuing to live on friendly terms with this woman for about three years, and allowing her to manage the whole estate as if she occupied a position at least equal to her own. It is said this management was purely permissive; but it was a management, which did not find favour either with the ryots or the authorities. According to

(1) L.R. 11 Q.B.D. 30.

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Purna Chunder Bandopadhya, Jibon Ram Phookun, her agent in the management and her alleged paramour, was so unpopular and his intercourse with the defendant so scandalous and notorious that even the ryots combined to remonstrate and ask for his dismissal. Failing to secure this, it is said they set up one Chunder Narain as a claimant to the estate. In the struggle for possession which then ensued the whole estate was thrown into disorder, and crimes of every description, we are told, were committed, yet the plaintiff remains quiet; she never thinks of withdrawing her permission. No one ever thought of going [825] to her for redress, and no one ever then thought of setting up her title. The district authorities also were very anxious to get rid of Jibon Ram Phookun, but they never asked the plaintiff to interfere. Like the ryots, they appealed to the defendant, and they appealed in vain. In short, up to the 24th August 1886, when the case under s. 145 of the Criminal Procedure Code was decided by the Deputy Commissioner, the plaintiff's name (except as far as it appears in that case) never seems to have been mentioned in connection with this property. On the 27th August 1886 the plaintiff says she left the defendant owing to her ill-treatment and scandalous behaviour. Her eyes then appear to have been opened; and the trouble with Chunder Narain having been overcome, she set up a claim, which gave rise to fresh trouble and kept alive the contest with the disaffected tenants. We should add that in the case under s. 145 the two Ranees were described to be of the first party, and Chunder Narain of the second, and the case was decided in favour of the Ranees. The defendant does not seem to have objected to the inclusion of the plaintiff's name until after the case had been decided, and until after the plaintiff had set up an adverse title; but she distinctly alleged in her written statement that she alone was entitled to the property, and it does not appear that the plaintiff took any part in the conduct of he case.

Such was the plaintiff's conduct. We will now turn to the defendant's. Within six days of the Rajah's death she produced for registration an anumatipatra said to have been executed by the Rajah ten days before he died. By this document he recognizes the defendant as his wife, and gives her power to adopt, postponing the plaintiff's power of adoption until after the death of the defendant.

The plaintiff is said to have been present when this document was presented for registration, and to have signed her name as a consenting party. The registration was before the Registrar of Calcutta, who went to Rajah's house, where the plaintiff and defendant were then residing. Under that Act the Registrar had to satisfy himself that the Rajah had executed the deed; he certifies that he did so: and it was registered. We [826] allude to this fact merely as showing that it was not a mere formal registration. Of this deed the plaintiff makes no mention; but Chunder Nath Chowdhry swears in his affidavit that she signed it in his presence, and the execution by the Rajah is also sworn to by another man. On the 10th of August 1883 the defendant got her name registred as sole proprietor of the Rajah's estates. A consent petition is said to have been filed under a mukhtearnamah executed by the plaintiff, and this petition admits the exclusive title of the defendant. Again, on the 27th November 1884, the defendant took out a certificate under Act XXVII of 1860, and the plaintiff is said to have put in a consent petition under a vakalutnamah. All these documents are alleged to be forgeries, but there is evidence before us that they were signed by her. We are not going to express any opinion as to which version is true; but we shall

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certainly not assume that they are forgeries. They at all events show that the defendant has openly from the very first asserted her exclusive title to the property, and that she was the recognized owner. It is said in the plaint (paragraph 8c) that "the defendant proclaimed in the zemindaries that the plaintiff was willing that she should be looked upon as the sole heiress of the Rajah." There is no proof whatever of the "looking-upon" part of the allegation, and the defendant never seems to have pretended that she was collecting rent on account of any one but herself.

It is argued that, even admitting the defendant to be the widow of the Rajah, she is only entitled to joint possession with the plaintiff, or to a moiety of the estate; that it is for the defendant to prove the family custom which is alleged to exist; and that the title of the plaintiff as an admitted widow of the Rajah is strong enough in itself to justify the appointment of a receiver. As to this, we shall merely say that the defendant's affidavits show grounds for believing that shuch a custom exists, and the affidavits for the plaintiff disclose no single instance in which the property has devolved on more than one heir. Besides this, the circumstances to which we have already alluded support the defendant's contention. The claim for maintenance furnishes no ground for the appointment of a receiver, and it is not shown [827] that suitable maintenance has ever been refused. The plaintiff does not rely on her reversionary title, and even if she did, no case of waste sufficient to justify the appointment has been made.

We think, therefore, that, apart altogether from the way in which this property has been and is being managed, no case to justify the appointment of a receiver has been made good. In support of the charge of unchastity there is no single piece of credible evidence, and no one ever seems to have questioned the dsfendant's position as widow of the Rajah until this claim was brought forward under circumstances not altogether free from suspicion. We should be sorry on the materials before us to lend any colour to the accusations of unchastity and fraud by taking the property out of the defendant's possession.

It is necessary to say a few words on the other part of the case, *viz.*, the way in which the property has been managed. Both the Deputy Commissioner and the Judge say that Jibon Ram Phukoon was a very inexperienced person, and quite incompetent to have charge of such a large property, and they attribute to his mismanagement the disorder and crimes which have prevailed in the estate for some years past. We are not going to say a word in support of Jibon Ram Phukoon's capabilities; he may be incompetent, and it may be very desirable to get a stronger and more experienced man; but there is nothing on the record to justify the inference that it was owing to his unpopularity or mismanagement that Chunder Narain came or was put forward as a claimant, though it may well be that he was not strong enough to put down that claim, and that his unpopularity may have added to the number of ryots who took Chunder Narain's side. It is easy to conceive what follows when one person tries to oust another as Chunder Narain is held to have done. The ryots were got over and took different sides; the rents were not collected to the extent they ought to be; and there is a constant struggle accompanied possibly with acts of violence and crimes such as those referred to by the Judge. But it was hardly reasonable to hold the person who is trying to maintain possession answerable for all this. It is impossible to say that the disorder would have continued, or that the rents would not

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have been [828] collected after Chunder Narain's claim had been disposed of if the plaintiff had not then come forward as a claimant and endeavoured to get possession. We consider that she is to a great extent responsible for the disorder of which she complains, and she is not, we think, in a position now to ask the Court to appoint a receiver while she is prosecuting her claim in the civil suit.

We do not think it necessary to consider in detail the charges of mismanagement wihch are set out in the affidavit of Poornoo Chunder Bundopadhya. It is clear that the defendant has not been able to collect a large portion of the rent and that she has expended large sums of money.

The expenditure certainly appears to have been unnecessarily great; but this, and the inability to collect the rent, is largely due to the adverse claim set up first by Chunder Narain, and afterwards by the plaintiff.

We think the order for a receiver ought not to have been made, and we set it aside and decree this appeal. The defendant is entitled to costs.

C. D. P. *Appeal allowed.*

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Before Mr. Justice Tottenham and Mr. Justice Ghose.

PUDMANUND SINGH BAHADUR AND OTHERS (*Plaintiffs*) v. BAIJ NATH SINGH (*Defendant*).* [9th August, 1888.]

Illegal Cess—Abwabs—Bengal Tenancy Act (VIII of 1885), *ss.* 74, 179*—Regulations VIII of* 1793, *s.* 54; *V of* 1812, *ss.* 2 *and* 3; *and XVIII of* 1812, *s.* 2.

What is or is not an *abwab* must depend upon the circumstances of each particular case in which the question arises.

Where by a kabuliat dated 1869 the defendant, as holder of a mokurari tenure, agreed to pay a certain fixed sum as rent, and also certain items designated *tehwari* and *salami*, it was held that they were not illegal cesses within the Full Bench Ruling of *Chultan Mahton* v. *Tilukdari Singh* (1), not being uncertain and arbitrary in their character, but [829] specific sums which the tenants agreed to pay to the landlords, and the payment of which, no less than the payment of the rent itself, formed part of the consideration upon which the tenancy was created (2), and which were in fact part of the rent agreed to be paid, although not so described; they were recoverable therefore under Regulation V of 1812.

[**Diss.,** 17 C. 726 (**F.B.**); 7 Ind. Cas. 582 (583); **D.,** 19 Ind. Cas. 701=18 C.L.J. 83.]

THE plaintiffs sued to recover Rs. 2,830-13-3 for arrears of rent, and for *tehwari* and *salami* due to them for the years 1290 (1883-84) to Baisakh 1293 (April 1866) in respect of a mokurari tenure held under them by the defendant. The basis of the suit was a kabuliat dated 25th December 1869, by which the defendants agreed to pay a certain fixed rent, plus a small annual addition for items designated therein as *tehwari dusara* and *salami towzi*, in respect of which items the amounts declared to be payable were Rs. 9 and Rs. 2 respectively.

The only defence material to this report was that the defendant was not liable to pay *tehwari* and *salami*, inasmuch as they were *abwabs*,

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* Appeal from Appellate Decree No. 1647 of 1887, against the decree of C. A. Wilkins, Esq., Judge of Bhagulpore, dated the 2nd May 1887, modifying the decree of Baboo Upendra Chunder Mullick, Subordinate Judge of that district, dated the 19th August 1886.

(1) 11 C. 175. (2) See *Mahomed Fazan Chowdhry* v. *Jamoo Gazee*, 8 C. 730.

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and therefore illegal and not recoverable under the Bengal Tenancy Act VIII of 1885.

The Subordinate Judge decided that the two items of *tehwari* and *salami* were not illegal cesses; they being "ingredients of the consideration or bonus on payment of which the permanent mokurari lease was granted;" that they did not come within the Full Bench Ruling of *Chultan Mahton* v. *Tilukdari Singh* (1), that ruling "having reference only to the tenures of ordinary ryots and not to mokurari tenures acquired on payment of bonus or consideration. The provisions of s. 74 of Act VIII of 1885 can be distinguished similarly. It has been held in *Jogodish Chunder Biswas* v. *Zarikulla Sircar* (2) that there is nothing illegal in a *parahi* when it is a part of the consideration for which an agreement is entered into. In the mokurari lease *tehwari* and *salami* are treated as part of the rent stipulated for, although integral portions were split into heads, and the same therefore cannot be treated as impositions upon tenants in addition to the actual rent. The stipulation was definite and certain, based upon consideration and therefore does not come within the provision of s. 74."

The Subordinate Judge therefore gave the plaintiff a decree.

[**830**] The Judge on appeal reversed this decision on the point in dispute, and held that the items of *tehwari* and *salami* were *abwabs*, and therefore irrecoverable in this suit.

As to those items being *abwabs* he said:—

"There can be little doubt that the true meaning of the term is 'anything levied by the landlord in excess of the actual rent or *asal Jama*.' They were condemned in the regulations, chiefly on the ground of their being arbitrary and indefinite, subjecting the tenants to unforeseen payments, and rendering them liable to pay enhanced rents in a manner not contemplated by law. Now the kabuliat itself divides the amount payable by the mokuraridar into *mal* rent, *tehwari dusara* and *salami towzi*, that is, it distinguishes the two latter items from the actual or *asal* rent. Moreover the *salami* is a tax levied on the occasion of a *Punna* or religious ceremony; the *tehwari* is another tax levied on the occurrence of the *Durga Puja* when it is the custom for zemindars to expend money in certain ceremonies. Therefore I come to the conclusion that these two items not being a part of the actual rent, being stated in the deed of agreement to be separate from the actual rent, and having no connection with the land itself or the occupancy thereof, are *abwabs* within the meaning of the Regulations (3) as well as of the former and present rent laws."

He was also of opinion that under the Full Bench Ruling of *Chultan Mahton* v. *Tilukdari Singh* (1) all *abwabs*, not only those levied from ryots, but also, as in the present case, from a mokuraridar, would be illegal, and also with reference to ss. 74 and 179 of the Bengal Tenancy Act, the latter of which sections, "though it might apply to future agreements, cannot legalize an agreement which existed before the Act came into force and which was under the then law illegal."

The Judge therefore modified the decree of the first Court.

The plaintiffs appealed to the High Court.

Mr. *R. E. Twidale* and Moulvie *Mahomed Yusoof* for the appellants.

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(1) 11 C. 175. (2) 25 W.R. 90.

(3) The Regulations referred to by the lower Courts were Regulation VIII of 1793, s. 54, Regulation V of 1812, ss. 2 and 3, and Regulation XVIII of 1812 s. 2, which were repealed by Act VIII of 1885.

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[831] Baboo Lal Mohun Das, for the respondents.

JUDGMENT.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was delivered by

TOTTENHAM, J.—In this case we reserved judgment because it appeared to us that the case was of some difficulty in connection with a Full Bench judgment of this Court upon which the District Judge relied in his decision.

The suit was brought to recover arrears of rent, including certain sums on account of what are called *tehwari* and *salami* due in respect of a mokurari tenure. There was also a question with regard to interest payable; the plaintiffs claimed interest in monthly instalments, the defendants denied their liability to pay monthly; they also denied their liability for *tehwari* and *salami*.

The first Court decided the suit in favour of the plaintiffs; but on appeal the District Judge modified the decree by disallowing the items of *tehwari* and *salami*, and reducing the claim to interest by making it payable quarterly instead of monthly. The District Judge, as regards the items of *tehwari* and *salami* relied upon a Full Bench decision of this Court—*Chultan Mahton* v. *Tilukdari Singh* (1). He was of opinion that under that decision he was bound to hold that the demands under these items were *abwabs*, and as such must be disallowed. He came to this conclusion because it appeared to him that the items in question were outside the rent properly so called.

The words of Mr. Justice Mitter's decision in that Full Bench case, to which the District Judge refers, do at first sight seem to bear out the view taken by the Judge, but I happened to be one of the Judges of the Full Bench who concurred in Mr. Justice Mitter's judgment, and I certainly did not at the time of the decision intend to concur in holding that anything recoverable under the terms of Regulation V of 1812 could not be recovered at the present day. That Regulation has been repealed by the new Tenancy Act. But at the time the kabuliat was given by the defendants in the present suit, it was in full force. We have had since an opportunity of consulting Mr. Justice Mitter on this point, and he is anxious that he should not be [832] misunderstood in this matter. He did not mean then to exclude the operation of Regulation V of 1812, where that Regulation could apply. In the case before the Full Bench, that Regulation did not support the plaintiffs: on the contrary it was directly opposed to their claim. In the present case, the Regulation does support the plaintiffs case, because the items in dispute are not arbitrary and uncertain in their character, but they are specific sums which the tenants agreed to pay to the landlords; and from the terms of their kubuliat it seems to us that the payment of these items, no less than the payment of the jumma itself, formed part of the consideration upon which the tenancy was created. Therefore, the plaintiffs were entitled by virtue of Regulation V of 1812 to demand and recover these items, they being in fact part of the rent agreed to be paid, although not so described. In the definition contained in the new Tenancy Act, " rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." There is nothing new in this, but it expresses concisely what has always been understood

(1) 11 C. 175.

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by the word " rent." What is or is not an *abwab* must depend upon the circumstances of each particular case in which the question arises. The Full Bench case, upon which the District Judge relies, does not, as we have said, bar the plaintiffs' present claim. We think the plaintiffs are entitled to succeed on that point.

As regards the other point, namely, whether interest should be charged monthly or quarterly, we think it clear that District Judge is in error, because it is expressly provided in the tenant's kabuliat that interest should be charged monthly. The respondent's pleader, upon this being pointed out to him, frankly admitted that he could not support the District Judge's decision upon this point.

The result is that the appeal will be decreed, the decree of the lower appellate Court disallowing these disputed sums will be set aside, and the decree of the Court of first instance affirmed with costs in this Court and in the lower appellate Court.

J. V. W. *Appeal allowed.*

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15 C. 833.

[833] CIVIL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Gordon.

KALI SUNKER DASS (*Plaintiff*) *v.* KOYLASH CHUNDER DASS (*Defendant*).* [17th August, 1888.]

Provincial Small Cause Courts Act (IX of 1887), sch. II. art. 35, cl. (g)—Suit for actual pecuniary damages for breach of contract of marriage—Jurisdiction.

A suit for actual pecuniary damages for breach of contract of marriage comes within cl. (*g*) of art. 35 sch. II of Act IX of 1887, and as such is excluded from the jurisdiction of the Small cause Court.

[**F.**, 13 M.L.T. 497 (498)=1913 M.W.N. 637 (638); 19 Ind. Cas. 700; **R.**, 5 Bur L.T. 57=14 Ind. Cas. 837.]

THIS was a reference by the Judge of Small Cause Court at Sealdah, and arose out of a suit for actual pecuniary damages for breach of contract of marriage.

Kali Sunker Dass, the plaintiff, alleged that on the 13th Falgoon he had agreed with Koylash Chunder Dass, the defendant, to the marriage of his daughter with Koylash's son, and that the 25th Falgoon was the date fixed for the marriage; that on the same day he had spent a sum of Rs. 40-6 in feeding relatives who were present, and had further to pay Rs. 10-4 for carriage hire for going to the bridegroom's house; and that he had also advanced a sum of Rs. 17-8-6 to musicians in contemplation of the marriage; but that on the 20th Falgoon, when he had gone to Panihati to fetch the bridegroom to his house, Koylash Chunder broke the contract by agreeing to his son's marriage with the daughter of another person. Kali Sunker therefore brought this suit to recover from Koylash Chunder Rs. 67-15-6 as the sum actually spent by him in contemplation of the marriage of his daughter with Koylash's son.

The Judge directed the plaint to be returned for presentation in the Munsif's Court, subject, however, to the opinion of the High Court on the following question: " Whether, having regard to the facts stated in

* Civil Reference No. 17A of 1888, made by Baboo Krishna Mohun Mukherji, Judge of the Court of Small Causes, Sealdah, dated the 5th June 1888.

the plaint, a suit for actual pecuniary damages for breach of contract of marriage could be entertained by the Small Cause Court." 1888 Aug. 17.

[834] Baboo *Jogender Chunder Ghose*, for the plaintiff.

Baboo *Sham Lall Mitter*, for the defendant. Civil Reference.

The opinion of the High Court (Pigot and Gordon, JJ.) was as follows:— 15 C. 833.

OPINION.

In this case we think that the suit, as one for compensation for breach of contract of marriage, comes within cl. (*g*) of art. 35 of the second schedule to the Small Cause Court Act. We must take the terms of the Act with reference to the conditions of society in this country—conditions perfectly well known. In the immense majority of instances these contracts are made and broken, not by the acts of the persons about whose marriages they are entered into, but by their parents or guardians. We think that this case being one of these must be contemplated as included under that portion of the Small Cause Court Act above referred to. Of course where the special conditions of native life do not apply, as, for instance, in the case of persons *sui juris*, the argument of the pleader that the English mode of looking at these contracts should be followed may apply.

In the present case we think the matter must be regarded as one excluded from the jurisdiction of the Small Cause Court.

We allow the defendant the costs of this appearance.

C. D. P.

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the lessees. For default in payment of rent this lease was decreed to be in future liable to cancellation "by the decree of any competent Court, according to any law which may be in force in Oudh with respect to persons holding an under-proprietary right in land." Afterwards, in 1879, the parties agreed that the lessees might be dispossessed for non-payment of rent. Default occurred, decrees for arrears were made in 1882 and 1883, and remained unsatisfied. In a rent suit brought by the talukdar, *held*, that he could not sue in a Revenue Court, to have the lease cancelled under the terms of the Oudh Rent Act (XIX of 1868), either by virtue of the decree, or of the subsequent agreement. MADHO SINGH v. AJUDHIYA SINGH, 15 C. 515 (P. C.)=15 I. A. 77=12 Ind. Jur. 217=5 Sar. P. C. J. 165=Rafique and Jackson's P. C. No. 101 927
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(2) *Ss.* 14 *and* 40—*Irregularity in procedure in dismissing a muktear.*—A charge of unprofessional conduct brought against a practitioner holding a certificate under Act XVIII of 1879, having been found to be established by a Subordinate Court, which also considered that he, in consequence, should be dismissed, and the same having been reported, in conformity with s. 14 of that Act, to the principal Court in the province such dismissal was ordered. *Held,* that the practitioner cound not be dismissed or suspended under that section without his having been allowed, under s 40, an opportunity of defending himself before that Court. It is within the duties of a Court informed of the misconduct of one of the practitioners

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before it, to take steps to have the mater adjudicated upon. *In the matter of* SOUTHEKAL KRISHNA RAO, 15 C. 152 (P.C.)=14 I. A. 154=12 Ind Jur. 11=5 Sar. P. C. J. 96 — — 685

(3) *S. 32, Construction of—Outsider practising as mukhtear, his liability to punishment—Mukhtears, their functions—Civil Procedure Code, s. 37*—Act XVIII of 1879 is an amending as well as a consoldating Act, and one of the respects in which it amended the old law was the confererring upon the High Court Power "to make rules declaring what shall be deemed to be the functions, powers, and duties of the mukhtears practising in the Subordinate Courts. When a person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule framed by the High Court in accordance with the provisons of the Legal Practitioners Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32 of the Act. The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtears who have failed to take out their certificates. *G. N.*, though not a certificated mukhtear was in the habit of appointing and and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act, *G. N.*, made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family and lives in a separate village." *Held,* that G. N., was neither a private servant nor a recognized agent of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners Act for having practised as a mukhtear. *Held,* also, that having regard to the Court in which *G. N.* practised, the words in s. 32 "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorizing him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250." *In the matter of the petition of* GIRHAR NARAIN. TUSSUDUQ HOSAIN v. GIRHAR NARAIN, 14 C. 556 (F.B.)=12 Ind. Jur. 22 — 868

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(1) *Ss.* 20, 21—*General Clauses Act* (I *of* 1868), *s.* 6—*Retrospective enactment when applicable to pending suit—Pending suit—Landlord and tenant—Right of occupancy*—S. 21, sub-s. 2 of Act VIII of 1885 is expressly retrospective, and applies to suit pending at the date of the commencement of that Act. Tupsee Singh v. Ramsaran Koeri, 15 C. 376 (F. B.) 835

(2) *Ss.* 20, 21—*Suits pending at time Act came into force—Suit for ejectment—Acquisition of right of occupancy.*—S. 21 of the Bengal Tenancy Act applies to suits pending at the time the Act came into force, *viz.*, 1st November 1885, which had not then resulted in a decree. In a suit instituted on the 8th October 1885, to eject the defendants after notice to quit it was held that, although the defendant had held the land from whch it was sought to eject him for less than 12 years, and therefore would not, if the Bengal Rent Act VIII of 1869 had been applicable, have acquired a right of occupancy, yet the effect of ss. 20 and 21 of the Bengal Tenancy Act was to give him a right of occupancy, and therefore he could not be ejected. Jogessur Das v. Aisani Koyburto, 14 C. 553 366

(3) *S.* 53—*Established usage, Meaning of.*—The words "*established usage*" in s. 53 of the Bengal Tenancy Act, 1885, do not refer to a practice previously prevailing between the landlord and his tenant, but to the established usage of the pargana in which the holding is situate. Hira Lal Das v. Mothura Mohun Roy Chowdhry, 15 C. 714 1060

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(6) Ss. 74, 179—See Illegal Cess, 15 C. 828.

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themselves into as many groups as there are properties held by them in common; and in the latter case each group of share-holders should put in separate applications on which separate Court-fees should be levied. The notice in the case of tenures should be as provided by s. 93 of the Act, and should be of the same character and to the same effect as in the case of estates *In the matter of the petiion of* FAZEL ALI CHOWDHRY. FAZEL ALI CHOWDHRY v. ABDUL MOZID CHOWDHRY, 14 C. 659 437

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(9) *S.* 148 (*h*)—*Decree for arrears of rent, Assignment of—Execution of decree by assignee.*—The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (*h*) an assignee who proceeds to execution afterwards; but execution cannot be refused where, before that Act came into operation, the assignment had been recognised by a Court of execution under s. 232 of the Civil Procedure Code. KOILAS CHUNDER ROY v. JODU NATH ROY, 14 C. 380 ... 252

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lease under which he alleges he is holding, and the Court is bound to go into and decide that question if raised. A lease granted by guardian of minor's property who has obtained a certificate under Act XL of 1858 for a term exceeding five years without the sanction required by s. 18 of that Act is invalid. BHUPENDRO NARAYAN DUTT v. NEMYE CHAND MUNDUL, 15 C. 627 .. 1001

(15) *S.* 174—*Act creating new rights, Effect of Application for execution.*—The provisions of an Act which creates a new right cannot, in the absence of express legislation, or direct implication have a retrospective effect. *Held,* accordingly, that a judgment-debtor's right under s. 174 of the Bengal Tenancy Act to set aside a sale did not avail where the sale was held in pursuance of a decree, the execution whereof had been applied for before that Act came into operation. LAL MOHUM MUKERJEE v. JOGENDRA CHUNDER ROY; BONOMALI CHUNDER GHOSAL v. REMKALI DUTT, 14 C. 636 **(F. B.)** 422

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(18) *S.* 174—*Judgment-debtor, Meaning of.*—The word "judgment-debtor" as used in s. 174 of Act VIII of 1885 does not include a transferee or assignee from a judgment-debtor, but must be construed strictly as referring to a judgment-debtor alone. RAJENDRO NARAIN ROY v. PHUDY MONDUL, 15 C. 482 906

(19) *S.* 178—See RIGHT OF OCCUPANCY, 14 C. 621.

(20) *S.* 184 *and sch. III, part I, art.* 3—*Occupancy raiyat—Suit—Limitation.*—The suit mentioned in s. 184 and sch. III, part I, art. 3 of the Bengal Tenancy Act, 1885, means a suit by an occupancy raiyat as such, that is an occupancy raiyat claiming a right of occupancy as against his landlord. CHUNDER KISHORE DEY *alias* MUKHORI DEY v. RAJ KISHORE MOZUMDAR, 15 C. 450 885

(21) *S.* 188—*Co-sharers, Suit by—Parties.*—S. 188 of the Bengal Tenancy Act applies only to such matters as a landlord is, under the Act, authorised or required to do; there is nothing in that Act which requires or authorizes a landlord to sue thereunder for arrears of rent. One of several joint landlords is competent to sue for the entire rent due from a tenant making his co-sharers parties to the suit. PREM CHAND NUSKUR v. MOKSHODA DEBI, 14 C. 201 134

(22) *S.* 188—*Suit for rent—Co-sharers, Suit by—Joint undivided estate—Jurisdiction—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622.—A District Judge, in deciding a rent suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit. *Held,* on an application under s. 622 of the Civ. Pro. Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside. JUGGOBUNDHU PATTUCK v. JADU GHOSE ALKUSHI, 15 C. 47 617

(23) *Sch. III, art.* 3—*Limitation—Suit by occupancy ryot to recover possession from trespasser, Limitation for*—Art. 3, Sch. III of the Bengal Tenancy Act (Act VIII of 1885), relates to suits brought by an occupancy ryot against his landlord and not to a suit brought against a third party who is a trespasser. RAMJANEE BIBEE v. AMOO BEPAREE, 15 C. 317 — 795

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2.—Bengal Acts.

Act VII of 1868 (Bengal Land Revenue Sales).

See SALE FOR ARREARS OF REVENUE, 14 C. 440.

Act VIII of 1869 (Bengal Landlord and Tenant Procedure).

(1) S. 14—See KABULIAT, 14 C. 99.

(2) Ss. 22, 52—See EJECTMENT, 14 C. 33.

(3) *S. 27—Limitation—Suit for possession—Question of title.*—Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed, and sued for a declaration of his title and for recovery of possession, claiming a right of occupancy, and the defendant, while admitting that the plaintiff had for one or two years been a tenant of a small portion of the land in suit, denied his title to the remainder, or that he had acquired a right of occupancy; *Held,* that the suit was one to try a *bona fide* question of title, and it was not barred by one year's limitation under s. 27 of Bengal Act VIII of 1869, but was maintainable within 12 years from the date of the cause of action. BASARUT ALI v. ALTAF HOSSAIN, 14 C. 624 — 414

(4) Ss. 34, 59, 61 and 65—See SALE FOR ARREARS OF RENT, 14 C. 14.

(5) *S. 58—Execution of decree—Suit for rent not brought under Beng. Act VIII of* 1869*—Decree of Court of foreign State—Civ. Pro. Code,* 1882, *s.* 434*—Limitation.*—The law of limitation applicable to the execution of a decree of the Civil Court of Cooch Behar, for rent for a sum under Rs. 500 in a suit not brought under the Rent Act, is by s. 434 of the Civ. Pro. Code, which gives the Courts in British India power to execute decrees passed by the Courts of a foreign State, s. 58 of Beng. Act VIII of 1869. That section is not confined to suits brought under that Act. *In the matter of the petition of* HUKUM CHAND ASWAL. HUKUM CHAND ASWAL v. GYANENDER CHUNDER LAHIRI, 14 C. 570 — 377

(6) S. 58—See EXECUTION OF DECREE, 14 C. 385.

(7) S. 109—See APPEAL—SECOND APPEAL, 15 C. 107.

Act IX of 1871 (Howrah Bridge).

S. 27—See NOTICE, 15 C. 259.

Act VIII of 1876 (Bengal Estates Partition).

S. 31—See JURISDICTION, 15 C. 198.

Act VII of 1878 (Bengal Excise).

Ss. 4, 11, 29, 32—See ACT III OF 1880 (CANTONMENTS), 15 C. 452.

Act VII of 1880 (Bengal Public Demands Recovery).

(1) *Ss.* 2, 8, 10, 19*—Bengal Act VII of* 1868, *s.* 2*—Sale for arrears of Road Cess—Suit to set aside sale—Ground for setting aside sale under certificate—Act XI of* 1859, *s.* 33*—Civ. Pro. Code, ss.* 290, 311, 312.—Neither the provisions of s. 33 of Act XI of 1859, nor those of s. 2, Beng. Act VII of 1868, affect the jurisdiction of the Civil Court to entertain a suit to set aside a sale under a certificate on any of the following grounds, namely, that no arrears were due at all, that no notice was served in accordance with the provisions of Beng. Act VII of 1880, or that the provisions of s. 290 of the Civ. Pro. Code were infringed. The words "in respect of sales in execution of decrees" in s. 19 of Beng. Act VII of 1880, do not include any proceedings instituted *after the sale* for setting it aside. Ss. 311 and 312 therefore of the Civ. Pro. Code/do not apply to sales under a certificate. The infringement of the provisions of s. 290 of the Civ. Pro. Code is not a mere irregularity, but it vitiates the sale—*Bakshi Nand Kishore* v. *Malak Chand,* I. L. R., 7 All. 289. The provision s. 8 of Beng. Act VII of 1880, as to the certificate becoming absolute and acquiring the force and effect of a final decree, does not come

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Act VII of 1880 (Bengal Public Demands Recovery).—(*Concluded*).
into operation unless the notice required by s. 10 is actually served. The only remedy of a judgment where property has been sold in execution of a certificate issued under Beng. Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale, is by way of an appeal under s. 2 of Beng. Act VII of 1868. The effect of s. 2 of Beng. Act VII of 1880 is that Act XI of 1859, and Beng. Act VII of 1868, and Beng. Act VII of 1880, are to be considered as if the provisions contained in them were contained in one Act so far as such construction is consistent with the tenor of the last mentioned Act. By the force therefore of s. 2 of the Act of 1880, the provisions of s. 2 of the Act of 1868 became applicable to a sale under an execution issued upon a certificate made under the Act of 1880. Bengal Act VII of 1880 is an Act for the recovery of all kinds of public demands, and therefore applies to cases of road or other public cesses. SADHUSARAN SINGH v. PANCHDEO LAL, 14 C. 1 1

(2) *S. 19—Certificate Procedure—Civil Procedure Code (Act XIV of 1882), ss.* 311, 312.—A suit will lie in a Civil Court to set aside a sale held under Beng. Act VII of 1880, where the sale proclamation is issued against the whole sixteen annas of the estate, but a sale held only of a portion thereof. The effect of s. 19 of that Act is, that it relates to the practice and procedure in respect of sales, that is, to the practice and procedure of executing Courts in the carrying out of sales. RAM LOGAN OJHA v. BHAWANI OJHA, 14 C. 9 7

Act IX of 1880 (Bengal Road Cess).
Ss. 50—71—Cesses—Rent-free lands—Notice.—Plaintiffs sued to recover arrears of road and public works cesses on account of certain rent-free land, claiming double the amount under s. 58 of the Cess Act (Beng. Act IX of 1880). It was found that no notice of the valuation had been published as required by s. 52 of the Act, and it was held by the lower Court that the plaintiff was therefore not entitled to recover double the amount under s. 58. It was then contended that he was at any rate entitled to recover the amount of the cesses with interest under s. 62. *Held* that the latter section did not give the holder of the estate or tenure a right to recover the cesses payable under s. 56 before publication of notice, and that the plaintiff was therefore not entitled to a decree, and that his suit must be dismissed. RASH BEHARI MUKERJEE v. PITAMBORI CHOWDHRANI, 15 C. 237 743

Actionable Claim.
See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 241; 15 C. 436.

Additional Evidence.
In Appellate Court. See CIV. PRO. CODE (ACT XIV OF 1882), 15 C. 765.

Adjustment.
See DECREE, 14 C. 376.

Administration Decree.
See CIV. PRO. CODE (ACT XIV OF 1882), 15 C. 202.

Admission.
See GUARDIAN AND MINOR, 15 C. 8.

Adverse Possession.
See LIMITATION, 14 C. 323; 14 C. 610; 14 C. 674.
See POSSESSION, 14 C. 592.

Affidavit.
See FALSE EVIDENCE, 14 C. 653.

Agent.
See LIMITATION ACT (XV OF 1877), 14 C. 256.

Agreement.
See RIGHT OF OCCUPANCY, 14 C. 621.

Air.
Right to. See EASEMENT, 14 C. 839.

Alienation.
See GHATWALI TENURE. 15 C. 471.

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Alternative Relief.
See PRACTICE, 15 C. 211.
Animals feræ naturæ.
See FISHERY, 15 C. 388; 15 C. 402.
Appeal.
1.—GENERAL.
2.—SECOND APPEAL.
3.—TO PRIVY COUNCIL.
———1.—**General.**

(1) *Attachment—Objection to attachment by judgment-debtor on behalf of others—Order against decree-holder—Civ. Pro. Code (Act XIV of* 1882), *ss.* 244, 278, 279, 280, 281, 282, 283.—Where a judgment-debtor claims property which is the subject-matter of attachment, either on his own account as his own property, under whatever right, or as the representative of third parties in which capacity he has been sued, the question between him and the attaching creditor is properly one between the parties to the suit under s. 244 of the Code of Civil Procedure. But where the judgment-debtor raises the claim or objection on behalf of third parties who are not represented before the Court, the order passed thereon must be regarded as an order under s. 280 of the Code, and the only mode in which that order can be contested is in a regular suit as provided by s. 283. In execution of a decree against a judgment-debtor in his private capacity the judgment creditor attached certain property. Thereupon the judgment-debtor objected that the property attached had been dedicated by him sometime previous as *wakf* under a registered *wakfnamah,* and that he was only in possession as *mutwali* under the deed. The lower Court found that the document created a valid *wakf,* and allowed the objection and released the property from attachment. The judgment-creditor appealed. At the hearing of the appeal it was contended that no appeal lay, inasmuch as the order was one under s. 280 of the Civ. Pro. Code. On behalf of the judgment-creditor it was contended that the order was one under s. 244, and was thus appealable. *Held* that the order was one under s. 280, and that no appeal lay, the remedy of the judgment-creditor being by way of a regular suit as provided by s. 283. ROOP LALL DASS v. BEKANI MEAH; MOHINEE MOHUN ROY v. BEKANI MEAH, 15 C. 437=12 Ind. Jur. 460 ... 876

(2) *In Criminal Case—Cattle Trespass Act (I of* 1871), *s.* 22—*Compensation for illegal seizure of cattle.*—No appeal lies from an order under s. 22 of Act I of 1871, awarding compensation for illegal sezure of cattle. DHIKU v. DENO NATH DEB *alias* DINU, 15 C. 712 1058

(3) See ACT XVII OF 1875 (BURMAH COURTS), 14 C. 351.

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 312; 15 C. 231.

(5) See LIMITATION ACT (XV OF 1877), 14 C. 26; 15 C. 242.

———2.—**Second Appeal.**

(1) *New point—Discretion of Court.*—On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception it is purely discretionary with the Court whether to consider it or not. FAKIR CHAND AUDHIKARI v. ANUNDA CHUNDER BHATTACHARJI, 14 C. 586 ... 388

(2) *Rent suit—Bengal Act,* VIII *of* 1869, *s.* 102—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 153—*General Clauses Act,* I *of* 1868, *s.* 6.—The word "proceedings" in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety that is, down to the final decree. A second appeal, therefore, to the High Court on a question of the amount due as rent, will not lie when the suit was instituted previous to

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Appeal—2—General—(*Concluded*).
the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. SATGHURI v. MUJIDAN, 15 C. 107 656
(3) See PRACTICE, 15 C. 706.
(4) See REVIEW, 15 C. 432.
————**3.—To Privy Council.**
Security for performance of order to be made by Her Majesty in Council—Civ. Pro. Code, 1882, *s.* 608—*Refusal of order staying execution where decree was not yet appealed to the Privy Council, but leave to appeal from interlocutory orders in execution granted—Intimation to Court below*—A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not beng competent to the Judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. That intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the treasury in obedience to the decree. INDER KUMARI v. JAPAL KUMARI, 14 C. 290 (P.C.)=14 I. A. 1=4 Sar. P. C. J. 757=Rafique and Jackson's P. C. No. 94. 192

Appellate Court.
See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 15 C. 765.

Application.
(1) Against claimant resisting execution—See EXECUTION OF DECREE, 14 C. 234.
(2) By person not party to suit—See MANAGEMENT, 15 C. 253.
(3) Execution—See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 636.
(4) For assessment of mesne profits—See LIMITATION ACT (XV of 1877), 14 C. 50.
(5) To sell attached property subject to a mortgage—See LIMITATION ACT (XV OF 1877), 15 C. 363.

Apportionment.
See LAND ACQUISITION ACT (X OF 1870), 14 C. 749.

Arrears of Rent.
(1) See DECLARATORY DECREE, 14 C. 586.
(2) See EJECTMENT, 14 C. 33.
(3) See EXECUTION OF DECRFF, 15 C. 492.

Arrest Before Judgment.
Security for personal appearance of defendant—Civ. Pro. Code. (Act XIV *of* 1882), *ss.* 477, 479—Bona fide *suit.*—A suit was instituted aganst the master of a vessel for repairs done to his vessel and for hire of a dock in which the vessel had been. The master being about to leave the jurisdiction of the Court with his vessel, the plaintiffs, under s. 477 of the Code of Civil Procedure, applied for an order that the defendant should give security for his appearance to answer any decree that might be passed against him, and a rule was issued calling on him to show cause why such security should not be furnished. The defendant showed cause, and alleged that the amount claimed for the repairs was excessive, that the repairs were badly done, that the plaintiffs were not entitled to dock hire, and that some of the repairs charged for had not been executed. He further counterclaimed for a large sum for demurrage owing to the detention of his vessel and damages caused to it by the wrongful act of the plaintiffs. It was contended that, as the claim was on a contested account which on the face of it

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Arrest Before Judgment.—(*Concluded*).
was stated, but unsettled, on the principal of the English authorities, the plaintiffs were not entitled to the order asked for. It was further contended that the suit was not a *bona fide* one, but brought merely harass to the defendant, and that for this reason security should not be ordered to be given. It was not disputed that the defendant had no domicile in this country, and that he was shortly leaving in his vessel in the ordinary course of his business. The Court found the plaintiffs were undoubtealy entitled to recover some amount on account of repairs, and that the mere fact that the plaintiffs added on to such a claim one of a disputable character did not go to show that the suit was not a *bona fide* one. *Held*, that there is no authority for saying that the principles applied in England to the granting of writs *ne exeat regno* should be applied in this country; and that the Court can only look to the provisions of the Code of Civil Procedure; that when a person comes on business to this country in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed, there is an implied understanding, if the work was done on his credit, that it should be paid for before he leaves. *Held*, also, that the case fell within the provisions of s. 477 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of s. 479, such security to be for the amount of the claim. PROBODE CHUNDER MULLICK v. DOWEY, 14 C. 695 ... 461

Assam.
Law in—See RIGHT OF OCCUPANCY, 15 C. 100.

Assam Land and Revenue Regulation (1 of 1886).
S. 59—Rent suit for arrears due before Regulation came into force.—In a suit for the recovery of arrears of rent accrued due before the Assam Land and Revenue Regulation of 1886 came into force, which was instituted on the 7th of July 1886, where it appeared that the plaintiff's name had been previously registered, but that the Chief Commissioner had issued no notification under s. 48 of the Regulation directing that the registers then in existence should be deemed to be registers prepared under s. 59 of the Regulation, and that the plaintiff's name had not been registered under the last-mentioned section: *Held*, that s. 59 applies to rent accruing due after the Regulation came into force, and not to rent already due on the date on which it came into force, and that therefore the suit was maintainable. BROJO NATH CHOWDHRY v. BIRMONI SINGH MONIPURI, 15 C. 227 ... 736

Assessment.
(1) *Of re-formed land after diluviation—Act* IX *of* 1847, *ss.* 1, 6, 7 *and* 9 *effect of—Jurisdiction of Board of Revenue, Its extent—Civil Court, Power of—Survey Maps, their evidentiary value.*—Where on inspection of a survey map, and after its comparison with a former *thak* map, the Board of Revenue assessed certain land as alluvial increment, which, however, the Civil Court in a suit against the order of the Board, found upon further evidence to be a re-formation on the original site of a permanently-settled estate, in respect whereof the plaintiff had all along paid revenue without abatement: *Held*, that the land was not liable to fresh assessment, under the provisions of s. 6 of Act IX of 1847, nor was the comparison of the two maps by the Revenue Officer conclusive on the question of addition to the estate—*Held*, also, (*Mitter, J., dissenting*) that the order of the Board of Revenue fixing the land with liability to assessment was not final, and could be set aside by the Civil Court as *ultra vires*—*Held*, by the majority of the Full Bench, that the language of s. 9 was not such as would prohibit the present suit; and unless the meaning were clear, its operation should be limited

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Assessment.—(*Concluded*).

to suits for damages on account of anything done in good faith; for instance, in a case of ouster under s. 7—*Held*, (*Mitter, J., dissenting*)— S. 1 of Act IX of 1847 repealed everything in the Regulation which enacted by what officers and how the question of liability to assessment should be tried, and therefore took away from Collectors and Boards of Revenue the power of giving any binding decision on the point. *Held* also (*Mitter, J., dissenting*) that the effect of the words "shall be final," in s. 6 was to make the assessment final in every case in which there was jurisdiction to assess, but to leave it open to the Civil Court to inquire in each case whether there was such jurisdiction, or whether the lands assessed were liable to assessment. *Per Mitter, J.*—Section 1 has not abolished the judicial functions of the Revenue Authorities under Regulation II of 1881; all that has been abolished by that section are the tribunals constituted by Regulation III of 1828. *Per Mitter, J.*—The proceedings of the Revenue Authorities under s. 6 embrace an inquiry upon two questions, *viz.*, the question of the liability to assessment and the rate of assessment, and under the express wording of the section the finality attaches to the whole order of the Sudder Board of Revenue. FAHAMIDNANNISSA BEGUM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 14 C. 67 (**F. B.**) 46

See LIMITATION 14 C. 323.

Assignee.

(1) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 380.

(2) See EXECUTION OF DECREE, 15 C. 446.

Assignee of Trustee.

See LIMITATION ACT (XV OF 1877), 15 C. 703.

Attached Property.

See MUNSIF, 15 C. 104.

Attaching Creditor.

See PRACTICE, 14 C. 374.

Attachment.

(1) *Civ. Pro. Code, s. 266—Property held by judgment-debtor in trust for a specific purpose—Attempt to attach surplus after fulfilment of trust.*—Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment-debtor is rendered liable to attachment in execution of the decree against him, because a surplus of income is in his hands for his own benefit after due performance of the trusts: nor does such corpus, or any part of it, come, for that reason, within the meaning of s. 266 of the code of Civil Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power exercisable for his own benefit. Where a trust had been created for specific purpose, *viz*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate. *Held*, that a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that in a suit in which all the parties interested were not before the Court there could be no decision as to the extent of the trusts, nor as to whether any surplus profits of the trust estates would or would not, after the performance of the trust, belong to the trustee personally. *Bishen Chand Basawat. v. Nadir Hossein*, 15 C. 329 (**P.C.**)=15 I. A. 1=12 Ind. Jur. 170=5 Sar. P. C. J. 113 803

(2) *Execution of decree—Partnership debt, Attachment of.*—An uncertain sum which may or may not be payable by one member to

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Attachment.—(*Concluded*)

another of a partnership, not shown to have been wound up, cannot be attached or sold in execution of a decree. DWARIKA MOHUN DAS v. LUCHIMONI DASI, 14 C. 384 255

(3) See APPEAL, 15 C. 437.

(4) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 617; 14 C. 631; 15 C. 202; 15 C. 771.

(5) See EXECUTION OF DECREE, 14 C. 124 15 C. 371; 15 C. 762.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 241.

Attempt.

See SENTENCE, 14 C. 357.

Attorney's Lien.

See PRACTICE, 14 C. 374.

Auction-Purchaser.

(1) See LIMITATION ACT (XV OF 1877), 15 C. 703.

(2) See LIS PENDENS, 15 C. 94.

(3) See RES JUDICATA, 14 C. 401.

Bail.

Illegal practice—Police officer—Court Duty of—Crim. Pro. Code (Act X of 1882), *ss.* 344, 526, 526A.—The practice of leaving to the Police decision as to the sufficiency of bail when bail has been ordered by the Court is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself and not with the Police. M, the complainant, on the 19th November 1887, made an application to the Deputy Magistrate, under s. 526 A of the Crim. Pro. Code, for the postponement of his case against G, to enable him to apply to the High Court under s. 526 for a transfer of the case from the file of the Deputy Magistrate to that of another officer. On the same date the Deputy Magistrate refused the application, and proceeded with the case, acquitting G. *Held*, having regard to the words "the Court shall exercise etc.," in s. 526 A, the order of the Deputy Magistrate of the 19th November refusing to grant the application was illegal. QUEEN-EMPRESS ON THE PROSECUTION OF PALAKDHARI MAHTON v. GAYITRY PROSUNNO GHOSAL, 15 C. 455 888

Balance Sheet.

See STAMP ACT (I OF 1879), 15 C. 162.

Basis of Decision.

See PLEADINGS, 14 C. 801.

Benami Lease.

See SALE, 15 C. 350.

Benami Transaction.

See EVIDENCE, 15 C. 20.

Benami Transfers.

See SALE FOR ARREARS OF REVENUE, 14 C. 109.

Board of Revenue.

See ASSESSMENT, 14 C. 67.

Bona Fide Suit.

See ARREST BEFORE JUDGMENT, 14 C. 695.

Brother's Daughter's Son.

See HINDU LAW—INHERITANCE, 15 C. 780.

Burden of Proof.

(1) *Revenue Sale Law—Act XI* of 1859, s. 37—*Purchasers of estate sold at auction, Rights of.*—The onus of proving that under-tenures in a taluk sold at a revenue sale under Act XI of 1859 fall under any of the exceptions to s. 37 of that Act is on the person alleging the under-tenures to be within such exceptions. RASH BEHARI BOSU v. HARA MONI DEBYA, 15 C. 555 954

(2) *Transferability of tenure—Presumption.*—There is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for khas possession on the ground that a tenure sold was not transferable must establish his case as an ordinary plaintiff. DOYA CHAND SHAHA v. ANUND CHUNDER SEN MOZUMDAR, 14 C. 382 253

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Burden of Proof.—(*Concluded*).

(3) *Transferability of tenures.*—In a suit brought to recover possession of certain lands forming part of the patni estate of the plaintiffs and constituting the ryoti holding of one Mongola Akund, which lands were sold in execution of a money decree against Mongola Akund, and purchased by the defendant, the defendant set up that the tenure held by Mongola Akund was of a permanent and transferable nature. *Held*, that the onus of proving the transferability of this tenure was upon the defendant. KRIPAMOYI DABIA *v.* DURGA GOBIND SIRCAR, 15 C. 89 645

(4) See HINDU LAW—ALIENATION, 15 C. 717.

(5) See SONTHAL PERGUNNAS SETTLEMENT REGULATION (III OF 1872), 15 C. 765.

Bustoo Land.

See SMALL CAUSE COURT—MOFUSSIL, 15 C. 174.

Cantonment Magistrate.

See ACT III OF 1880 (CANTONMENTS), 15 C. 452.

Carrying on Business.

See JURISDICTION, 14 C. 256.

Cause of Action.

(1) See CIV. PRO. CODE (ACT XIII OF 1859), 15 C. 422.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 60.

(3) See JURISDICTION, 14 C. 256.

(4) See LIMITATION, 14 C. 323.

(5) See LIMITATION ACT (XV OF 1877), 14 C. 256; 15 M. 51.

(6) See MULTIFARIOUSNESS, 14 C. 681.

Certificate of Administration.

(1) *Act* XXVII *of* 1860—*Rival claimants for certificate—Procedure—Trial of questions of title.*—In a case of rival claimants to a certificate under Act XXVII of 1860 to the estate of a deceased Mahomedan lady, *A* based his claim on the ground that the deceased was a Sunni, and that he being a Sunni was her nearest heir. *B's* claim was founded on the allegation that the deceased was a Shiah, and that he being a Shiah had the preferential title. The Judge declined to receive the whole of the evidence tendered, and to go into the question of title. On appeal the case was remanded to the Judge for determination of the question whether the deceased was a Sunni or a Shiah, and which of the parties had the preferential title to the certificate, upon the entire evidence. *Per* GHOSE, J.—Where the question as to right to a certificate is between two parties, one of whom, according to certain given facts, would be the heir and the other a total stranger, those facts must be gone into and determined, although such procedure involves to a certain extent the trial of a question of title. Cases distinguished where the question of the title to obtain a certificate is raised between one who is undoubtedly a natural heir and another who sets up a special title, or between two persons equally entitled to the succession, but one of whom claims exclusive title upon some special grounds. The scope and object of Act XXVII of 1860 discussed. ASGAR REZA *v.* ABDUL HOSSEIN, 15 C. 574=13 Ind. Jur. 21 966

(2) See ACT XVII OF (BURMAH COURTS), 14 C. 351.

(3) See ACT XXVII OF 1860 (SUCCESSION CERTIFICATE), 15 C. 54.

(4) See GUARDIAN, 14 C. 55.

Certificate of Sale.

See MORTGAGE—SALE, 15 C. 546.

Certified Copies.

See EXECUTION OF DECREE, 14 C. 546.

Certified Purchaser.

See SALE FOR ARREARS OF REVENUE, 14 C. 583.

Cesses.

See ACT IX OF 1880 (BENGAL CESS), 15 C. 237.

Change of Parties.

See PARTIES, 14 C. 400.

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Charge.

(1) See EXECUTION OF DECREE, 15 C. 492.
(2) See JOINDER OF CHARGES, 14 C. 128.
(3) See LIMITATION ACT (XV OF 1877), 14 C. 730; 15 C. 66.
(4) See PENAL CODE (ACT XLV OF 1860), 14 C. 314.
(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 687.

Charge of Jury.

Criminal Procedure Code (*Act* X *of* 1882) *s.* 298—*Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts and accepted in others.*—A jury, after retiring, returned to the box, and after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held,* that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believed those facts. Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereunder. JASPATH SINGH v. QUEEN-EMPRESS, 14 C. 164=11 Ind. Jur. 254 — 109

Chur Land.

See LIMITATION, 14 C. 323.

Civil Court.

See ASSESSMENT, 14 C. 67.

Civil Procedure Code (Act VIII of 1859).

(1) S. 7 See RES JUDICATA, 15 C. 800.
(2) *S.* 114—*Civil Procedure Code,* 1882, *s.* 103—*Identity of causes of action in two suits, notwithstanding difference of relief claimed.*—To a suit, brought in 1883, for redemption of a mortgage made in 1853 of villages in Oudh, subsequently included in the mortgagee's talukdari estate and sannad, the defence was that the mortgagor having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortagee having appeared to defend, against the plaintiff under s. 114 of Act VIII of 1859. *Held,* that although the plaintiff, who had claimed in the prior suit the under proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was, in both cases, the refusal of the right to redeem; and that under s. 114 of the Act the judgment of 1864 was final. SHANKAR BUKSH v. DAYA SHANKAR, 15 C. 422 (**P.C.**)=15 I A. 66=5 Sar. P. C. J. 107=12 Ind. Jur. 132=Rafique and Jackson's P. C. NO. 100 — 866
(3) S. 284—See EXECUTION OF DECREE, 15 C. 365.
(4) S. 378—See REVIEW, 15 C. 432.

Civil Procedure Code (Act X of 1877).

Ss. 13 and 43—See RES JUDICATA, 15 C. 800.

Civil Procedure Code (Act XIV of 1882).

(1) S. 2—See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 312.
(2) S. 10—See CIV. PRO. CODE (ACT VIII OF 1859), 15 C. 422.
(3) S. 11—See RIGHT OF SUIT, 15 C. 159.
(4) Ss. 11, 318—See POSSESSION, 14 C. 644.
(5) S. 13—See RES JUDICATA, 15 C. 756; 15 C. 808.
(6) Ss. 19, 223, sch. IV, form 128—See EXECUTION OF DECREE, 14 C. 661.
(7) S. 25—See EXECUTION OF DECREE, 15 C. 177.
(8) Ss. 27 and 32—See PARTIES, 14 C. 400.
(9) Ss 31 and 53—See MISJOINDER, 14 C. 435.

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Civil Procedure Code (Act XIV of 1882—(*Continued*).

(10) S. 37—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 14 C. 556.
(11) S. 43—See ENHANCEMENT, 15 C. 145.
(12) Ss. 50, 53, sub-s. (*d*)—See PLAINT, 15 C. 533.
(13) S. 100—See MINOR, 14 C. 204.
(14) Ss. 125, 127—See PRACTICE, 14 C. 703.
(15) Ss. 131, 136—See PRACTICE, 14 C. 768.
(16) *Ss.* 213, 276, 295—*Administration decree—Attachment after date of institution of administration suit under decree obtained prior to such suit—Injunction.*—On the 22nd July 1886 one *R. L.* obtained a money decree against one *P. C.* On the 5th November 1886 *P. C.* died; and on the 18th December 1886 *R. L.* applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th and 12th January 1887. On the 21st December 1886 one *S.* filed a suit to administer the estate of the deceased, and on the 20th January 1887 obtained the usual administration decree. On the 5th May 1887 *S.* applied for an order staying all proceedings taken by *R. L.* against the estate of *P. C.* and directing him to come in should he think fit so to do, and prove his claim in the administration suit. *Held,* that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted, *in the matter of the application of* SOOBUL CHUNDER LAW. SOOBUL CHUNDER LAW v. RUSSICK LALL MITTER, 15 C. 202=12 Ind. Jur. 307 719
(17) Ss. 220, 617, 620—See COSTS, 15 C. 507.
(18) Ss. 223, 229—See EXECUTION OF DECREE, 15 C. 365.
(19) S. 223 (*c*)—See EXECUTION OF DECREE. 15 C. 667.
(20) S. 232—See EXECUTION OF DECREE, 15 C. 446.
(21) Ss. 232, 244, 273—See EXECUTION OF DECREE, 15 C. 371.
(22) Ss. 237, 245—See EXECUTION OF DECREE, 14 C. 124.
(23) *S.* 244—*Finality of order—Competency of Court.*—*S. S.* brought a suit under a mortgage bond, making *R. S.*, a subsequent incumbrancer, a defendant, and obtained a decree for a sale of the whole of the mortgaged premises. After the decree a compromise was effected between all the parties *with the exception of R. S.*, by the terms of which, in consideration of the judgment-debtors (mortgagors) undertaking to do certain acts, *S. S.* promised to execute his decree against only a 3 annas 12 dams share of the mortgaged premises. The judgment-debtors (mortgagors) having failed to carry out the compromise, S. S. applied for a sale of the whole of the mortgaged premises, but on the petition of *R. S.* setting out the terms of the compromise to which he was no party, the Subordinate Judge, by an order of the 7th September 1885, held that under the agreement *S. S.* was entitled to sell only a 3 annas 12 dams share of the mortgaged premises, which was accordingly directed to be sold. That order was not appealed against, but subsequently in March 1886, *S. S.* made a fresh application for a sale of the reminder of the premises, *R. S.* objecting. *Held,* that the order of the 7th September was one which the court was competent to make under s. 244 of the Code of Civil Procedure, and by reason of that order not being appealed it became final. BASUDEO NARAIN SINGH v. SEOLOJY SINGH, 14 C. 610 (F.B.). 424
(24) S. 244—See EXECUTION OF DECREE, 14 C. 484.
(25) S. 244—See MESNE PROFITS, 14 C. 605.
(26) S. 244—See RIGHT OF SUIT, 15 C. 179.
(27) *Ss.* 244 *and* 258—*Judgment-debtor as part-purchaser of a decree, Suit by*—*H. D.* and *R. D.* owned a 6-anna share in certain decrees. The other decree-holders subsequently sold their 10-anna share to *H. S.* and *S. M.*, two of the judgment-debtors. *H. D.* and *R. D.* then proceeded to execute the decrees, and in satisfaction thereof were allowed to receive, upon giving security under s. 231 of the Code, the full 16-annas share of the decretal amount from *H. S.* and *S. M.*, notwithstanding the objection of the latter on the ground of their purchase.

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Civil Procedure Code (Act XIV of 1882)—(*Continued*).

Thereupon *H. S.* and *S. M.* brought a suit for declaration of their right of purchase and the recovery of a 10-anna share of the money in the hands of *H. D.* and *R. D.* *Held*, that the plaintiffs were entitled to the relief sought for. *Held*, also, that the provisions of s. 258 of the Civ. Pro. Code, did not affect the suit, which was brought not upon the allegation that the decrees were satisfied by the plaintiffs' purchase, but, on the contrary, was founded upon the proposition that the decrees were not so satisfied. *Held* further, that the claim was not within the words "relating to the execution of the decree" is s. 244 of the Civ. Pro. Code, inasmuch as it did not raise any question in respect to the furtherance of, or hindrance to or the manner of carrying out the execution of the decrees. HARAGOBIND DAS KOIBURTO v. ISSURI DASI, 15 C. 187 ... 709

(28) Ss. 244, 278, 283—See APPEAL, 15 C. 437.

(29) *S. 246—Execution of cross-decrees—Power of Court executing decree—* Bona fide *purchaser—Presumption of validity of order for sale.*—If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property, sold in execution of a valid decree under the order of a competent Court, was purchased *bona fide* and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. REWA MAHTON v. RAM KISHEN SINGH, 14 C. 18 (**P.C.**)=13 I. A. 106=10 Ind. Jur. 428=4 Sar. P.C.J. 746

(30) S. 253—See SURETY, 15 C. 497.

(31) S. 258—See DECREE, 14 C. 376.

(32) S. 266—See ATTACHMENT, 15 C. 329.

(33) S. 266—See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 241.

(34) *Ss. 276, 295—Claim to rateable distribution under s. 295—Sale pending attachment.*—A claim under s. 295 of the Civ. Pro. Code is not enforceable as an attachment against which an assignment is rendered void by the provisions of s. 276. In June 1883, *A. B.* and *C.* obtained separate money decrees against, amongst others, *T*, as executor under the will of his father. Sometime in 1884 *B* attached the whole of the testator's properties in execution of his decree, and *A* and *C.* applied for rateable shares in the sale proceeds. On the 2nd June 1884 the parties came to an arrangement by which it was agreed that *B's* claims should be satisfied by means of all the attached properties with the exception of one, which should be left free for the benefit of the other judgment-creditors. By a deed, dated the 16th June, but which was found to have been actually executed on the 17th, *T* conveyed this property to *A*; and on the 17th June all the other attached properties were sold in execution of *B's* decree; and on the same day *B* put in an application for the removal of his attachment from this property, *D*, another decree-holder, on the 16th June applied to be included in the rateable distribution of the properties attached by *B;* and on the 30th June *D.* attached the property sold to *A.* in execution of his decree. *A.* preferred a claim to the property, which was disallowed; and *A*, thereupon brought a suit to establish her right to it on the ground *inter alia* that *B's* attachment had ceased to exist on the date of her purchase, and that the sale was valid one. *Held*, that the sale to *A.* was valid as against *D.* DURGA CHURN ROY CHOWDHRY v. MONMOHINI DASI, 15 C. 771. ... 1908

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Civil Procedure Code (Act XIV of 1882)—(*Continued*).

(35) *S. 278—Claim to property directed to be sold under a mortgage decree—Attachment.*—Proceedings by way of claim under s. 278 of the Civ. Pro. Code are applicable only to cases of money decrees where property has been attached, and not to claims preferred to properties directed to be sold under mortgage decrees. *In the matter of* DEEFHOLTS. DEEFHOLTS v. PETERS, 14 C. 631. 418

(36) Ss. 278, 280, 283—See LIMITATION ACT (XV OF 1877), 15 C. 521.

(37) *S. 280—Attachment—Wakf—Trust property—Jurisdiction of Court under s. 280, Code of Civil Procedure.*—The question to be determined under s. 280 of the Civ. Pro. Code is the question of possession; the words "possession of the judgment-debtor or of some person in trust for him" refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances. *In the matter of the petition of* HAMID BAKHUT MOZUMDAR v. BUKTEAR CHAND MAHTO, 14 C. 617 409

(38) Ss. 280—283—See LIMITATION ACT (XV OF 1877), 15 C. 674.

(39) Ss. 283—See MUNSIF, 15 C. 104.

(40) Ss. 290, 311, 312—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 14 C. 1; 14 C. 9.

(41) *S. 311—"Any person whose immoveable property has been sold" Interpretation of.*—The words "any person whose immoveable property has been sold," in s. 311, are sufficiently wide to include a person who is neither the decree-holder, nor the judgment-debtor, nor the auction-purchaser; but who alleges that the property sold in execution is his. ABDUL HUQ MOZOOMDAR v. MOHINI HOHUN SHAHA, 14 C. 240 159

(42) *S. 311—Objection to sale by wife of judgment-debtor—Sale in execution—Execution of Decree.*—A person who claims to be a purchaser from a judgment-debtor prior to an attachment is not entitled to come in under s. 311 of the Civ. Pro. Code and object to the sale of the judgment-debtor's property. Rule that a person applying to set aside a sale for irregularity must prove substantial injury arising therefrom, as laid down in 2 W. R. Mis. 13, and explained by 11 Bom. H. C. 15, approved. ASMUTUNNISSA BEGUM v. ASHRUFF ALI, 15 C. 488 (F.B.)=13 Ind. Jur. 54 909

(43) *Ss. 311, 312—Sale in execution, Application to set aside—Limitation Act (XV of 1877), s. 18, and sch. II, art. 166—Fraud.*—An application under s. 311 of the Civ. Pro. Code to set aside a sale cannot be made after the expiry of thirty days from the date of such sale and after such sale has been confirmed, even though it be alleged that the sale was fraudulently kept from the knowledge of the applicant until after such confirmation. *Semble,* that if, before such sale had been confirmed, an application had been made although after thirty days from the date of the sale, the Court would possibly have been justified in granting the application and extending the period of limitation if sufficient cause under s. 18 of the Limitation Act were made out. GOBIND CHUNDRA MAJUMDER v. UMA CHARAN SEN, 14 C. 679 450

(44) S. 316—See MORTGAGE—SALE, 15 C. 546.

(45) S. 317—See SALE FOR ARREARS OF REVENUE, 14 C. 583.

(46) S. 331—See EXECUTION OF DECREE, 14 C. 234.

(47) *S. 336—Surety, Liability of—Execution proceedings.*—The liability of a surety under s. 336 of the Civ. Pro. Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. *D*, a judgment-debtor, was committed to jail on the 8th of August, 1884, and he applied under s. 336 of the Civ. Pro. Code to be released. On the 16th of November, 1884, *B* and *C* stood security for him under the provisions of s. 336 of the Civ. Pro. Code, that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and *D* was thereupon released. Instead of applying under s. 344 to be declared an insolvent he applied to have the decree, which had been obtained

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Civil Procedure Code (Act XIV of 1882)—(*Concluded*).
ex parte, set aside. This application was disallowed, and the decree-holder was directed to take further steps. On the 21st of February, 1885, the application for execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court. *Held*, that the power reserved to the Court, under s. 330 of the Civ. Pro. Code, to realise the security in execution of the decree, could not be exercised when the execution proceeding wherein the security was furnished was no longer in existence. LALJI SAHOY v. ODOYA SUNERI MITRA, 14 C. 757 — 502
(48) Ss. 336, 344—See SURETY, 15 C. 171.
(49) Ss. 344, 360—See EXECUTION OF DECREE, 15 C. 762.
(50) S. 351—See INSOLVENT, 14 C. 691.
(51) S. 434—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 570.
(52) S. 434—See EXECUTION OF DECREE, 14 C. 546.
(53) S. 440—See MINOR, 14 C. 159.
(54) S. 443—See MINOR, 14 C. 204.
(55) Ss. 477, 479—See ARREST BEFORE JUDGMENT, 14 C. 695.
(56) S. 503—See RECEIVER, 15 C. 818.
(57) *S. 561—Practice—Objections to decree by respondent—Time for filing objections—Date fixed for hearing appeal.—Quære.*—Whether under s. 561 of the Code of Civil Procedure objections to the decree by the respondent must necessarily be filed seven days before the date originally fixed for hearing the appeal, or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision of the Bombay High Court in 8 B. 559, to that effect is not correct, and the decisions of the Calcutta High Court to the contrary are not erroneous. TULSHI PERSHAD v. RAJA MISSER, 14 C. 610=12 Ind. Jur. 61 — 404
(58) *S. 568—Production of additional evidence in the appellate Court.*—Circumstances under which an appellate Court will *not* allow additional evidence to be produced at the hearing of an appeal under s. 568 of the Civ. Pro. Code. NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU, 15 C. 765 — 1094
(59) S. 578—See MINOR, 14 C. 159.
(60) S. 608—See APPEAL TO PRIVY COUNCIL. 14 C. 290.
(61) S. 610—See LIMITATION ACT (XV OF 1877), 14 C. 348.
(62) *S. 622—Revision of interlocutory order when appeal lies from final decree—Power of High Court.*—There is nothing in s. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word "case" in that section is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order, DHAPI v. RAM PERSHAD, 14 C. 768=12 Ind. Jur. 97 — 509
(63) S. 622 See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 321; 15 C. 47.
(64) S. 623—See REVIEW, 14 C. 627.
(65) S. 623—See SUPERINTENDENCE, 15 C. 446.
(66) Ss. 623, 629—See REVIEW, 15 C. 432.
(67) S. 647—See EXECUTION OF DECREE, 15 C. 177.

Claim.
(1) See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 631; 15 C. 771.
(2) See LIMITATION ACT (XV OF 1877), 14 C. 801; 15 C. 521.

Cognisance of Offence.
See FALSE CHARGE, 14 C. 707.

Commission.
See CRIM. PRO. CODE (ACT X OF 1882), 15 C. 775.

Companies Act VI of 1882.
S. 162—Extraordinary power of the Court under the Companies' Act—Examination of witness—Costs.—Certain persons connected with

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Companies Act VI of 1882—(*Concluded*).

a Company then in course of liquidation, who were also some of the defendants in a pending suit brought by the Company (and revived subsequent to the order for winding up by the Official Liquidator) for an account and for the recovery of certain sums alleged to have been paid to the promoters of the Company, having been examined under an order obtained under s. 162 of the Companies Act, 1882, applied through their counsel for costs incurred on such examination: *Held*, that no order as to such costs could be made. *In the mater of the* INDIAN COMPANIES' ACT, 1882, and *in the matter of* T. F. BROWN & COMPANY, LTD., 14 C. 219 .. 145

Company.

Trading by a Company under its Memorandum of Association—Memorandum of Association—Ultra vires.—The doctrine that a company can do nothing which is not expressly or impliedly warranted by its Memoradum of Association, or other instrument of incorporation must be reasonably understood and applied. A Company, therefore, in carrying on the trade for which it is constituted, and in whatever may be fairly regarded as incidental to, or consequential upon that trade, is free to enter into any transaction not expressly prohibited by its Memorandum of Association. SHAMNAGAR JUTE FACTORY CO v. RAM NARAIN CHATTERJEE, 14 C. 189 125

Compensation.

(1) See APPEAL, 15 C. 712.

(2) See ACT I OF 1871 (CATTLE TRESPASS), 14 C. 175.

(3) See LAND ACQUISITION ACT (X OF 1870), 14 C. 423; 14 C. 749.

Concurrent Findings.

See CUSTOM, 14 C. 296.

Concurrent Remedies.

See POSSESSION, 14 C. 644.

Confession.

(1) *Confession of an accused person—Evidence, Admissibility of confession in—Question and answer—Memorandum in English by Magistrate—Crim. Pro. Code (Act X of* 1882), *ss.* 164, 364 *and* 533.—It is not necessary that the English Memorandum referred to in para. 3 of s. 364 of the Crim. Pro. Code should be made in respect of confessions recorded under s. 164, as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364. A confession of any accused person was recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal Procedure Code, while the case was under investigation by the police. No English Memorandum of the nature referred to in s. 364 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence, and no evidence was given under the provisions of s. 533 of the Crim. Pro. Code that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions. *Held,* upon the authority, of the decision in 8 C. 618 (note), that as the accused was not prejudiced by the questions and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld. FEKOO MATHO v. THE EMPRESS, 14 C. 539 — 357

(2) *Crim Pro. Code (Act* X *of* 1882), ss. 1, 164, 364, 533—*Defect in confession—Evidence Act* (I *of* 1872), *ss.* 21, 26, 80—*Presidency Towns, Investigations in.*—An accused, in custody at the time, made to a Magistrate in Calcutta, in the course of a police investigation held in Calcutta, a statement confessing that he had murdered his

Confession—(*Concluded*).

father. The accused spoke and understood English, and the Magistrate questioned him in English, and was answered sometimes in English and sometimes in Bengali. Whenever the answers were given in English they were so taken down, when in Bengali they were written down in English and read over to the accused in that language, who accepted the English as being the meaning of that which he had stated, and signed the document in the presence of the Magistrate, who affixed the usual certificate thereto. In taking this confession the Magistrate purported to have acted under ss. 164 and 364 of the Crim. Pro. Code. At the trial, subsequently to the admission of the confession in evidence under s. 80 of the Evidence Act, the Magistrate was called as a witness and deposed to the above facts with reference to the language in which the confession was taken and the mode in which it was recorded. *Held,* on a reference to a Full Bench as to whether the confession was inadmissible in evidence by reason of some of the answers having been given in Bengali but recorded in English, that the provisions of s. 164 of the Code had no application to statements taken in the course of a police investigation made in the town of Calcutta, and that consequently ss. 364 and 533 had no application. *Held, nevertheless,* that the document was properly admitted upon the evidence of the Magistrate under the provisions of s. 26 of the Evidence Act. *Semble.*—The provisions of s. 164, as read with s. 364, would not be complied with, where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given; and further, that there would be grave doubt if such a defect could be cured by s. 533. QUEEN-EMPRESS *v.* NILMADHUB MITTER, 15 C. 595

Confirmation of Sale.

See MORTAGAGE—SALE, 15 C. 546.

Consideration.

See LIMITATION ACT (XV OF 1877), 14 C. 457; 15 C. 51.

Construction.

(1) See LEASE, 15 C. 342.
(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 687.

Constructive Possession.

See SPECIFIC RELIEF ACT (I OF 1877), 14 C. 649.

Contentious Suit.

See LIS PENDENS, 15 C. 647.

Contract.

(1) Made by Court, Summary enforcement of—See MANAGEMENT, 15 C. 253.
(2) Novation of—See CONTRACT ACT (IX OF 1872), 15 C. 319.
(3) Penal clause in—See INTEREST, 14 C. 248.
(4) Registration—See REGISTRATION ACT (III OF 1877), 14 C. 449.
(5) Satisfaction of—See CONTRACT ACT (IX OF 1872), 15 C. 319.

Contract Act (IX of 1872).

(1) Ss. 15, 27—See VOLUNTARY PAYMENT, 15 C. 656.
(2) *Ss. 62, 63—Novation—Contract, Novation of—Satisfaction of contract.* —The plaintiff sued to recover the sum of Rs. 1,173 due on a bond. It was found as a fact that after the due date of the bond an arrangement was come to between the plaintiff and the defendant by which the plaintiff agreed to accept in satisfaction of what was due to him at the time of the arrangement Rs. 400 in cash and a fresh bond for Rs. 701, payable by instalments; and it was further found that the plaintiff never intended or agreed to accept the naked promise of the defendant to pay the Rs. 400 and to give the bond for Rs. 701. The defendant did not pay the Rs. 400 or give the bond, but pleaded that there had been a novation of the original contract by reason of the subsequent agreement, and that the suit being based on the original contract could not be maintained, and he relied on the provisions of

Contract Act (IX of 1872)—(*Concluded*).

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ss. 62 and 63 of the Contract Act in support of his contention. *Held*, that neither section had any bearing on the case, and that upon the breach by the defendant of the terms which he had made, and upon the non-performance by him of the satisfaction which he had promised to give, the parties were relegated to their rights and liabilities under the original contract, and that consequently the plaintiff was entitled to the relief he claimed. *Held*, further that s. 62 of the Contract Act is merely a legislative expression of the common law, and the provisions thereof do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to. MANOHUR KOYAL *v.* THAKUR DAS NASKAR, 15 C. 319 796

(3) Ss. 69, 70—See SMALL CAUSE COURT, MOFUSSIL, 15 C. 652.

(4) S. 74—See INTEREST, 14 C. 248.

(5) S. 78—See SALE, 15 C. 1.

Conviction.

See CRIM. PRO. CODE (ACT XIV OF 1882), 14 C. 174.

Cooch Behar.

See EXECUTION OF DECREE, 14 C. 546.

Co-parceners.

See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761.

Co-sharers.

(1) *Ijmali property—Cultivation of indigo by one co-sharer without consent of others—Injunction as between co-sharers—Practice of the English Courts in granting injunction, Applicability of.*—W, while in possession of an entire mouzah as ijaradar, had under an arrangement with the proprietors built factories and cultivated indigo by reclaiming a quantity of waste land. On the expiration of his lease W, who, still held a portion of the mouzah in ijara from a 2-anna co-sharer continued to cultivate indigo on the khas lands as before, and disregarding the opposition of the 14-anna co-sharers, claimed an exclusive title to do so. The 14-anna co-sharers thereupon brought a suit against W for ijmali possession of the khas lands, and prayed, among other things, for an injunction prohibiting the defendant from sowing indigo upon the ijmali lands without the plaintiffs' consent, and also for a general injunction to prohibit the defendant from throwing any obstacles in the way of plaintiffs holding ijmali possession of the lands. The Court below granted an injunction prohibiting the defendant from growing indigo on the khas lands without the consent of the plaintiffs. *Held*, that the plaintiffs were entitled to an injunction but having regard to the circumstances, under which the defendant cultivated the lands, it was necessary to vary the injuntion granted by the Court below by making it an injunction restraining the defendant from excluding by any means the plaintiffs from their enjoyment of the ijmali possession of the lands. RAM CHAND DUTTA *v.* WATSON & Co., 15 C. 214 727

(2) *Payment of arrears of revenue by one co-sharer, Effect of—Charge—Act* XI *of* 1859, *s.* 9, *Construction of—Lien.*—*Held* (MITTER and NORRIS, JJ., dissenting), there is no general rule of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. KINU RAM DAS *v.* MOZFFER HOSAIN SHAHA; KINU RAM DAS *v.* HAJJATULLA SHAHA; KINU RAM DAS *v.* KAMARUDDI SHAHA, 14 C. 809 **(F.B.)**

(3) *Right to deal with joint property—Excavation of tank on joint property—Discretion of Court in granting injunction—Specific Relief Act* (*I of* 1877), *s.* 55.—Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as, for in-

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Co-sharers—(*Concluded*).

stance, where a tank has been excavated), a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order of that nature. JOY CHUNDER RUKHIT v. BIPRO CHURN RUKHIT, 14 C. 236 — 156

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 201; 14 C. 659; 15 C. 47.

(5) See INJUNCTION, 14 C. 189.

(6) See LIMITATION ACT (XV OF 1877), 15 C. 542.

(7) See MAHOMEDAN LAW—PRE-EMPTION, 15 C. 224.

(8) See SALE IN EXECUTION OF DECREE, 14 C. 572.

Costs.

(1) *Costs of suit by husband against wife for divorce—Deposit of costs—Stay of proceedings until costs paid—Poverty of husband.*—In a suit brought for dissolution of a marriage solemnised in 1859 (the parties to such marriage being of Anglo-Indian domicile) the respondent, being possessed of no separate property of her own, applied to the Court for an order directing her husband to deposit in Court a sum sufficient to cover her probable costs of suit. The Court made an order directing the Registrar to estimate and certify the wife's probable costs of suit, and directed the husband to pay the sum so certified into Court. The husband being a man of next to no means failed to pay into Court the sum certified by the registrar. *Held* on an application by the wife to stay proceedings until such costs were paid, that it would be unreasonable to stay proceedings on account of the husband being unable to pay into Court that which he did not possess; but that, inasmuch as the affidavits filed by the parties were contradictory as to the means of the husband, the matter should be referred (if the parties so desired it) for an inquiry by an officer of the Court into the question of means. THOMSON v. THOMSON, 14 C. 580 — 384

(2) *Practice—costs of reference to High Court—Small Cause Court (Presidency Towns) Act (Act* XIV *of* 1882), *s.* 69—*Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 220, 617, 620.—Under s. 620 of the Civ. Pro. Code the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the cost of the suit. They are however, in the discretion of the Court, and need not necessarily follow the event of the suit. NICOL v. MATHOORA DASS DUMAI, 15 C. 507=12 Ind. Jur. 458 — 922

(3) See COMPANIES ACT (VI OF 1882), 14 C. 219.

(4) See EXECUTION OF DECREE, 14 C. 185.

(5) See PRACTICE, 14 C. 374.

(6) See PRINCIPAL AND AGENT, 14 C. 147.

(7) See SMALL CAUSE COURT, MOFUSSIL, 15 C. 713.

(8) See WILL, 15 C. 725.

Court.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 18; 14 C. 640.

(2) See EVIDENCE ACT (I OF 1872), 14 C. 176.

(3) See INSPECTION OF DOCUMENTS, 15 C. 109.

Covenant.

See MORTGAGE—ENGLISH, 14 C. 464.

Creditor.

See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 15 C. 54.

Criminal Intimidation.

Penal Code (Act XLV *of* 1860), *s.* 503.—The threat referred to in s. 503 of the Penal Code must be a threat communicated or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind. GUNGA CHUNDER SEN v. GOUR CHUNDER BANIKYA, 15 C. 671. — 1031

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Criminal Misappropriation.
See FISHERY, 15 C. 388.

Criminal Procedure Code (Act X of 1882).

(1) Ss. 1, 164, 364, 533—See CONFESSION, 15 C. 595.

(2) Ss. 94—96—See INSPECTION OF DOCUMENTS, 15 C. 109.

(3) *S. 133—Removal of nuisance—Public way—Suit for declaration of right and confirmation of possession—Cause of Action.*—On the 6th of July 1882, the Joint Magistrate of Krishnagur, on a complaint made by *A*, order *B* to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon *B* brought a suit against *A* for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaint did not allege that *B*, in causing the Magistrate to initiate proceedings against *A*, had been actuated by malicious motives and had acted with intention of wrongfully injuring the plaintiff. *Held,* that the suit would not lie. KHODABUKSH MUNDUL v. MONGLAI MUNDUL, 14 C. 60 41

(4) *Ss. 133—137, Course to be followed in the administration of—Obstruction to highway—Claim of title*—Bona fides *of claim of title, Right of Magistrate to enquire into—Jurisdiction.*—The mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss. 133—137 of the Crim. Pro. Code. In proceedings under s. 133 of the Crim. Pro. Code with reference to obstructions to public ways, it is open to the Magistrate to enquire into the *bona fides* of the claim; and where he decides against its *bona fides,* he must state reasons for his decision which will be subject to revision by the High Court. Such a claim must be set up at or before the hearing and not afterwards. LUKHEE NARAIN BANERJEE v. RAM KUMAR MUKHERJEE, 15 C. 564. 960

(5) Ss. 133, 137—See SPECIFIC RELIEF ACT (I OF 1877), 15 C. 460.

(6) *S. 145—Dispute as to right to collect rents—Tangible immoveable property.*—A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Crim. Pro. Code. Where a dispute arose as to the right to collect the rents of certain land the ownership of which was claimed by both *A* and *B,* and the tenants who had been paying rent to *A* refused to pay rent to *A* and attorned to *B*: *Held,* that the conduct of the tenants in attorning to *B* was not an assertion adverse to *A* such as to put an end to the relation of landlord and tenant between them and *A* and to *A's* right to collect the rents. Such attornment therefore did not deprive *A* of his right to have recourse to s. 145 in case of a likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained, pending proceedings in a civil suit. SARBANANDA BASU MOZUMDAR v. PRAN SANKAR ROY CHOWDHURI, 15 C. 527. 935

(7) *S. 145—Joint hearing of the case of several claimants—Possession—Number of plots. Dispute as to—Practice.*—A Magistrate proceeding under s. 145 of the Crim. Pro. Code, in a case in which one party (thirty-nine in number) claimed to be tenants of 708 bighas of land belonging to one Tofuzul Hosein, and the members of the other party (seventeen in number) claimed to hold the same land in separate parcels as their maurasi jote, tried the question of possession as between the two parties in one case, notwithstanding the protest of the maurasi claimants to this mode of procedure, and decided that possession was with the party of thirty-nine, directing that they as a body should remain in possession until ousted by the order of the Civil Court. *Held,* that the course pursued by the Magistrate at the hearing was prejudicial to the case of the maurasi claimants, and that the form of his order was open to the objection that it would

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Criminal Procedure Code (Act X of 1882)—(*Continued*).

render it necessary for the party out of possession to make all the persons declared to be in possession defendants in any civil suits brought to recover possession of the land. KUTTUHUL SINGH v. UMA SINGH, 15 C. 31 606

(8) *S. 145—Order passed under s. 146, on proceedings taken under s. 145, Crim. Pro. Code—Power of Court on revision—Evidence on revision.*—Where a Magistrate has passed an order under s. 145 of the Crim. Pro. Code, whereas the proper order in the case should have been one under s. 146, the High Court on revision will make the order which the lower Court ought to have made. Case in which the High Court on revision entered into the whole of the evidence in the case. REID v. RICHARDSON, 14 C. 361=11 Ind. Jur. 379. 239

(9) *S. 145—Possession—Title—Symbolical possession.*—A Magistrate, trying a case under s. 145 of the Crim. Pro. Code, in determining the question of possession, took into consideration to question of title. *Held,* that he had a right to discuss to question of title, if in his opinion it was material upon the question of possession; and that the mere fact that he had considered and discussed the question of title would not invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession. *Semble.*—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession. RAJA BABU v. MUDDUN MOHUN LALL, 14 C. 169=11 Ind. Jur. 256 112

(10) Ss. 164, 364 and 533—See CONFESSION, 14 C. 539.

(11) S. 191—See FALSE CHARGE, 14 C. 707.

(12) Ss. 200—203, 437—See DISMISSAL, 14 C. 141.

(13) *Ss. 233, 234, 537—Separate charges for distinct offences.*—Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one *F* were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment. *Held* that the trial was illegal, and the defect was not cured by s. 537 of the Crim. Pro. Code. *In the matter of the petition of* CHANDI SINGH. QUEEN EMPRESS v. CHANDI SINGH, 14 C. 395. 262

(14) Ss. 234, 537—See JOINDER OF CHARGES, 14 C. 128.

(15) Ss. 289, 540—See PRACTICE, 14 C. 245.

(16) S. 298—See CHARGE TO JURY, 14 C. 164.

(17) S. 307—See VERDICT OF JURY, 15 C. 269.

(18) S. 310—See EVIDENCE, 14 C. 721.

(19) Ss. 344, 526, 526 A—See BAIL, 15 C. 455.

(20) S. 349—See MAGISTRATE, 14 C. 355.

(21) S. 369—See REVIEW, 14 C. 42.

(22) *S. 370, (cl. i)—Summary Procedure—Conviction, Reasons for.*—The meaning of s. 370, (cl. *i*), of Act X of 1882 is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court: but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly. A sentence of a fine of Rs. 10 and imprisonment in default of payment of the fine, is not a sentence of imprisonment within the meaning of the section. MOTHEERAM v. BELASEERAM, 14 C. 174 115

(23) *S. 417—Order as to property as to which offence has been committed—Discharge of accused.*—On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate under s. 517 of the Crim. Pro. Code, ordered the elephant to be given to the Executive Engineer of the district,

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Criminal Procedure Code (Act X of 1882)—(*Concluded*).

holding that it was the property of Government. *Held*, that the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal and must be set aside. In setting it aside the High Court held, however, following 1 Bom. 630, that they had no power to order restitution of the elephant. *In the matter of the petition of* BASUDEB SURMA GOSSAIN. BASUDEB SURMA GOSSAIN v. NAZIR-UDDIN, 14 C. 834=12 Ind Jur. 152 551

(24) S. 435—See PRACTICE, 14 C. 887.

(25) S. 437—See FURTHER ENQUIRY, 15 C. 608.

(26) *S. 503—"Purdha-nashin" woman—Examination by commission—Personal appearance in Court.*—A Hindu lady having been summoned as a witness on behalf of an accused applied under s. 503 of the Code of Criminal Procedure to be examined by Commission on the ground (*inter alia*) that she was a "purda-nashin," and that her enforced appearance in a Criminal Court would entail a forfeiture of her dignity and position in Hindu society. *Held*, that such application was properly made under the section and that under the circumstances of the case the order prayed for could be made. *In the matter of the petition of* DIN TARINI DEBI, 15 C. 775 1100

(27) S. 537—See IRREGULARITY, 14 C. 358.

Criminal Trespass.

See FISHERY, 15 C. 388, 402.

Cross-cases.

See IRREGULARITY, 14 C. 358.

Cross-decree.

(1) See CIVIL PROCEDURE CODE (Act XIV OF 1882), 14 C. 18.

(2) See EXECUTION OF DECREE 15 C. 446.

Cultivation.

Of indigo by one co-sharer without consent of others—See CO-SHARERS, 15 C. 214.

Custody.

See GUARDIAN, 14 C. 615.

Custom.

(1) *Evidence as to—Wajib-ul-araiz—Concurrent findings of Courts below.*—A custom of inheritance was alleged to prevail in an Oudh clan that, if the branch of a family became extinct, the other branches of it should take the estate amongst them in equal shares without regard to their degrees in kinship to the deceased. This custom was found not proved by the Original and Appellate Courts upon evidence of instances of succession in kindred families and of rights recorded in certain *Wajib-ul-araiz*. If there had been any principle of evidence not properly applied, or documentary evidence had been referred to on which it would be shown that the Courts below had been led into error, the case might have been re-examined on this appeal, but in the absence of such ground this could not be done. THAKUR HARIHAR BAKSH v. THAKUR UMAN PARSHAD, 14 C. 296 (**P. C.**)=14 I. A. 7=11 Ind. Jur. 194=4 Sar. P.C.J. 766=Rafique and Jackson's P.C. No. 95 196

(2) See EVIDENCE ACT (IX OF 1872), 15 C. 233.

Damages.

(1) See INJUNCTION, 14 C. 189.

(2) See PRACTICE, 14 C, 703; 15 C. 211.

(3) See SMALL CAUSE COURT, MOFUSSIL, 15 C. 833.

Damdupat.

Rule of—See HINDU LAW—GENERAL, 14 C. 781.

Date.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 610.

Decision of Case.

See PLEADINGS, 14 C. 801.

Declaration.

See False Evidence, 14 C. 653.

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Declaratory Decree.

(1) *"Further relief"—Arrears of rent—Specific Relief Act I of 1877), s. 42.*—In a suit for declaratory decree in respect of plaintiff's right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed: *Held,* that the "further relief" referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to "the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying," and does not include a claim for arrears of rent. FAKIR CHAND AUDHIKARI v. ANUNDA CHANDER BHUTTACHARJI, 14 C. 586 — 388

(2) See RIGHT OF SUIT, 15 C. 159.

Decree.

(1) *Construction of—Construction of decree for money payable by instalments—Term making entire sum payable on default in payment of the instalments at certain dates.*—A decree for money payable by yearly instalments made the full amount payable on both, the first instalment being unpaid on the due date, and two consecutive instalments being in default and unpaid at the same time. Defaults were made, and questions as to the rate of interest, on what amounts, and for what periods, by reason of the debtor's delay, interest was payable, were dealt with in an order of Her Majesty in Council, which made declarations as to the allowance of interest to which the decree-holder would be entitled on the adjustment of accounts between the parties. The accounts having been taken in the Court executing the order, the decree-holder applied for execution to the full amount. *Held,* that the instalments having been paid, though not at due date, and applied in payment of interest, he was not entitled to such execution because the contingency, on the happening of which he would have been entitled thereto, had not happened. SHAM KISHEN DAS v. RUN BAHADUR SINGH, 15 C. 751 **(P.C.)**=12 Ind. Jur. 255 — 1085

(2) *Evidence of satisfaction of—Adjustment of decree without certifying—Civil Procedure Code, 1882, s. 258—Proof of payment of decree otherwise than by certificate—Fraudulent execution of decree after adjustment.*—Where a decree has been satisfied out of Court, and the payment has not been recorded in accordance with s. 258 of the Civ. Pro. Code, it is nevertheless open to the *quondam* judgment-debtor, when suing to have a sale made the *quondam* decree-holder after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under that section. PAT DASI v. SHARUP CHAND MALA, 14 C. 376 — 249

(3) *Payable by instalments—Instalment, Failure of whole sum decreed to fall due—Right of decree-holder to waive his right to execute the whole decree—Waiver—Limitation Act,* XV *of* 1877, *sch.* II, *art.* 75.—A proviso in a decree made payable by instalments, by which the whole amount of the decree is to become due upon default in payment of any instalment, is a proviso enuring for the benefit of the decree-holder alone, and he is at liberty to take advantage of it or to waive it as he thinks fit. RAM CULPO BHATTACHARJI v. RAM CHUNDER SHOME, 14 C. 352 — 233

(4) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 570.

(5) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 380.

(6) See EXECUTION OF DECREE, 14 C. 185; 14 C. 316; 14 C. 385; 14 C. 484; 14 C. 546; 15 C. 365; 15 C. 371; 15 C. 762.

(7) See LIMITATION ACT (XV OF 1877), 15 C. 502.

(8) See MESNE PROFITS, 14 C. 605.

(9) See MINOR, 14 C. 754.

(10) See SALE, 15 C. 557.

(11) See WILL, 15 C. 725.

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Decree-holder.
(1) See APPEAL—GENERAL, 15 C. 437.
(2) See EXECUTION OF DECREE, 14 C. 316; 15 C. 371.
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(1) See LEAVE TO SUE, 14 C. 526.
(2) See LIMITATION, 14 C. 791.
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(1) See LIMITATION ACT (XV OF 1877), 14 C. 457.
(2) See SALE, 15 C. 1.
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(1) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 321.
(2) See COSTS, 14 C. 580.
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See MINOR, 14 C. 159.
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(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 14 C. 834.
(2) See FURTHER ENQUIRY, 15 C. 608.
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(1) See INSPECTION OF DOCUMENTS, 15 C. 109.
(2) See PRACTICE, 14 C. 768.
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(1) See APPEAL—SECOND APPEAL, 14 C. 586.
(2) See CO-SHARERS, 14 C. 236.
(3) See EXECUTION OF DECREE, 15 C. 446.
(4) See LEAVE TO SUE, 14 C. 526.
(5) See RECEIVER, 15 C. 818.
Dismissal.
(1) *Of complaint—Report of Police Officer who is an accused person—Criminal Procedure Code (Act* X *of* 1882), *ss.* 200—203, 437.—Sections 200 to 203 of the Criminal Procedure Code must be read together, and a Magistrate dismissing a complaint under the provisions of s. 203 on any one of the three grounds, *viz.*, (1), if he upon the statement of the complainant reduced to writing under s. 200, finds no offence has been committed; (2), if he distrusts the statement made by the complainant; and (3), if he distrusts that statement, but his distrust is not sufficiently strong to warrant him in acting upon it except upon a further enquiry as provided for in s. 202—must record his reasons for so doing, for if such reasons were not recorded it would be impossible for the High Court, exercising its revicinal powers under s. 437 of the Criminal Procedure Code, to consider whether the discretion of such Magistrate has been properly exercised. It was never contemplated that a Magistrate should call for a report from an accused person under s. 202 for the purpose of ascertaining the truth of the complaint if such accused happened to be an officer subordinate to the Magistrate. Where, therefore, a complaint was made against a Police officer, and complainant's statement was duly recorded, and the Magistrate acting under the provision of s. 202 called for a report from such Police officer, and acting upon that report dismissed the complaint under s. 203: *Held*, that he had acted illegally, and that his order made under the last named section should be set aside, and the case proceeded with according to law from the time at which the

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Dismissal—(*Concluded*).

complaint was made and the complainant's statement so recorded. BAIDYA NATH SINGH v. MUSPRATT, 14 C. 141=11 Ind. Jur. 226 —

(2) See ENHANCEMENT, 15 C. 145.

Dispute.

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See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 14 C. 395.

District.

See SALE FOR ARREARS OF REVENUE, 14 C. 440.

District Court.

See LAND ACQUISITION ACT (X OF 1870), 14 C. 423.

District Judge.

(1) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 231; 15 C. 327.

(2) See EXECUTION OF DECREE, 15 C. 177.

District Superintendent of Police.

See ACT V OF 1861 (POLICE), 15 C. 194.

Divorce.

See COSTS, 14 C. 580.

Document.

(1) *Construction of—Construction of* razinama *disposing of estate with words "naslan bad naslan."*—In cases decided on the construction of documents, in which the expressions *mokurari istemrari, istemrari mokurari*, have been considered upon the question whether an absolute interest has been conferred by such documents or not, it has been taken for certain that if the words "*naslan bad naslan*" had been added, an absolute interest would have been clearly conferred. Accordingly, in construing a *razinama* between parties dividing family estate, and expressly declaring that the shares should descend "*naslan bad naslan*," *held*, that the insertion of these words was conclusive in itself; the expressed objects of this *razinama* pointing to the same construction, *viz.*, that the estate taken under it was absolute. THAKUR HARIHAR BAKSH v. THAKUR UMAN PARSHAD, 14 C. 296 (P.C.)=14 I.A. 7=11 Ind. Jur. 196=4 Sar. P.C.J. 776=Rafique and Jackson's P.C. No. 95 — 196

(2) See INSPECTION OF DOCUMENT, 15 C. 109.

(3) See PRACTICE, 14 C. 768.

(4) See REGISTRATION ACT (III OF 1877), 14 C. 449.

(5) See STAMP ACT (I OF 1879), 15 C. 150.

Easement.

(1) *Light and air—South breeze—Limitation Acts; Act* IX *of* 1871, *s.* 27; *Act* XV *of* 1877, *s.* 26—*English Prescription Act,* 2 *and* 3 *Will.* IV, *c.* 71—*Limitation Act, Effect of, on the pre-existing law as to nature and extent of the right to light or air.*—The Indian Limitation Act, unlike the English Prescription Act places light and air on the same footing; and the object of the Prescription Act and of the provisions of the Indian Limitation Act, is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easement—a mode independent of legal fiction and capable of easy proof in a Court of law; these Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right. The only amount of light for a dwelling-house which can be claimed by prescription or by length of time (whether prior or subsequently to the Limitation Act of 1871) without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. The right of air is co-extensive with the right to light. To give a right of action, either prior or subsequently to the Limitation Act of 1871, in a case (where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business. There is no such right as a right to the un-

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Easement—(*Continued*).
interrupted flow of south breeze as such. The "45 decree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. DELHI AND LONDON BANK v. HEM LALL DUTT, 14 C. 839 555
(2) See HINDU LAW—PARTITION, 14 C. 797.

Ejectment.
(1) *Suit for arrears of rent—Bengal Rent Act* (VIII *of* 1869), *ss.* 22, 52.—A landlord who sues, for arrears of rent, for the whole of one year, and a porton of the next, and also for ejectment is not entitled to a decree for the latter. The right to ejectment under s. 22 of the Rent Act (Bengal Act VIII of 1869), accrues at the end of the year, and forfeiture or determination of the tenancy thereupon takes place, but if the landlord sues for subsequent arrears, he treats the defendant as his tenant, and the right acquired under that section must be taken to have been waived. JOGESHURI CHOWDHRAIN v. MAHOMED EBRAHIM, 14 C. 33 23
(2) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 553.
(3) See SALE, 14 C. 518; 15 C. 350.

Emolument.
See RIGHT OF SUIT, 15 C. 159.

Enforcement.
Of doubtful title—See SALE, 14 C. 518.

Enhanced Rate of Interest.
See INTEREST, 14 C. 248.

Enhancement of Rent.
(1) *Dependent taluk—Bengal Regulation* VIII *of* 1793, *ss.* 48—52—*Bengal Regulation* XLIV *of* 1793, *ss.* 2—5.—A purchaser of a zemindari at a public sale may, by virtue of his ordinary right as *zemindar* enhance the rent of a dependent taluk from time to time under the provisions of Bengal Regulation VIII of 1793, and is not barred from so doing by the provisions of s. 5 of Bengal Regulation XLIV of 1793. The words "for the same period as the term of their own engagements with Government," in s. 48 of Bengal Regulation VIII of 1793, refer to the period of the decennial settlement, and do not mean "in perpetuity." In an enhancement suit of the nature indicated above, the rate of rent to be fixed as payable by the under-tenure-holder must ordinarily be fixed with reference to the rents paid by ryots within the tenure itself and not with reference to those paid by ryots in the neighbourhood outside the limits of the tenure. BISSESSURI DEBI CHOWDHRAIN v. HEM CHUNDER CHOWDHRY, 14 C. 133 88
(2) *Suit for—Dismissal of enhancement suit—Rent suit at old rate for year for which rent had been sought at enhanced rate—Civil Procedure Code, s.* 43.—The dismissal or suit for rent at an enhanced rate is no bar to a subsequent suit for rent at the rate originally fixed. SUDDURUDDIN AHMED v. BANI MADHUB ROY CHOWDHRY, 15 C. 145 (F.B.) 680
(3) *Suit for—Transferable tenure—Mutation of names—Tenant who has transferred his holding, Liability of.*—The main object of a suit for enhancement is to have the contract between the landlord and tenant as regards the rate of rent re-adjusted. In a suit for enhancement it was found that the defendant had, prior to institution, sold his holding, which by custom was transferable without the consent of the landlord, to a third party. There had been no mutaton of names, or payment of a *nazar*, or execution of fresh lease; but the landlord had received rent from the third party and was fully aware of the transfer. *Held*, that the connection of the defendant with the holding had come to an end, and the suit against him did not lie. ABDUL AZIZ KHAN v. AHMED ALI, 14 C. 795 (F.B.) 526
(4) See GUARDIAN AND MINOR, 15 C. 8.

Entry.
See MORTGAGE—ENGLISH, 14 C. 464.

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Error in frame of suit.
See MINOR, 14 C. 204.
Error of Law.
See REVIEW, 14 C. 627.
Estate.
See SALE FOR ARREARS OF REVENUE, 14 C. 440.
Estoppel.
See RES JUDICATA, 14 C. 401.
Evidence.
1.—GENERAL.
2.—SECONDARY.

———1.—**General.**

(1) *Previous conviction for the purpose of increasing the evidence at the trial against accused—Evidence Act* (I *of* 1872), *s.* 54—*Crim. Pro. Code* (*Act* X *of* 1882), *s.* 310.—Under s. 54 of the Evidence Act a previous conviction is in all cases admissible in evidence against an accused person. QUEEN-EMPRESS v. KARTICK CHUNDER DAS, 14 C. 721 (**F. B.**) ... 478

(2) *Statement of accused to Police Officer during investigation—Admissions—Confessions—Experts, Evidence of—Medical witnesses, Evidence of—Opinion of experts, how elicited—Evidence Act* (I *of* 1872), *ss.* 25, 26, 27, 45.—Instances of statements made by an accused person to a Police Officer held to be admissible and inadmissible in evidence against such accused person. A medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post mortem* examination and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post mortem* to the witness and to ask what, in his opinion, was the cause of death on the hypothesis that those signs were really present and observed. QUEEN-EMPRESS v. MEHER ALI MULLICK, 15 C. 589 ... 976

(3) *Survey Map—Suit for possession—Ejectment—Evidence of possession and title.*—In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser at a revenue sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47. *Held,* that a survey map is evidence of possession at a particular time, *viz.,* the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case: *Held,* further, that as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly twenty years between them—they might be sufficient evidence of title, and the decree of the lower Court was correct. SYAM LAL SAHU v. LUCHMAN CHOWDHRY, 15 C. 353 ... 819

(4) *Validity of transfer—Benami transaction.—Wajib-ul-arz.*—A transfer by registered deed admitted to have been executed, but alleged to have been benami and merely colourable was held, on the evidence, to have been valid and effective in the absence of evidence showing the contrary. A settlement officer should not receive for entry in the *wajib-ul-arz* of a village a mere expression of the views of a proprietor, or enter it upon the records relating to the village the *wajib-ul-arz* being intended to be the official record of local customs. UMAN PARSHAD v. GANDHARP SINGH, 15 C. 20 (**P.C.**)=14 I. A. 127=11 Ind. Jur. 474=5 Sar. P.C.J. 71=Rafique and Jackson's P.C. No. 98 ... 599

(5) See CHARGE TO JURY, 14 C. 164.

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Evidence—1.—General—(*Concluded*).
(6) See CONFESSION, 14 C. 539.
(7) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 14 C. 361.
(8) See EXECUTION OF DECREE, 14 C. 546.
(9) See MAHOMEDAN LAW—DOWER, 14 C. 420.
(10) See PRACTICE, 14 C. 245.
(11) See RECEIVING STOLEN PROPERTY, 15 C. 511.
(12) See REGISTRATION ACT (III OF 1877). 14 C. 449.

————**2.—Secondary.**
See EVIDENCE ACT (I OF 1872) 14 C. 486.

Evidence Act (I of 1872).
(1) *Ss.* 3 *and* 57—*Registering Officer—"Court"—Registered power-of-attorney—Judicial notice.*—A registered power-of-attorney admitted under s. 57 of the Evidence Act without proof, the registering officer being a Court under s. 3 of the Act. KRISTO NATH KOONDOO v. BROWN, 14 C. 176 117

(2) *S.* 13—*Custom—Admissibility in evidence of judgments not "inter partes."*—In a suit for rent the amount of the land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21⅝ inches and not one of 18 inches, as claimed by the plaintiff zemindar. Certain decrees obtained by the zemindar against other tenants, in the same pargana in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pargana was one of 18 inches. *Held,* that such decrees were admissible in evidence under the provisions of s. 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed. JANUTULLAH SIRDAR v. ROMONI KANT ROY; PIR BUKSH MUNDUL v. ROMONI KANT ROY, 15 C. 233 740

(3) Ss. 21, 26, 80—See CONFESSION, 15 C. 595.
(4) Ss. 25, 26, 27, 45—See EVIDENCE—GENERAL, 15 C. 589.
(5) S. 41—See PROBATE, 14 C. 861.
(6) S. 54—See EVIDENCE—GENERAL, 14 C. 721.
(7) *Ss.* 65 *and* 74—*Secondary evidence of contents of document—Public document.*—Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act, I of 1872. An *anumatipatra* is not a public document within the meaning of s. 74., nor, if it were, would its being on the record constitute a copy certified as required by s. 76. KRISHNA KISHORI CHAODHRANI v. KISHORI LALL ROY, 14 C. 486 (**P.C.**)=14 I. A. 71=11 Ind. Jur. 313=5 Sar P. C. J. 13 323

(8) S. 86—See EXECUTION OF DECREE, 14 C. 546.
(9) S. 115—See RES-JUDICATA, 14 C. 401.

Excavation.
See CO-SHARERS, 14 C. 236.

Execution.
See LIMITATION ACT (XV OF 1877), 14 C. 26.

Execution of Decree.
(1) *Arrears of rent, Decree for—Beng. Act* VIII *of* 1869, *s.* 58—*Application for execution—Suspended proceedings, Effect of.*—*G.* obtained an *ex parte* decree in 1882 for a sum less than Rs. 500 as arrears of rent. Execution was taken out on the 19th May 1885. On the 20th June *C,* the judgment-debtor, applied to have the decree set aside, whereupon the application for execution was struck off. On the 21st November *C.*'s application for re-hearing was rejected. On the 3rd February 1886, *G* applied for the execution of his decree: *Held* that the decree-holder was entitled to execution, the application of the 3rd February being a continuation of the proceedings commenced on the 19th May, which had been suspended by the order of the Court of the 20th June. CHANDRA PRODHAN v. GOPI MOHUN SHAH, 14 C. 385 259

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Execution of Decree—(*Continued*).

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 232—*Assignee of decree, Execution by—Execution by Assignee—Cross decrees—Discretionary power of Court under s. 232 of Act* XIV *of* 1882.—The discretion given to a Court under s. 232 of the Code of Civil Procedure as to allowing execution of decrees by assignees must be exercised reasonably. The mere fact of the existence of a cross claim against the assignor of a decree by his judgment-debtor is no reason for refusing issue of execution on the application of the assignee. KRISHNA MOHINI DOSSEE v. KEDARNATH CHUKERBUTTY, 15 C. 446 ... 882

(3) *Civ. Pro. Code, Chapter* XX (*ss.* 344, 360)—*Insolvency*—Ex parte *decree subsequent to insolvency—Attachment—Receiver in insolvency.*—An insolvent, to whose estate no receiver under Chapter XX of the Code of Civil Procedure had ever been appointed, entered in his schedule the names of certain persons as creditors for a sum of Rs. 210-9-3. These creditors subsequently obtained against the insolvent an *ex parte* decree for the sum so entered in the schedule, and in execution attached certain pay which the insolvent was then earning, but which he was not in receipt of at the time his schedule was filed, and did not appear therein as an asset of his estate: *Held*, that the judgment-creditors were entitled to take out execution, and were not prevented from so doing by reason of the insolvency proceedings. *In the matter of* BADAL SINGH v. BIRCH, 15 C. 762 ... 1092

(4) *Decree against executors for debts incurred while acting under a will afterwards found invalid, Effect of—The heir's liability under the decree—The remedy of the decree-holder.*—Certain executors, acting under an order of the Court, borrowed a sum of money from *K. M.* for the funeral expenses of *J. D.*, the testator. *K. M.* obtained a decree for the amount against the executors and the adopted son of *J. D.* Afterwards *F. D.* got a decree, whereby both the will and the adoption were set aside, and he was declared the legal heir of *J. D.* *K. M.* then sought to enforce his decree against *F. D.*, by the sale of the property which now formed part of the estate of *F. D.*, who objected to the proceedings. *Held*, that as *F. D.* was not the legal representative of the judgment-debtors, the decree could not bind the estate in his hands but, in order to make the estate liable for the debt, the proper course for the decree-holder was to bring a regular suit against *F. D.* FONINDRO DEB RAIKUT v. JUGADISHWARI DABI, 14 C. 316 ... 210

(5) *Decree for arrears of rent—Under-tenure—Sale of property other than under-tenure—Arrest of judgment-debtor—"Charge" Bengal Tenancy Act* (VIII *of* 1885), s. 65—*Transfer of Property Act* (IV *of* 1882), *ss.* 68, 100.—A landlord who has obtained a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act (VIII of 1885) to executing such decree in the first instance by sale of the under-tenure, but is at liberty to execute it in the ordinary manner aginst the person or other property, whether moveable or immoveable, of his judgment-debtor. The provisions of s. 68 of the Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section *Semble*.—The "charge" referred to in s. 65 of the Bengal Tenancy Act (VIII of 1885) is not such a "charge" as that defined by s. 100 of the Transfer of Property Act. FOTIC CHUNDER DAY SIRCAR v. FOLEY, 15 C. 492 ... 912

(6) *Decree on Mortgage Bond—Costs against judgment-debtors personally.*—Certain plaintiffs were the holders of the following decree obtained on a mortgage bond: "It is order that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree; interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will

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be given to the plaintiffs." On the judgment-debtors making default, the decree-holders applied for execution, the Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal: *Held* that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged: RUTNESSUR SEIN v. JUSODA, 14 C. 185 123

(7) *Foreign decree—Execution in British India of decrees of Courts of Native States—Evidence—Certified copies of foreign judicial records—Cooch Behar, Execution in British India of decree passed by Courts of—Civil Procedure Code (Act* XIV *of* 1882), *s.* 434—*Evidence Act* (I *of* 1872), *s.* 86.—A decree of the Court of the Civil Judge of Cooch Behar was sent for execution to the Court of the District Judge of Rungpore. The copy of the record was signed by the Sheristadar instead of by the Judge himself. Upon receipt of the decree by the Subordinate Judge a notice, under s. 248 of the Civil Procedure Code, was served on the judgment-debtor, calling on him to show cause why the decree should not be executed, and an order was forthwith issued for the attachment of his property. The Judgment-debtor appeared and objected that the copy of the record was not properly certified, and, therefore, that the whole of the execution proceedings were bad. The Subordinate Judge ordered that the record be sent back to the Cooch Behar Court through the District Judge in order that a certificate might be given in proper form, and directed that the other points raised should be decided after the return of the papers. On appeal it was urged that the order of the Subordinate Judge was made without jurisdiction, but the District Judge rejected the appeal. The judgment-debtor appealed to the High Court: *Held,* that the Subordinate Judge acted properly in sending the record back to the Cooch Behar Court to be properly certified, and also that he should have set aside the execution proceedings as being altogether void, but, as that formed no portion of the grounds of appeal urged in the lower appellate Court, the appeal should be dismissed. *Per* NORRIS, J.—*Quære.*—Whether the notification published in the *Calcutta Gazette* of 8th April 1879, signed by the then Deputy Commissioner of Cooch Behar, and stating the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies, and which notification was published after a notification had been published by the Governor-General of India in Council under the provisions of s. 434 of the Civil Procedure Code to the effect that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British India as if they had been made by the Courts of British India, was a compliance with the provision of s. 86 of the Indian Evidence Act at the time when there was a representative of the Government of India resident in Cooch Behar. *Per* NORRIS, J.—The notification of the 8th of April 1879 is now of no use, as there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and consequently certified copies of judicial records of that State cannot now be received in evidence in the Courts of British India under the provisions of s. 86 of the Evidence Act. GANEE MAHOMED SARKAR v. TARINI CHARAN CHAKERBUTTI, 14 C. 546 362

(8) *Mortgage decree for sale of properties in different districts and jurisdictions—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 19, 223 (*c*), *Sch.* IV, *Form* 128—*Jurisdiction.*—A decree obtained in a suit, brought under the provisions of s. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshaye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshaye and Nyadumka, directed that the properties mentioned in the mortgage

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should be sold and the proceeds applied in payment of the mortgage debt. The properties were sold by the Court of Rajshaye: *Held*, that the authority given by s. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshaye Court was within its jurisdiction in directing and carrying out the sale. *Quære*.—Whether, where a sale takes place under a money decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure. *Per* GHOSE, J.—S. 223 of the Code of Civil Procedure merely provides that when it may be necessary for a Court to send a decree for execution to another Court by reason of the property being situate beyond its local jurisdiction, it ought to do so; and the words of sub-s. (*c*), "sale of immoveable property situate without the local limits of the jurisdiction of the Court which passed it," contemplate a case where *the whole of the property*, and not any portion of it, is situate beyond the local limits of the Court which passes the decree. MASEYK v. STEEL & CO., 14 C. 661 — 439

(9) *Omission to describe the property to be attached—Act* XIV *of* 1882, *ss.* 237, 245—*Limitation*.—A decree-holder, on the 8th July 1885, applied for execution of a decree dated the 10th July 1873, omitting to set out specifically in such application a description of the immoveable property sought to be attached. On the 24th July he applied for and obtained one month's time to file a list of these properties; and on the 7th August, after filing the list, applied for the attachment and sale of such properties. The judgment-debtor contended execution was barred by limitation: *Held*, that the omission to file on the 8th July the list describing specifically the properties sought to be attached, was a mere defect of description which could be remedied under s. 245 of the Code of Civil Procedure by allowing an amendment to be made; and further that the two applications of the 8th and 24th July should be considered as one entire application dating from the date of the 8th July. MACGREGOR v. TARINI CHURN SIRCAR, 14 C. 124 — 82

(10) *Possession under decree—Reversal of decree—Restitution of property after reversal of decree—Mesne profits—Civ. Pro. Code*, 1882, s. 244.—A Court, reversing a decree under which possession of property has been taken, has power to order restitution of the property taken possession of, and with it any mesne profits which may have accrued during such possession. MOOKOOND LALL PAL CHOWDHRY v. MAHOMED SAMI MEAH, 14 C. 484 — 321

(11) *Practice—Execution proceedings—Power of District Judge to transfer execution proceedings to another Court—Civ. Pro. Code, ss.* 25, 647.—A District Judge has no power to transfer execution proceedings to a subordinate Court. KISHORI MOHUN SETT v. GUL MOHAMED SHAHA, 15 C. 177 — 702

(12) *Representative of decree-holder—Attachment of decree—Civil Procedure Code* (*Act* XIV *of* 1882), *ss.* 232, 244, 273.—A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in s. 244, cl. (*c*) of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor. PEARY MOHUN CHOWDHRY v. ROMESH CHUNDER NUNDY, 15 C. 371 — 831

(13) *Resistance to execution—Application against a claimant resisting execution, how treated—Order under Civil Procedure Code, s.* 331, *Nature of*.—An application in furtherance of execution of a decree for possession against a person who resists execution, claiming the

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property as his own, is an application within s. 331 of the Civil Procedure Code, and should be treated as a plaint. FONINDRO DEB RAIKUT v. JUGODISHWARI DABI, 14 C. 234 155

(14) *Sale of property covered by decree to Court which passed decree when property is situate outside its local jurisdiction at time of application—Civil Procedure Code (Act* XIV *of* 1882), *s.* 233 (*c*), *jurisdiction.*—A mortgage decree was passed directing the sale of certain property wholly situate within the local limits of the jurisdiction of the Court which passed the decree. After the decree the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. The judgment-debtor then applied to the first Court for execution of the decree and thereupon the judgment-debtor objected that that Court had no jurisdiction to entertain the application or to direct the sale of the property. *Held,* that that Court had authority to execute its own decree and bring the property to sale. *Held* further, that *s.* 223 (*c*) of the Code of Civil Procedure does not curtail the power of the Court to execute its own decree, but gives it a discretion either to execute the decree itself or on the application of the decree-holder, to send it to another Court for execution, and thereby extends rather than limits the Court's power. KARTIC NATH PANDEY v. TILUKDHARY LALL, 15 C. 667 1028

(15) *Scheduled Districts—Execution of decree passed by Court of Scheduled District in Court of a Regulation District—Civil Procedure Code (Act* VIII *of* 1859), *s.* 284—*Civil Procedure Code (Act* XIV *of* 1882), *ss.* 223, 229—*Scheduled Districts Act* (XIV *of* 1874), *s.* 5.—On the 15th May 1876, a judgment-creditor obtained a decree in the Civil Court of the Chittagong Hill Tracts, which are included amongst the Scheduled Districts and on or about the 15th May 1876, at his instance, it was sent with a certificate of non-satisfaction to the Court of a Munsif in the Regulation District of Chittagong for execution. After sundry unsuccessful attempts to execute the decree, an application was made on the 17th September 1886, for its execution. The judgment-debtor objected that under s. 229 of the Code of Civil Procedure (Act XIV of 1882) the Munsif's Court had no jurisdiction to execute the decree, as it could only act under that section and the Code had never been extended to the Chittagong Hill Tracts. *Held* that, as at the time the decree was passed and sent to the Munsif for execution Act VIII of 1859 was in force, and by s. 284 of that Act the judgment-creditor had a right to have his decree sent to any Civil Court for execution, he was entitled now to have it executed, as neither Acts X of 1877 or XIV of 1882 by express words or implication deprived him of that right: *Held,* further, that the intention of the legislature was with regard to decrees obtained in Scheduled Districts after the Code of 1877 came into force, that such decrees should not be executed by Courts in British India unless and until, under the provisions of s. 5 of the Scheduled Districts Act (XIV of 1874), the Government had issued the notification therein referred to applying to the Scheduled Districts such portion of the Code of Civil Procedure as they thought proper to apply. *Quære.*—Whether a decree passed by a Court in a Scheduled District, and sent for execution to a Court in a Regulation District after Act X of 1877 came into force can be executed by the latter Court in the absence of such a notification extending the provisions of the Code of Civil Procedure to the Scheduled Districts. KASHI MOHUN BORUA v. BISHNOO PRIA, 15 C. 365=12 Ind. Jur. 385 827

(16) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 570.

See ACT VIIIOF 1835 (BENGAL TENANCY), 14 C. 380, 15 C. 383.

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(18) See ATTACHMENT, 14 C. 384.
(19) See LIMITATION ACT (XV OF 1877), 14 C. 50, 14 C. 348, 15 C. 502. 15 C. 363.
(20) See SALE, 15 C. 557.
(21) See SURETY, 15 C. 497.
(22) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 241.

Execution Proceedings.
See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 757.

Executor.
(1) See PROBATE, 14 C. 861.
(2) See WILL, 15 C. 83

Experts.
See EVIDENCE, 15 C. 589.

Extension of Time.
See MORTGAGE—FORECLOSURE, 14 C. 451.

Factory.
See LAND ACQUISITION ACT (X OF 1870), 14 C. 423.

False Charge.
(1) *Crim. Pro. Code, Act* X *of* 1882, *s.* 191—*Cognizance of an offence on suspicion—Penal Code, Act* XLV *of* 1860, *s.* 211—*Police report—False charge, Prosecution for, without first enquiring into truth of original complaint.*—A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated and his witnesses summoned. This application was refused, and the Magistrate after perusing the police report passed an order directing him to be prosecuted under s. 211 of the Penal Code. *Held,* that the application to the Magistrate was "a complaint" within the meaning of s. 191 of the Crim. Pro. Code into which the Magistrate was bound to have enquired. A Magistrate may take cognizance under ss. 291 and 292 of the Crim. Pro. Code, of an offence brought to his notice by a police report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him police report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made the person who made the original charge should be offered an opportunity of supporting it or abandoning it. QUEEN-EMPRESS v. SHAM LAL, 14 C. 707 **(F.B.)**=12 Ind. Jur. 56 ... 469
(2) *Penal Code, s.* 211.—A false charge before the Police is a false charge falling within the first portion of s. 211 of the Penal Code. The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and does not apply to false charges merely QUEEN-EMPRESS v. KARIM BUKSH, 14 C. 633 ... 420

False Evidence.
Affidavit affirmed before a Deputy Magistrate—Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate—Penal Code, Act XLV *of* 1860, *ss.* 193, 199—*Declaration by law receivable as evidence —Sanction to prosecute, Order for, quashed.*—A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code. *In the matter of the petition of* ISWAR CHUNDER GUHO, 14 C. 653 ... 433

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Finality of Order.
See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 640.

Fine and Compensation.
See ACT I OF 1871 (CATTLE TRESPASS), 14 C. 175.

Fishery.

(1) *Fishing in tank connected with a running stream—Theft—Criminal trespass—Penal Code, ss.* 379, 447.—Accused were charged with having taken fish from a tank belonging to the complainant and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish; that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high and the tank was connected with the streams so that the fish could leave it at pleasure. *Held,* that the fish were *fera natura* and not in "the possession of" the complainant and consequently no offence had been committed. *Held,* further, that had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the owner of the tank, the conviction would have been upheld. MAYA RAM SURMA v. NICHALA KATANI, 15 C. 402 852

(2) *Infringement of exclusive right of fishery in public river—Theft—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly—Penal Code, ss.* 143, 378, 403, 426 *and* 447.—Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and the infringement of that right is not *theft* under s. 378 of the Indian Penal Code. The accused were charged with unlawfully taking fish along with same eleven others in a public river, the right of fishing in which had been let out by the Government to the complainant, and the lower Court amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly. *Held,* that the conviction was wrong, and that no offence had been committed. BHAGIRAM DOME v. ABAR DOME, 15 C. 388 843

Foreign Decree.
See EXECUTION OF DECREE, 14 C. 546.

Foreign State.
See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 570.

Forfeiture.
See LANDLORD AND TENANT, 14 C. 176.

Forgery.

Intention—Penal Code, s. 466.—Where a document is made for the purpose of being used to deceive a Court of Justice, it is made *with the intention* of being used for that purpose. A person, therefore, who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document. HARADHAN MAITI v. QUEEN-EMPRESS, 14 C. 513 (F.B.) 340

Fraud.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 679.
(2) See LIMITATION ACT (XV OF 1877), 15 C. 58.
(3) See PLAINT, 15 C. 533.
(4) See RIGHT OF SUIT, 15 C. 179.
(5) See SALE, 15 C. 557.

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Fraudulent Execution of Decree.
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See PRACTICE, 14 C. 374.

Further Enquiry.
Notice to accused—Discharge by Magistrate—Crim. Pro. Code (Act X of 1882), s. 437.—No notice to an accused person is necessary in point of law before an order under s. 437 can be passed; but as a matter of discretion it is proper that such notice should be given. *Held,* by the majority of the Full Bench (PRINSEP, WILSON, TOTTENHAM, NORRIS, PIGOT and O'KINEALY, JJ.)—After an enquiry by a subordinate Magistrate and the discharge of an accused person a Sessions Judge or Magistrate has jurisdiction, under s. 437 of the Crim. Pro. Code, to order a "further enquiry or a re-hearing upon the same materials which were before the subordinate Magistrate, *i.e.,* when no further evidence is forthcoming. But (PRINSEP, J., dissenting) the words "further enqury" in that section mean the enquiry preliminary to trial which regularly results in a charge or discharge, and do not include the trial. And if on the evidence taken the accused ought to be committed, then, in a case triable only at the Sessions, the proper course is to commit under s. 436; in other cases to refer to the High Court. *Per* PRINSEP, J.—The "enquiry" includes a trial, and the "further enquiry" would therefore allow of the framing of a charge and the cross-examination of witnesses for the prosecution. *Per* PETHERAM, C.J., and GHOSE, J.—The power given by s. 437 of the Crim. Pro. Code to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that with a more exhaustive enquiry further materials would be forthcoming. It was not intended that such an enquiry should be granted simply for the reconsideration of evidence. *In the matter of* HARI DAS SANYAL v. SARITULLA, 15 C. 608=13 Ind. Jur. 55 — 989

Further Relief.
See DECLARATORY DECREE, 14 C. 586.

Ghatwali Tenure.
Ghatwali Tenure in Bhagalpur—Ghatwali's right of alienation—Sale of Ghatwal's estate in execution of decree against him.—Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances and to them the law of the Mitakshara, to its full extent, is not entirely applicable, yielding in their case to a custom, though only to the extent of the custom proved. On a question whether the sale of a ghatwali tenure in the Kharagpore zemindari, in Bhagalpur, in execution of a decree against the ghatwal, had transferred the inheritance as against the Ghatwal's son: *Held,* in regard to a proved custom, that the ghatwali was not inalienable, but might be aliened by the ghatwal, or sold in execution of a decree against him, if such alienation was assented to by the zeminder, this power of alienation not being limited to the life-interest of the ghatwal for the time being, but forming part of his right and title to the ghatwali. KALI PERSHAD v. ANAND ROY, 15 C. 471 (**P.C.**) =15 I.A. 18=12 Ind. Jur. 172=5 Sar. P.C.J. 121 — 898

Gift.
Over on failure of prior devise—See WILL, 15 C. 282.

Good Faith.
See PENAL CODE (ACT XLV OF 1860), 14 C. 566.

Goods.
See LIMITATION ACT (XV OF 1877), 14 C. 457.

Great Grandson of Paternal Grandfather.
See HINDU LAW—INHERITANCE, 15 C. 780.

Ground for setting aside Sale.
See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 14 C. 1.

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Guardian.

(1) *Enhancement of rent, Effect of—Acts of mother and guardian how far binding on minor son—Kabuliyat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her —Admission not amounting to estoppel.*—A Putnidar obtained decrees for the enhancement of the rent of holding in the possession of the widow of a deceased tenant, one decree being in respect of land formerly held by the latter and the other in respect of a holding purchased by the widow on behalf of her minor son by the deceased, whilst the enhancement suits were pending. The widow also signed kabuliyats relating to both tenancies, agreeing as mother of the minor, to pay the enhanced rent. *Held,* that as the putnidar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son; also as she had come to what she believed to be, and was a proper arrangement, the son on his attaining full age, and entering into possession of the tenancies, was bound by the kabuliats. The putnidar was not precluded by the fact that he had, after the son had attained full age, sued the mother as tenant, stating that she, and not the son, was tenant. WATSON AND COMPANY v. SHAM LALL MITTER, 15 C. 8 (P. C.)=14 I. A. 178=11 Ind. Jur. 395=5 Sar. P.C.J. 66 591

(2) *Guardianship of female minor—Female minor, Right to custody of —Mahomedan Law, Shia Sect—Act* IX *of* 1861—*Act* XL *of* 1858, *s.* 27.—A Mahomedan father of the Shia sect is entitled to the custody of a daughter above the age of 7 years as against the mother. The decision in 10 C. 15 has no application to a case where the father is seeking to get the custody of his daughter. *In the matter of the petition of* MAHOMED AMIR KHAN. LARDLI BEGUM v. MAHOMED AMIR KHAN, 14 C. 615 407

(3) *Minority—Suit by minor—Certificate of administration—Act* XL *of* 1858, *s.* 3.—Whenever an application is made for the appointment of a guardian under Act XL of 1858 and an order is passed appointing a person to be guardian of the minor, even though no certificate be taken out by the person so appointed, the minor becomes a ward of Court and the period of his minority is extended to 21 years. GRISH CHUNDER CHOWDHRY v. ABDUL SELAM, 14 C. 55 37

(4) See ACT XL OF 1858 (MINORS), 15 C. 40.

(5) See MINOR, 24 C. 204.

Hawaladari Tenure.

See KABULIYAT, 14 C. 99.

Heir.

See EXECUTION OF DECREE, 14 C. 316.

Hereditary Office.

See RIGHT OF SUIT, 15 C. 159.

High Court.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 768.
(2) See HINDU LAW—GENERAL, 14 C. 781.
(3) See HINDU LAW—PARTITION, 14 C. 835.
(4) See VERDICT OF JURY, 15 C. 269

Hindu Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—GIFT.
5.—INHERITANCE.
6.—JOINT FAMILY.
7.—MAINTENANCE.
8.—MARRIAGE.
9.—PARTITION.
10—REVERSIONER.
11.—WIDOW.
12.—WILL.

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Hindu Law—1.—General.

Contract—Interest recoverable at any one time, Amount of—Damdupat, *Rule of—Act* XXVIII *of* 1855—*High Court, Ordinary Original Civil Jurisdiction.*—The rule of Hindu Law, known in Bombay as the rule of *Damdupat* that no greater arrear of interest can be recovered *at any one time* than what will amount to the principal sum, is neither a mere moral precept nor limited in its application to other than stipulated interest, and as a part of the Hindu Law of contract is, in the absence of any legislative enactment to the contrary, the law as between Hindus in the High Court in its Ordinary Original Civil Jurisdiction. Act XXVIII of 1855 deals exclusively with the rate of interest which may be allowed, and there is nothing in that Act inconsistent with the rule of *Damdupat*. NOBIN CHUNDER BANERJEE v. ROMESH CHUNDER GHOSH, 14 C. 781 517

———**2.—Adoption.**

See RES JUDICATA, 14 C. 401.

———**3.—Alienation.**

(1) *Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt.*—The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose. The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt. A decree against indebted fathers in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title and interests of the debtors, but of the property being such interest. On the other hand, before the sale notice was given on behalf of the sons that the property was ancestral and joint. *Held* in a suit on behalf of the sons against the purchaser at the sale, to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was necessary for the purchaser to show that there had been a proper enquiry as to the purpose of the loan or to prove that the money was borrowed for family necessities. BHAGBUT PERSHAD SINGH v. GIRJA KOER, 15 C. 717 (**P.C.**)=15 I. A. 99=12 Ind. Jur. 289=5 Sar. P. C. J. 186 1062

(2) See HINDU LAW—INHERITANCE, 14 C. 387.

———**4.—Gift.**

(1) *Delivery of possession—Transfer of Property Act, s.* 123—*Immoveable and moveable property.*—Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by s. 123 of the Transfer of Property Act. The first para. of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble.*—The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery be adopted as the mode of transfer. DHARMODAS DAS v. NISTARINI DASI, 14 C. 446 297

(2) See HINDU LAW—WILL, 14 C. 222.

———**5.—Inheritance.**

(1) *Dayabhaga School—Brother's daughter's son—Great grandson of paternal grandfather.*—A brother's daughter's son does not succeed in preference to a great grandson of the paternal grandfather of the deceased. HARI DAS BUNDOPADHY v. BAMA CHARAN CHOTTOPADHYA, 15 C. 780 1104

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Hindu Law—5.—Inheritance—(*Concluded*).

(2) *To property purchased by Hindu widow out of the income of her estate.*—When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. The authority upon this matter is found in 10 C. 324=10 I.A. 150, where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justifying alienation of the former. SHEOLOCHUN SINGH v. SAHEB SINGH, 14 C. 387 (**P.C.**)=14 I.A. 63=11 Ind. 321=5 Sar. P.C.J. 1 257

——————**6.—Joint Family.**

(1) *Mitakshara Law—Sale of joint family property in execution of decree as the result of a mortgage by Managing Member—Liability of shares of members of family not parties to the decree.*—Although some of the members of a joint family had not been made parties to a suit upon the mortgage effected by the managing members, the entire family estate was bound by the Act of the latter, and passed at the sale in executon of a decree upon the mortgage. Whether the shares of all were bound depended on the authority of those who executed the mortgage. This authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm. The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm, were sued upon it by the mortgagee, who afterwards purchased the property at the execution sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that, not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution. *Held*, that as the defence was substantially on the latter ground only, though there was every opportunity given to the defendants to raise the former ground also, the suit need not be remanded; and that the whole estate had passed to the purchaser. DAULAT RAM v. MEHR CHAND, 15 C. 70 (**P.C.**)=14 I. A. 187=11 Ind. Jur. 435=5 Sar. P.C.J. 84=1 P.R. 1888 632

(2) *Right of members of a joint Hindu family in a talukdari estate—The Oudh Estates Act* (I *of* 1869)—*Partition and account against the talukdar—The Oudh Rent Act* (XIX *of* 1868), *s.* 83, *cl.* 15 and *s.* 106—*Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 127 *and* 120.—A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate as he has no definite share until partition. He may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account. A talukdari estate, though entered in the name of one member of a joint family in the lists prepared in conformity with the Oudh Estates Act, I of 1869, may be subject to a trust implied from the acts and declarations of the talukdar, for the joint family as a joint estate. In that suit, commenced in 1865, by a member of a joint family for the declaration of his rights, partition not being claimed, the order of Her Majesty in Council (1879) directed that the talukdar should cause and allow the villages forming the talukdari estate and the proceeds thereof to be managed and applied according to the trust declared in favour of the members of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, s. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it it stood in 1865, and also with the addition of villages since acquired

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Hindu Law—6.—Joint Family—*(Concluded).*

out of profits, claiming an account against the talukdar. The latter alleged, among other defences, that the talukdari estate was impartible, and brought a cross suit to establish this, and also that it was held by him accordng to the rule of primogeniture, the right of other members of the family being only to the profits. *Held,* that, in regard to the order of Her Majesty above mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari state could not be declared to be impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under-proprietor under the talukdar could not be allowed to stand. *Held,* also, (*a*) that the first suit, as one for partition and an accunt, was not barred by limitation under Act XV of 1877, s. 120, and must be decreed; (*b*) that the provisions of the Oudh Rent Act, XIX of 1868, s. 8, cl. 15, and s. 106, precluding proceedings in the Civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate; and (*c*) that the section of the Code of Civil Procedure relating to mesne profits were not applicable to a suit for partition or for an account of the proceeds of family estate in which a plaintiff has no specific interest until decree. PIRTHI PAL v. JOWAHIR SINGH, UMAH PRASHAD v. JOWAHIR SINGH 14 C. 493 (**P.C.**)=14 I. A. 37=11 Ind. Jur. 232=4 Sar. P. C. J. 758=Rafique and Jackson's P. C. No. 97. ... 327

(3) See HINDU LAW—ALIENATION, 15 C. 717.

————7.—Maintenance.

See SMALL CAUSE COURT, MOFUSSIL, 15 C. 164.

————8.—Marriage.

(1) *Sudras—Inter marriage between persons of different sections of the Sudra caste, Validity of.*—There is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or sub-divisions of the Sudra caste. UPOMA KUCHAIN v. BHOLARAM DHUBI, 15 C. 708=13 Ind. Jur. 108 ... 1055

(2) See SMALL CAUSE COURT, MOFUSSIL, 15 C. 833.

————9.—Partition.

(1) *Bengal school of Law—Partition by sons—Mother's shares on partition—Succession to share given to a mother on partition.*—Under the Bengal School of Law the share which a mother takes on partition among her sons is not taken from her husband's estate either by inheritance or by way of survivorship in continuation of any pre-existing interest, but is taken from her sons in lieu of or by way of provision for, that maintenance for which they and their estates are already bound, and on her death that share goes back to her sons from whom she received it. SOROLAH DOSSEE v. BHOOBUN MOHUN NEOGY. UNNOPOORNAH DOSSEE v. BHOOBUN MOHUN NEOGHY, 15 C. 292 ... 779

(2) *Family dwelling-house—Partition wall—Open space of ground—Easement.*—Upon partition of joint property in Calcutta by mutual conveyances, whether under the direction of a Court of law or otherwise, it is implied that the parties take their respective shares with easements of light and air as between themselves in accordance with the existing state of the premises. In a suit for the partition of a family dwelling-house it was directed that the parties should take their respective shares by *mutual conveyances* with liberty to the plaintiff to *raise a partition wall.* The shares were allotted but no conveyances executed. *Held,* that in equity the parties must be deemed to have taken as if under mutual conveyances, in so far as concerned easements of light and air. BOLYE CHUNDER SEN v. LALMONI DASI, 14 C. 797 ... 527

(3) *Of a portion of joint family property—Suit for partition of a portion of joint property.*—A suit will not lie for partition of a portion only of joint family property. JOGENDRO NATH MUKERJI v. JUGOBUNDHU MUKERJI, 14 C. 122 ... 81

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Hindu Law—9.—Partition—(*Concluded*).

(4) *Suit for—Partial partition—Jurisdiction of High Court, Original Side—Properties situate partly within and partly without jurisdiction.*—On the original Side of the High Court a suit for partition of joint estate, part of the property of which estate is situate within and part without the jurisdiction (there having been no leave granted under s. 12 of the Charter to sue concerning the portion outside the jurisdiction), is not liable to be dismissed on the ground that partial partition of a property cannot be granted, but may be decreed as far as the property within the jurisdiction is concerned. The ruling of JACKSON, J., in *Ruttun Monee Dutt* v. *Brojo Mohun Dutt*, 22 W. R. 333, explained. PUNCHANUN MULLICK v. SHIB CHUNDER MULLICK, 14 C. 835 552

(5) See HINDU LAW—JOINT FAMILY, 14 C. 493.

(6) See LIMITATION, 14 C. 610.

————**10.—Reversioner.**

See LIMITATION, 14 C. 323.

Hindu Law—11.—Widow.

(1) *Accumulations by Hindu widow—Accumulations, Period up to which they may be dealt with—Legacy to Hindu widow.*—The right of a Hindu widow to the income and accumulations of her husband's estate arising subsequently to his death is absolute, and is not affected by the fact that she may receive them in a lump sum; but whether she receives them as they fall due or after they have accumulated in the hands of others her right is the same. The question to be sought for in determining her right to deal with such income and accumulations of income is one of intention. If she has invested her savings in such a manner as to show an intention to augment her husband's estate, she cannot afterwards deal with such investments, except for reasons which would justify her dealing with the original estate; but, if she has evinced no such intention, she can, at any time during her life deal with the profits. Where she invests her income, making a distinction between the investments and the original estate, she can at any time thereafter deal with such investments save in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. GIRISH CHUNDER ROY v. BROUGHTON, 14 C. 861=12 Ind. Jur. 179 569

(2) See LIMITATION, 14 C. 323.

(3) See HINDU LAW—INHERITANCE, 14 C. 387.

————**12.—Will.**

(1) *Construction—Charitable Gifts—Void Gifts—Gifts void for uncertainty.*—A testator by his will directed that his executors should "get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brick-built baitakhana house inclusive of the building and garden thereto," in which he had constantly resided. *Held*, that the direction was not void for uncertainty, and that under the circumstances 3 per cent. of the testator's moveable estate was a proper sum to allow for the cost of erecting the temple. *Held*, also that a direction to the executors "to perform all the acts properly and *bona fide*, to the best of their respective information and judgment, and according to the provisions of this will" did not give the trustees an absolute discretion to fix the amount proper to be expended on the erection of the temple. The testator further declared that "the said executor's or any of" his "heirs and representatives" should "not be able to make any kind of gift, sale, or alienation, or create any incumbrance on the" said baitakhana house, "and none of" his "heirs" should "be able to claim it in his own right; but that the executors" should "be competent to allow" the testator's "brother Issur Lochun Roy and" his "sister's son Shama

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Hindu Law—12.—Will—(*Concluded*).

Das Roy to use the said baitakhana and rooms, &c." *Held,* that this clause did not operate to dedicate the baitakhana house to the idol Shiva, nor to vest it in the executors, but that on the death of the testator it descended to his heir-at-law, freed from any prohibition against alienation. The testator further directed that his executors should "keep in deposit Government Promissory Notes of Rs. 9,500 (nine and half thousand rupees) for the preservation and suitable repairs of" the baitakhana "house in proper time, and for the daily and periodical worship of the said god Shiva, for his sheba (worship) and for the repairs of the temple," the expenses of these acts to be defrayed out of interest of the Rs. 9,500. *Held,* that (there having been no dedication of the baitakhana house to the idol) the sum of Rs. 9,500 must be apportioned, one moiety going to the heir at-law, to whom the baitakhana house had descended, and the other to the executors for the repairs of the temple and the worship of the idol. The testator further declared that, "if after the performance of all the above acts there remains any money or moveable property as surplus, then the executors shall be able to spend the same in proper and just acts for" the testator's benefit." *Held,* that the direction contained in this clause was void for uncertainty. *Held,* also, that such direction did not amount to a valid precatory trust. Where Government securities in certain specified amounts are bequeathed by will, the interest thereon which has accrued due before the testator's death does not pass to the legatees. GOKUL NATH GUHA v. ISSUR LOCHUN ROY: ISSUR LOCHUN ROY v. GOKOOL NATH GUHA: SHAM DAS ROY v. ISSUR LOCHUN ROY, 14 C. 222=11 Ind. Jur. 334 ... 147

(2) *Construction of—Restrictions upon estate bequeathed, effect of, if contrary to Hindu law—Restrictions separable from valid dispositions.* —In the will of a Hindu restrictions contrary to law made by the will upon valid dispositions, if they are separable from the latter, need not be held to invalidate them. Three documents, of which the second and third were executed by a testator after intervals of some years, together formed his will; containing a bequest of estate to his sons. This was held valid by the High Court, although the testator in the latter documents had endeavoured to impose restrictions upon the estate contrary to law, and therefore inoperative; the principal of them being (*a*) prohibition of actual possession or alienation, by any son, of his share in the estate; and (*b*) direction that the whole estate should be managed in a common cutcherry, with religious trusts the sons to get only the remaining amount of profit according to their respective shares in perpetuity. At the same time the Court, held good a provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority, none of the sons should have a right to partition; any son who should separate from the others getting, up to the time of his attaining majority, merely maintenance, and not the profits accruing upon his share. A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share; the first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would not take effect. The judgment of the High Court to the above effect was upheld by the Judicial Committee. RAIKISHORI DASI v. DEBENDRA NATH SIRCAR, 15 C. 409 (**P.C.**)=15 I.A. 37=12 Ind. Jur. 175=5 Sar. P.C.J. 100 ... 857

Homestead Land.

See SMALL CAUSE COURT—MOFUSSIL, 15 C. 174.

Husband.

See COSTS, 14 C. 580.

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Illegal Cess.

Abwabs—Bengal Tenancy Act (VIII *of* 1885), *ss.* 74, 179—*Regulations* VIII *of* 1793, *s.* 54; V *of* 1812, *ss.* 2 *and* 3; *and* XVIII *of* 1812, *s.* 2.—What is or is not an *abwab* must depend upon the circumstances of each particular case in which the question arises. Where by a kabuliyat dated 1869 the defendant, as holder of a mokurari tenure, agreed to pay a certain fixed sum as rent, and also certain items, designated *tehwari* and *salami*, it was held that they were not illegel cesses within the Full Bench Ruling of 11 C. 175, not being uncertain and arbitrary in their character, but specific sums which the tenants agreed to pay to the landlords, and the payments of which, no less than the payment of the rent itself, formed part of the consideration upon which the tenancy was created, and which were in fact part of the rent agreed to be paid, although not so described they were recoverable therefore under Regulation V of 1812. PUDMANUND SINGH BAHADUR v. BAIJ NATH SINGH, 15 C. 828 1135

Immoveable Property.

(1) See CRIMINAL PRO. CODE (ACT X OF 1882), 15 C. 527.
(2) See HINDU LAW—GIFT, 14 C. 446.
(3) See LIMITATION ACT (XV OF 1877), 14 C. 801, 15 C. 66, 15 C. 542.
(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 687.

Implied Contract.

See SMALL CAUSE COURT—MOFUSSIL, 15 C. 652.

Incidents of Tenancy.

See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 627.

Incumbrances.

See SALE FOR ARREARS OF REVENUE, 14 C. 109.

Information.

See PENAL CODE (ACT XLV OF 1860), 15 C. 386.

Infringement.

See FISHERY, 15 C. 388.

Injunction.

(1) *Mandatory Injunction, when to be granted—Judicial discretion—Damages—Rights of co-sharers.*—In granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injuntion, if granted, would inflict upon the defendant. There is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction. SHAMNUGGER JUTE FACTORY CO. v. RAM NARAIN CHATTERJEE, 14 C. 189 125
(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 15 C. 202.
(3) See CO-SHARERES, 14 C. 236, 15 C. 214.

Inquiry

As to title of alleged owners of share sold under Act XI of 1859—See SALE FOR ARREARS OF REVENUE, 14 C. 109.

Insolvency.

See EXECUTION OF DECREE, 15 C. 762.

Insolvent.

(1) *Judgment-debtor—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 351, *Chap.* XX.—A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of Chap. XX of the Civ. Pro. Code unless it finds affirmatively that the applicant has brought himself within cls. (*a*), (*b*), (*c*) or (*d*) of s. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief. A judgment-debtor applied to be declared an insolvent under the provisions of Chap. XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities, and that he had made no effort for a period of two years to realise his property for the benefit of his

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Insolvent—(*Concluded*).

creditors. *Held,* that the District Judge was bound to grant the application as the applicant had not brought himself within cls. (*a*), (*b*), (*c*) or (*d*) of s. 351, in which cases alone he had a right to refuse the application. *In the matter of the petition of* JOWALLA NATH. JOWALLA NATH v. PARBATTY BIBI, 14 C. 691 — 459

(2) See SURETY, 15 C. 171.

Inspection of Documents.

In criminal case—Discovery—Power of Court to order inspection—Crim. Pro. Code, 1882, *ss.* 94—99—*Search warrant, form and validity of.*—A and T, the later of whom was the book-keeper in the firm of J.M. & Co., were charged on the complaint of that firm with cheating by having dishonestly induced them to deliver to A certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by T, omitting to make entries in the account books of sums due by A to the firm and by making false entries therein of payments by A. Whilst the charge was pending the Presidency Magistrate, before whom the charge had been made, granted a search warrant in the following terms:—"To Inspector M—Whereas A and another have been charged before me with the commission, or suspected commission of the offence of cheating, and it has been made to appear to me that the production of khatta books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence, or suspected offence, this is to authorize and require you to search for the said property in the house of A, No. 13, Pollock Street, and if found to produce the same forthwith before this Court." In execution of this warrant certain books and papers found in the house of A were seized and taken possession of by the Police, and of those books and papers the Magistrate, on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search warrant had been granted without proper judicial inquiry and upon insufficient materials; that it was bad on the face of it, as he did not "Specify clearly" as directed in Form VIII, sch. 5 of the Crim. Pro. Code, whose khatta books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of document by the prosecution in a criminal case. *Held, per* NORRIS, J., that assuming the contention as to the search warrant arose on the rule as granted the warrant must be looked at as a whole and so looked at it sufficiently clearly showed that it was the khatta books of A which were referred to as being essential to the inquiry, and the objects of the directed search; nor was there anything to show that the warrant was issued otherwise than regularly and in due course. *Per* NORRIS, J.—Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorised the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search warrant issued under the provisions of s. 96 of the Crim. Pro. Code, there is no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of, or subsequent to, his arrest, and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dilon* v. *O'Brien,* 20 Irish L.R., 300, the right to seize and detain property of any description in the possession of a person lawfully arrested for treason felony, misdemeanour, rests "upon the interest which the state has in a person justly or reasonably believed to be guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law," a right to

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Inspection of Documents—(*Concluded*).

inspect to seize and detain it, and the proper persons to inspect it are those conducting the prosecution. It would, moreover, be unreasonable that the Police or those conducting the prosecution should not have an opportunity of inspecting and examining documents, &c., found on a prisoner when arrested or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence. *Per* GHOSE, J.—The contention as to the validity of the search warrant did not arise on the rule as granted, but, *semble*, that the search warrant was bad in law, no summons under s. 94 of the Crim. Pro. Code having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons only; that although the warrant was not specific, still inasmuch as no objection was raised to the form of the warrant, before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed. *Per* GHOSE, J.—There is no doubt that by the criminal law of this country, as laid down in the Crim. Pro. Code since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine at the time when he makes an order under s. 94 of the Crim. Pro. Code, or issues a search warrant under s. 96 whether the documents are necessary for the inquiry; but when they are brought into Court the inspection should not rest with the Magistrate, who does not prosecute and has no interest one way or the other in the result of the prosecution. It is reasonable that those who conduct the prosecution should have such inspection for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the Police under Ch. XIV of the Crim. Pro. Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular document or other thing is seized under a search warrant, and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while prividing for the seizure and production in Court of documents, etc., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them and determine whether they should go in as evidence. *Held per curiam*—for the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search warrant. *In the matter of the petition of* AHMED MAHOMED. JACKARIAH & CO. v. AHMED MAHOMED. 15 C. 109=12 Ind. Jur. 259 658

Instalment.

(1) See DECREE, 14 C. 352, 15 C. 751.
(2) See LIMITATION ACT (XV OF 1877), 15 C. 502.

Instalment Bond.

See LIMITATION ACT (XV OF 1877), 14 C. 397.

Institution of Suits.

See PARTIES, 14 C. 400.

Instrument.

See SPECIFIC RELIEF ACT (I OF 1877), 14 C. 308.

Intention.

See FORGERY, 14 C. 513.

Interest.

(1) *Penal Clause in Contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act* (IX *of* 1872), *s.* 74—*Act* XXVIII *of* 1855, *s.* 2.—In a suit on a bond, wherein

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Interest—(*Concluded*).
it was stipulated that the loan was to be repaid on a certain date and to bear interest, at the rate of 2 per cent. *per mensem*, but that if the loan were not repaid on the date named the principal was to bear interest at the rate of 4 per cent. *per mensem* from the date of the loan: *Held*, on the authority of the decision in 10 C. 305, that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate, from the date of the bond, and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date fixed for the repayment of the loan, s. 74 of the Contract Act was not applicable. The decision in the case of 10 C. 305, overrules the decision in the case of 9 C. 615, and all similar cases *cited in* 9 C. 689, which held that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan,, is in the nature of a penatly. BAIJ NATH SINGH v. SHAH ALI HOSAIN, 14 C. 248 ... 165
(2) See HINDU LAW—GENERAL, 14 C. 781.

Interlocutory Order.
See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 768.

Interrogatories.
See PRACTICE, 14 C. 703.

Intimation to Court below.
See APPEAL TO PRIVY COUNCIL, 14 C. 290.

Investigations.
See CONFESSION, 15 C. 595.

Irregularity.
(1) *In Criminal Trial—Rioting, Counter charges of—Cross cases taken together—Crim. Pro. Code, Act* X *of* 1882, *s.* 537—*Irregularity prejudicing the accused—"Failure of justice."*—A Magistrate, there being counter charges of rioting and assault before him, took up and tried one of such cases, and having heard the evidence for the prosecution called on the counter case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case. *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Crim. Pro. Code. BACHU MULLAH v. SIA RAM SINGH, 14 C. 358 ... 237
(2) See JOINDER OF CHARGES, 14 C. 128.

Issues.
(1) *Inconsistent issues—Undue influence—Mahomedan law of Gift—Possession not delivered at the time, but afterwards obtained—Mushaa, mixed, or common property which shares undistinguished.*—The execution of a hibanama having been denied by the plaintiff, a Mahomedan widow and *purdanashin*, in a suit brought by her to have it set aside as fabricated, she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will. The above questions being inconsistent with one another the latter should not have been admitted to form part of an issue together with the former. On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to make the gift originated with the donor, the principles being always the same, although the circumstances may differ. The hibanama gave an undivided share in mokurari and zemindari holdings, besides other property not reduced into possession, the whole of

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Issues—(*Concluded*).

which had, as a matter of title, devolved upon the donor as a member of a family of which the donees were also members. *Held* that the hibanama did not infringe the Mahomedan doctrine of mushaa, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division, whence it followed that one of three sharers might give his share to the other two. *Held*, also, that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the doness had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In regard to the principle and the analogy in other systems of law to be found in the cases relating to voluntary transfers (where if the donor should not have done all that he could have done to perfect his intended gift, he cannot be compelled to do more) the Hindu case of 11 I. A. 218=11 C. 12 was referred to. MAHOMED BUKSH KHAN v. HOSSEINI BIBI, 15 C. 684 (**P.C.**)=15 I. A. 81=12 Ind. Jur. 261=5 Sar. P. C. J. 173 1040

(2) See POSSESSION, 14 C. 592.

(3) See TITLE, 14 C. 740.

Joinder of Charges.

Charge of three offences of same kind—Crim. Pro. Code (*Act* X *of* 1882), *ss.* 234, 537—*Irregularity occasioning a failure of justice.*—An accused was charged with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the Savings Bank under three separate accounts. The third of these charges related to the misappropriation of Rs. 195 composed of two separate sums of Rs. 150 and Rs. 45, alleged to have been misappropriated on the 16th and 25th November respectively. These sums the accused in his statement at the trial stated he had paid over on those dates to the depositor, and produced an account book showing entries of such payments on those dates. This statement was proved to be untrue, and the accused was convicted. On an application to quash the conviction on the ground that the trial had been held in contravention of s. 234 of the Code of Criminal Procedure: *Held*, that the entries in the account book did not clearly show that the misappropriation of the sum of Rs. 195 took place on two dates, or consisted of two transactions, the entries having been made for the purpose of concealing the criminal breach of trust; and that under the circumstances the criminal breach of trust with regard to the Rs. 195 was really one offence and could be included in one charge, *Semble*: (*per* PETHERAM, C.J.)—That if a man were tried for four specific offences of the same kind at one trial, such a procedure would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless possibly it could be cured by some subsequent proceeding by striking out some portion of the charge. *In the matter of*, LUCHMINARAIN, 14 C. 128=11 Ind. Jur. 186 85

Joint Contract.

See LIMITATION, 14 C. 791.

Joint Decree-holders.

See LIMITATION ACT (XV OF 1877), 14 C. 50.

Joint Fine.

See ACT I OF 1871 (CATTLE TRESPASS), 14 C. 175.

Joint Hearing.

See CRIMINAL PRO. CODE (ACT X OF 1882), 15 C. 31.

Joint Property.

See CO-SHARERS, 14 C. 236, 15 C. 214.

Joint Purchase.

See MAHOMEDAN LAL—PRE-EMPTION, 15 C. 224.

Joint undivided Estate.

See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 47.

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Judge.
See CHARGE TO JURY, 14 C. 164.

Judgment-debtor.
(1) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 482.
(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 15 C. 187, 15 C. 488.
(3) See EXECUTION OF DECREE, 15 C. 492.
(4) See INSOLVENT, 14 C. 691.
(5) See LIMITATION ACT (XV OF 1887), 15 C. 674.
(6) See SALE IN EXECUTION OF DECREE, 14 C. 572.
(7) See SURETY, 15 C. 171.

Judgment not inter partes.
Admissibility in evidence of—See EVIDENCE ACT (I OF 1872), 15 C. 233.

Judicial Discretion.
See INJUNCTION. 14 C. 189.

Judicial Notice.
See EVIDENCE ACT (I OF 1872), 14 C. 176.

Judicial Officer.
See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 327.

Judicial Records.
See EXECUTION OF DECREE, 14 C. 546.

Jungleburi Tenure.
See LIMITATION, 14 C. 323.

Jurisdiction.
(1) *Letters Patent*, 1865, *s.* 12—*Carrying on business and personally working for gain—Secretary of State—Cause of action—Statute* 21 *and* 22 *Vic., c.* 106, *s.* 65.—S. 65 of 21 and 22 Vic., c. 106, does not constitute the Secretary of State a body corporate, but simply lays down that that officer and department are to be sued as a body corporate. A suit, therefore, brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by s. 65. The words "cause of action" in s. 12 of the Letters Patent, 1865, mean all those things necessary to give a right of action; and in a suit for breach of contract, where leave has not been obtained to sue under that section, it must be established that the contract as well as the breach have taken place within the local limits of the Court. The work carried on by the Government of India is governing the country, in salt, opium, etc., although carried on by Government officers in charge of the several departments of Government, is not, properly speaking, business carried on by Government, but work carried on for the benefit of the Indian Exchequer. The words of s. 12 "carry on business or personally work for gain" are however, inapplicable to the Secretary of State for India in Council, DOYA NARAIN TEWARY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 14 C. 256 ... 170
(2) *Suit for partition—Revenue-paying estate—Proceedings under Bengal Act* VIII *of* 1876, *s.* 31, *Effect of.*—The jurisdiction of the Civil Court in matters of partition of a revenue-paying estate is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue. *Held,* accordingly that pendency of partition proceedings before the Collector, under s. 31 of Bengal Act VIII of 1876 was no bar to a suit for a declaration that under a partial partition effected between the co-sharers a portion of land had been separately allotted to the plaintiff. SAHRUN v. GOWRI SUNKAR, 15 C. 198 ... 716
(3) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 321, 15 C. 47.
(4) See ASSESSMENT, 14 C. 67.
(5) See EXECUTION OF DECREE, 14 C. 661, 15 C. 667.
(6) See HINDU LAW—PARTITION, 14 C. 835.
(7) See LEAVE TO SUE, 14 C. 526.
(8) See MESNE PROFITS, 14 C. 605.

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Jurisdiction—(*Concluded*).

(9) See RIGHT OF SUIT, 15 C. 159.

(10) See SMALL CAUSE COURT—MOFUSSIL, 15 C. 652, 15 C. 833.

(11) See SUPERINTENDENCE, 15 C. 446.

Jury.

See CHARGE TO JURY, 14 C. 164

Kabuliyat.

(1) *Construction of—Stipulations as to rent of new* chur—hawaladari *tenure—Measurement and assessment of* chur *land—Landlord and tenant—Beng. Act* VIII *of* 1869, *s.* 14.—A kabuliyat, executed by the tenant of land held in *hawala* tenure, provided that on an adjoining *chur* becoming fit for cultivation, the whole land, old and new, held by the tenant should be measured, and the old being deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing pergunnah rates. It provided also that either (*a*) rent should be realized according to law with interest thereon; or that (*b*) at the close of the year, the owner should, by a notice served on the *hawaladar*, require him to take a settlement of the excess land, and within fifteen days to file a kabuliyat; or (*c*) the excess land might be settled with others. Such a *chur* having been formed, the zemindar measured without notice to and in the absence of, the *hawaladar*. He then served a notice on the later requiring him to execute a kabuliyat within fifteen days for payment of a fixed rent upon the excess land as found by the measurement, or to yield up possession. Disregard of this led to a suit in which the zemindar claimed either *khas* possession or rent on measurement by order of Court. *Held,* that neither the kabuliyat nor the terms of s. 14 of Beng Act VIII of 1869 precluded a suit for assessment of the rent upon measurement; nor did the absence of authentic measurement as prescribed by the kabuliyat have that effect or affect the measurement by the amin; but that until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial determination), the zemindar could not put the *hawaladar* to his choice between (*b*) executing a kabuliyat for the rent, and (*c*) yielding up possession. RAMKUMAR GHOSE v. KALIKUMAR TAGORE, 14 C. 99 (**P.C.**)=13 I. A. 116=11 Ind. Jur. 33=4 Sar.P.C.J. 737 66

(2) Given by widow in possession—See GUARDIAN, 15 C. 8.

Kobiraj.

See PENAL CODE (ACT XLV OF 1860), 14 C. 566.

Land Acquisition Act (X of 1870).

(1) *Apportionment of compensation between zemindar and putnidar, Principle of.*—The apportionment between zemindar and putnidar of the amount awarded as compensation for land taken by Government under the Land Acquisition Act will depend partly on the sum paid as bonus for the putni, and the relation that it bears to the probable value of the property, and partly on the amount of rent payable to the zemindar, and also the actual proceeds from the cultivating tenants or under-tenants. BUNWARI LAL CHOWDHRY v. BURNOMOYI DASI, 14 C. 749 496

(2) *Ss.* 15, 30 *and* 55—*District Court, Powers of—Compensation, its principle and measure—Lands severed from a factory.*—The Land Acquisition Act provides for two classes of reference to the Judge, one to assess compensation under s. 15 and the other to apportion compensation under s. 38. The power of the District Court is limited to the determination of these questions and questions of title incidental thereto. There is no power in the Judge or the High Court in appeal to decide on any such reference a question arising under s. 55. Land taken under the Act is taken discharged of all easements, and the loss of easements must be taken into account in assessing compensation for injurious affection. TAYLOR v. COLLECTOR OF PURNEA, 14 C. 423 281

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Landlord and Tenant.

(1) *Occupancy tenant—Non-payment of rent—Abandonment of tenancy.*—Mere non-payment of rent by an occupancy ryot does not extinguish or constitute an abandonment of the tenancy. OBHOYA CHARAN BHOOIA v. KOYLASH CHUNDER DEY; OBHOYA CHARAN BHOOIA v. GOPINATH DEY, 14 C. 751 ... 498

(2) *Use and Occupation—Re-entry—Forfeiture—Demand of rent—Statute 32 Hen.* VIII, *c.* 34—*Waiver.*—A covenant in a lease reserved to the lessor, on default of payment of rent, a power of re-entry; there being no mention in such covenant of a similar power being also reserve to his heirs, successors or assigns." The lessor sold his rights in the property leased to third persons, and such third persons endeavoured to re-enter under the covenant. *Held,* that although re-entry was reserved only to the lessor, yet his vendees could take advantage of the covenant, the operative part of the stat. 32 Hen. VIII, c. 34, being wide enough to admit of this notwithstanding the wording of the preamble. *Held,* further that the forfeiture having been waived by subsequent demands for rent, and there being no legal demand for rent on the last day on which rent at a date subsequent to the waiver fell due, the vendees were not entitled to make use of their right of re-entry. KRISTO NATH KOONDOO v. BROWN, 14 C. 176 ... 117

(3) See KABULIYAT, 14 C. 99.

Lands.

Severed from factory—See LAND ACQUISITION ACT (X OF 1870), 14 C. 423.

Law.

Mistaken view of—See REVIEW, 14 C. 627.

Lease.

(1) *Construction of—Construction of pottah as to duration—Use of the word "mukurari."*—A ghatwali estate having been for arrears sold for revenue, the purchaser brought suits to set aside under-tenures, and in so doing sued a tenant who alleged himself to be a ghatwal. The latter compromised the suit, receiving a mokurari pottah not containing any words importing an hereditary interest: *Held* that the above circumstances were no ground for declining to give effect to the pottah as it stood, the word "mukurari" not importing inheritance. PARMESHWAR PERTAB SINGH v. PADMANAND SINGH, 15 C. 342 (**P.C.**)=5 Sar. P.C.J. 128 ... 812

(2) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 627.

(3) See MANAGEMENT, 15 C. 253.

(4) See PRE-EMPTION, 15 C. 184.

Leave to Appeal.

See APPEAL TO PRIVY COUNCIL, 14 C. 290.

Leave to bring a fresh Suit.

See HINDU LAW—PARTITION, 14 C. 122.

Leave to sue.

(1) *Small Cause Court Presidency Towns Act,* XV *of* 1882, *s.* 18—*Discretion, Exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction.*—A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of Rs. 23 for goods sold in Calcutta and forwarded by the E. I. Railway Co. for delivery at Lucknow. The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living at a long distance from Calcutta and that the suit was one for a small amount. *Held,* that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s. 18, and that the case was one in which the leave applied for should have been granted. *In the matter of the proposed suit of* COLLETT v. ARMSTRONG, 14 C. 526=11 Ind. Jur. 456 ... 349

(2) See MINOR, 14 C. 159.

(3) See RECEIVER, 14 C. 323.

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Legacy.
(1) See HINDU LAW—WIDOW, 14 C. 861.
(2) See WILL, 15 C. 83.

Lessee.
See MANAGEMENT, 15 C. 253.

Letters of Administration.
See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 14 C. 37.

Letters Patent.
Cl. 12—See JURISDICTION. 14 C. 256.

Liability.
(1) Acknowledgment of—See LIMITATION ACT (XV OF 1877), 14 C. 801.
(2) Of shares of members of family not parties to decree—See HINDU LAW —JOINT FAMILY 15 C. 70.
(3) Of subscribers to the proposed Town Hall—See RIGHT OF SUIT, 14 C. 64.
(4) Of surety—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14. C. 757.
(5) Of tenant who has transferred his holding—See ENHANCEMENT, 14 C. 795.

Liberty to apply.
See PRACTICE, 15 C. 211.

License.
(1) See ACT III OF 1880 (CANTONMENTS), 15 C. 452.
(2) See PATENT, 15 C. 244.

Lien.
(1) See CO-SHARERS, 14 C. 809.
(2) See MORTGAGE—ENGLISH, 14 C. 464.

Light and Air.
See EASEMENT, 14 C. 839.

Limitation.
(1) *Cause of action—Adverse possession—Acts* IX *of* 1871 *and* XV *of* 1877—Res judicata—*Right of occupancy—Liability to assessment—Hindu widow, Power of, to bind reversioners*—Chur *land*—Jungleburi *tenure.—R,* a Hindu widow, granted a *jungleburi* tenure to certain tenants in respect of a *chur* belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of *R* in respect of the tenure. *R* died in January 1861, and was succeeded by *J* and *P,* two daughters, the last of whom died on the 31st December 1880. On her death the grandsons succeeded to the estate. On *R's* death *J* and *P* got possession of all estate papers, and amongst them a *dowl* granted by the tenants in return for the *amulnama.* In 1865 proceedings were taken by the tenants to obtain kabuliyats on the footing of those documents, which proceedings came to an end in 1868. In 1873, *J* and *P* instituted suits against the tenants, alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to them, as well as to have it declared that *R's* acts did not bind them. In these suits it was found that *J* and *P* had all along been aware of the claim made by the tenants that they held a permanent tenure, and the suits were dismissed on the ground that it was too late for *J* and *P,* after the lapse of twelve years from *R's* death, to raise the question. In 1884, *D,* a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons reversioners were not bound by *R's* acts, and that the *junglebari* tenure was not binding on them; that the tenants were middlemen and had no right of occupancy; that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amounts covered by the *amulnama* and *dowl.* The defendant amongst other things pleaded limitation, *res judicata,* and that *R* had the power to grant the *jungleburi* tenures so as to bind the reversioners: *Held* that, being middlemen, the defendants had no right of occupancy, and that were the suit not dismissed for other grounds they were liable to have the rent assessed on the whole amount of lands held by them, which was in excess of that covered by the

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Limitation—(*Concluded*).

amulnama and *dowel*. That the suit was not barred by *res judicata* as in the suits brought by *J* and *P*, the question of whether *R*'s acts bound the reversioners was never decided. That the suit was barred by limitation. Adverse possession began to run on *R*'s death (as *J* and *P* who represented the estate were then well aware that the tenants claimed to hold the lands under a permanent lease, and though *J* and *P* received rent, the possession of the tenants was adverse to them), and more than twelve years elapsed before Act IX of 1871 came into force, and therefore the defendants had then obtained a good title by adverse possession as against all the reversioners which could not be defeated by the provisions of the subsequent Limitation Acts of 1871 and 1877. *Held*, further that the question whether a *jungleburi* tenure granted by a Hindu widow is binding on reversioners depends on the circumstances of the land *Quære*—Whether such a tenure granted in respect of a *chur* where no legal necessity on behalf of the widow is shown could under any circumstances be binding on the reversioners. DROBOMOYI GUPTA v. C. T. DAVIS, 14 C. 323 ... 214

(2) *Mortgagee—Adverse possession.*—A mortgagee of an entire undivided estate does not, by a subsequent purchase of a certain share therein from one not in actual possession at the time of conveyance, thereby change his character from a mortgagee to that of an owner, but his possession continues as a mortgagee *B* held an entire undivided estate under a mortgage (usufructuary) from *C* since 1273 (1866), and as such mortgagee in 1282 (1875) *B* purchased a share therein from *D*, who had not been in actual possession since the date of the mortgage. On the 20th January, 1885, *B* brought a suit to recover possession of his purchased share: *Held*, that the subsequent purchase did not change the character of *B* from that of a mortgagee to that of an owner, and that his suit was barred by 12 years' limitation. NUNDO LAL ADDY v. JODU NATH HALDAR, 14 C. 674. ... 447

(3) *Suit for partnership accounts—Joint contract—Necessary parties, Omission of—Addition of new defendant—Time of joinder how material.*—A suit was brought for partnership accounts. Upon the objection of the defendant it was found that a necessary party defendant had been omitted, and such party was afterwards added as a defendant at a time when the suit as against him was barred: *Held* that the whole suit was rightly dimissed. RAMDOYAL v. JUNMENJOY COONDOO, 14 C. 791 ... 524

(4) *Suit for possession by member of family admittedly not joint—Partition—Adverse possession.*—The plaintiff sued for possession of certain property, alleging that it had belonged to a joint family, of which he had been a member, and had been allotted to him on partition. The partition was not proved, and the suit was dimissed on the ground of limitation. On second appeal it was contended that if the partition was held not to be proved the family must be held to be joint, and as the possession of one member could not be adverse to another, the decree dismissing the suit on the ground of limitation was erroneous: *Held*, that as the family was admittedly not joint the plaintiff was bound to remove the bar of limitation by showing some sort of possession by himself within twelve years before his suit could be entertained, and as he had not done so his suit was properly dismissed. TULSHI PERSHAD v. RAJA MISSER, 14 C. 610=12 Ind. Jur. 61 ... 404

(5) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 570; 14 C. 624.

(6) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 317; 15 C. 450.

(7) See EXECUTION OF DECREE, 14 C. 124.

(8) See PARTIES, 14 C. 400.

(9) See REGISTRATION ACT (III OF 1877), 15 C. 538.

(10) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 687.

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Limitation Act (IX of 1871).

(1) See LIMITATION, 14 C. 323.
(2) S. 27—See EASEMENT, 14 C. 839.
(3) Art. 118—See PRINCIPAL AND AGENT, 14 C. 147.

Limitation Act (XV of 1877).

(1) *S.* 5, *and art.* 156—*Appeal—Review, Exclusion of time taken up with—Practice.*—The mere presentation of an application for review where it is not shown that the grounds threfor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed. ASHANULLA v. COLLECTOR OF DACCA, 15 C. 242 746

(2) *Ss.* 7 *and* 8, *sch.* II, *art.* 178—*Mesne profits—Decree for—Execution of Decree—Application for assessment of mesne profits—Joint decree holders—Minor, Right of, to execute whole decree when remedy of major joint-decree-holder is barred.*—In execution of a decree for possession of certain lands and for mesne profits, dated the 15th August 1878, possession having been obtained in August 1880, two decree-holders, one of whom was a minor, applied on the 4th April 1882 for ascertainment of the amount of such mesne profits. Upon that application the Amin was directed to ascertain the amount due, but after repeated reminders had been sent him, and no report being submitted, the execution case was struck off the file on the 9th October 1882. The minor judgment-creditor having attained his majority on the 17th April 1885, an application was made by both decree-holders for execution of the decree by ascertainment of the amount of mesne profits, and for the recovery of the amount when so ascertained. The judgment-debtors pleaded limitation. *Held,* that the application was not an application for execution of the decree. The decree was divisible into two parts, and the present application must be treated as for the purpose of obtaining a final decree regarding the mesne profits, the previous decree having been in that respect merely interlocutory: *Held,* also, that the provisions of art. 178 of sch. II of the Limitation Act apply to an application by a decree-holder to make a decree complete. And further that s. 8 of that Act had no application to the case, and that therefore so far as the application of the major decree holder was concerned his remedy was barred as his application should have been made within at least three years from the date of the delivery of possession of the lands decreed. *Held,* further, that under s. 7 of the Limitation Act, the remedy of the minor decree-holder was not barred as the other decree-holder, could not give a valid discharge without his concurrence—and that, under s. 231 of the Code of Civil Procedure, he was as entitled to execute the whole decree, as though the remedy of the major decree-holder was barred his right was not extinguished. ANANDO KISHORE DASS BAKSHI v. ANANDO KISHORE BOSE, 14 C. 50=11 Ind. Jur. 143 34

(3) *S.* 10—*Auction-purchaser—Assignee of trustee.*—An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an *assignee* of the trustee within the meaning of that term as used in s. 10 of the Limitation Act (XV of 1877), and consequently a suit against such a person by a plaintiff claiming to be entitled as trustee to possession of the trust property is governed by the ordinary rules of limitation and not excluded therefrom by by the provisions of s. 10. CHINTAMONI MAHAPATRO v. SARUP SE, 15 C. 703 1052

(4) *S.* 13—*Construction of—Absence from British India—Goods paid for before delivery—Short delivery—Failure of consideration.*—Money paid as the price of goods to be delivered hereafter is money received for the use of the seller and it is only upon failure of consideration that the money so paid becomes money received for the use of the buyer. When goods which have already been paid for are afterwards found to be short delivered, the failure of consideration takes place on the date of delivery, and limitation in respect of suit to recover back the sum overpaid will be reckoned from that date. The words

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Limitation Act (XV of 1877)—(*Continued*).

"absent from British India," in s. 13 of the Limitation Act should be construed broadly, and not limited in their application only to such persons as have been present there, or would ordinarily be present or may be expected to return. *Semble.*—A defendant is within s. 13, notwithstanding his having carried on a trade or had a shop or a house of business under an agent in British India. *Harrington* v. *Ganesh Roy*, I. L. R., 10 Cal., 440, commented upon. ATUL KRISTO BOSE v. LYON & CO., 14 C. 457 ... 304

(5) S. 18 and art. 166—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 679.

(6) *S. 19—Acknowledgment of liability—Suit for possession.*—Acknowledgment of liability, in order to be within the meaning of s. 19 of the same Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims. MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY, 14 C. 801 (**P.C.**)=14 I.A. 168=11 Ind. Jur. 397=5 Sar. P. C. J. 50 ... 531

(7) S. 26—See EASEMENT, 14 C. 839.

(8) Sch. II, arts. 10, 120—See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761.

(9) *Art. 11—Civ. Pro. Code, 1882, ss. 278, 280, 283—Investigation of claim to attached property.*—A decree-holder, against whom the release of property, attached in execution of his decree, has been ordered after investigation under s. 280 of the Code of Civil Procedure, is limited by art II of sch. II of Act XV of 1877, the Indian Limitation Act. to one year within which to institute a suit to establish that the property is that of his judgment-debtor. The extent to which the "investigation" required by s. 280 should be carried depends upon the circumstances of the case. SARDHARI LAL v. AMBICKA PERSHAD, 15 C. 521 (**P.C.**)=15 I.A. 123=5 Sar. P. C. J. 172=12 Ind. Jur. 210 ... 931

(10) *Art. 11—Civ. Pro Code, 1882, ss, 280—283—Judgment-debtor, Suit by, to establish title to property the subject-matter of claim in execution proceedings.*—A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term as sued in s. 283 of the Code of Civil Procedure so as to preclude his instituting a suit after the lapse of one year from the date of such order (the period of limitation prescribed by art. 11, sch. II, Act XV of 1877) to establish his title to and to recover possession of the property which has been the subject-matter of a claim in execution proceedings and in respect of which an order has been made under s. 280 of the Code. *G.* in execution of a decree, attached certain immoveable property belonging to the plaintiff, whereupon *B* preferred a claim and on the 10th March 1881 got the attachment removed. On the 20th July 1881, *B* sold the property to *K*. In 1882 *G* instituted a suit against *B* to set aside the order of the 10th March 1881, and to have it declared that the property was liable to attachment as belonging to the plaintiff. *K* was not made a party to that suit, and it was eventually compromised between *G* and *B*, the plaintiff's title being admitted. *G* thereupon again attached the property, and was met by a claim preferred by *K*, which was allowed on the 15th August 1883. *G* then brought another suit against *K*, to obtain relief similar to that claimed in his suit against *B*, but his suit was dismissed on the 17th February 1885. On the 25th September 1885, the plaintiff instituted a suit against *G*, *B* and *K*, to obtain a declaration of his title to and to recover possession of the property. It was contended that the suit was barred by limitation, being governed by art. 11, sch. II of Act XV of 1877, inasmuch as it was brought more than one year after the date of the order of the 15th August 1883. *Held*, that the suit was not such a suit as was contemplated by s. 283 of the Code of Civil Procedure, not being one to establish any right which was the subject-matter of the litigation in the execution proceedings, and that consequently the provisions of art. 11 did not apply to

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it, and it was not barred by limitation. KEDAR NATH CHATTERJI v. RAKHAL DAS CHATTERJI, 15 C. 674=13 Ind. Jur. 104 1032

(11) *Arts.* 61 *and* 115—*Agent for purchase of Stores for Government, Suit by—Cause of action—Suit against Secretary of State—Acknowledgment—Act* XV *of* 1877, *ss.* 19 *and* 20.—The plaintiff, a purchasing agent, sued the Secretary of State for India in Council to recover certain sums of money alleged to be due to him for the purchase of stores, etc., for the Second Cabul Campaign. This suit was brought more than three years after the termination of the plaintiff's agency and more than three years after the last supply made by him as purchasing agent, but within a few months after the final refusal of the Commissariat Department to pay him the amount claimed; *held,* that it was doubtful if art. 61 of the second schedule of the Limitation Act would apply as against the Secretary of State for India in Council, but even if not the suit was barred by art. 115. DOYA NARAIN TEWARY v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 14 C. 256 170

(12) *Art.* 62—*Suit to recover purchase money—Failure of consideration—Case of action, Accrual of.*—Purchase money paid for a consideration which has wholly failed is money received for the use of the buyer, and a suit to recover back the money is thus governed by art. 62 of the 2nd schedule to the Limitation Act. *A* purchased a share of joint property from a member of a Mitakshara family, but his suit to recover possession of it was dismissed on the ground that the sale having been made without the consent of the other coparceners was void under the Law. *A* then brought a suit to recover back the purchase money by reason of failure of consideration: *Held,* that the failure of consideration, although it did not become apparent until the former suit was brought and failed, was a failure from the beginning, and time ran from the date when the purchase money was paid. HANUMAN KAMUT v. HANUMAN MANDUR, 15 C. 51 620

(13) *Art.* 75—*Instalment bond—Default in one instalment, the whole amount to fall due—Waiver.*—The mere fact that a creditor has done nothing to enforce a condition in an instrument, under which the whole debt became due on failure in the payment of one instalment, is no evidence of waiver within the meaning of art. 75 of the Limitation Act. NOBODIP CHUNDER SHAHA v. RAM KRISHNA ROY CHOWDHRY, 14 C. 397 263

(14) Art. 75—See DECREE, 14 C. 352.

(15) *Art.* 91—*Suit to set aside deed —Fraud.*—In a suit instituted in 1884 by a husband and wife to have deed granting land which was executed by the husband in 1872 set aside on the ground that it had been obtained from the latter by fraud and undue influence, the facts relied upon were known to the co-plaintiff's husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside in 1882, on the ground of his having been unduly influenced, he was not at the time of the previous transaction, nor for some years after it, mentally incompetent or unable to allow that knowledge to operate on his mind: *Held* that, therefore, the suit, falling within s. 91 of sch. II of Act XV of 1877, was not maintainable by either of the plaintiffs. JANKI KUNWAR v. AJIT SINGH, 15 C. 58 (**P.C.**)=14 I. A. 148=12 Ind. Jur. 9=5 Sar P. C. J. 92=Rafique and Jackson's P. C. No. 99 624

(16) *Arts.* 99 *and* 132—*Government revenue, Suit to recover money paid on account of charge on immoveable property—Co-sharer, payment of arrears of revenue by.*—The plaintiffs and defendants were the proprietors of two separate plots of land, separately assessed with Government revenue, but covered by the same towzi number. Plaintiffs paid the Government revenue, due from the defendants in respect of their plot from September 1873 to June 1885 in order to prevent the two plots being brought to sale, and on the

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28th September 1885 instituted a suit to recover the amount. It was contended on behalf of the plaintiff, that art 132 of sch. II of Act XV of 1877 applied to the facts of the case, and that the plaintiffs were therefore entitled to recover all amounts so paid within twelve years of date of suit: *Held,* that as on the authority of 14 C. 809, the plaintiffs had no charge upon the property in respect of which the payment had been made, and as on the authority of 12 I.A. 13=7 A 502. Art. 132 only applied to cases where the money sought to be recovered is a charge upon the property, the limitation applicable to the case was that provided by art. 99, and the plaintiffs' claim in respect of all payments made more than three years before suit was barred. KHUB LAL SAHU v. PUDMANUND SINGH, 15 C. 542 ... 945

(17) *Art.* 116—*Suit for arrears of rent—Registered contract.*—A suit to recover arrears of rent upon a registered contract is governed by sch. II, art. 116 of the Limitation Act. UMESH CHUNDRA MUNDAL v. ADARMONI DASI, 15 C. 221 ... 732

(18) Arts. 118, 140, 141— See RES JUDICATA, 14 C. 401.

(19) Arts. 120 and 127—See HINDU LAW—JOINT FAMILY, 14 C. 493.

(20) *Art.* 127—*Suit for possession by purchaser from sharer in joint family.*—Art. 127 of sch. II of Act XV of 1877 does not apply to a suit where the plaintiff is a stranger who has purchased a share in joint family property from one of the members thereof. HORENDRA CHUNDRA GUPTA ROY v. AUNOARDI MUNDUL, 14 C. 544 ... 360

(21) *Art.* 132—*Construction of will—Charge on immoveable property.*—A will devising immoveables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immoveables, and it was held that a suit, brought by the auction purchaser of the creditor's claim, to recover the above mentioned debt, was within art. 132 of the second schedule of Act XV of 1877; and having been brought within twelve years from the date when the debt was so charged was not barred by time. GRISH CHUNDER MAITI v. ANUNDO MOYI DEBI, 15 C. 66 **(P.C.)**=14 I. A. 137=11 Ind. Jur. 432=5 Sar. P. C. J. 78 ... 630

(22) *Arts.* 132, 147—*Suit on a mortgage bond—English mortgage—"Mortagage" and "Charge"—Transfer of Property Act, ss.* 60, 67, 83, 86, 87—89, 92, 93, 100.—A suit on a mortgage bond to enforce payment by sale of premises hypothecated is governed by art. 132 of the Limitation Act. The clear distinction drawn for the first time between "mortgage" and "charge" in the Transfer of Property Act is not observed in the Limitation Act. Art 147 of the Limitation Act relates to a special kind of mortgage known as English mortgage, and includes only that class of suits in which the remedy is either foreclosure or sale in the alternative. GIRWAR SINGH v. THAKUR NARAIN SINGH, 14 C. 730 **(F.B.)** ... 484

(23) Art. 138—See POSSESSION, 14 C. 644.

(24) *Art.* 140—*Claim to share in immoveable property under will.*—The right to property left by will (assuming that the testator had power to dispose of it falls into possession, by Hindu law, immediately upon the death of the testator; and, therefore, a claim, making title to share in immoveable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under art. 140 of Act XV of 1877, sch. II. MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY, 14 C. 801 **(P.C.)**=14 I. A. 168=11 Ind. Jur. 397=5 Sar. P. C. J. 50. ... 531

(25) Art. 144—See SALE FOR ARREARS OF REVENUE, 14 C. 109.

(26) *Art.* 178—*Execution of decree—Decree payable by instalments—Instalment, Default in payment of.*—When a decree or order makes a sum of money payable by instalment on certain dates, and provides that, in default of payment of any instalment, the whole of the money shall become due and payable and be recoverable in execution, by art.

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178, sch. II of the Limitation Act, Limitation begins to run from the date of the first default, unless the right to enforce payment in default has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. *R.* obtained a decree against *D. C.* and *K. G* for a sum of money on 21st June 1880. On the 25th May 1882, an order was made in terms of the petition of both parties, provided that the amount of decree should be paid by five instalments, the first instalment being due in July 1882, and that in default of payment of any instalment the whole amount should be due and recoverable in execution. Default was made in payment of the first instalment, nor was there any subsequent payment of that or any other instalment. On 30th July 1886, *R.* applied for execution of the four last instalments, alleging that the first had been paid: *Held* that the application was barred by limitation under art. 178, sch. II, Limitation Act, 1877. MON MOHUN ROY v. DURGA CHURN GHOSE, 15 C. 502 919

(27) *Art. 179—Execution of decree—Step-in-aid of execution—Application to sell attached property subject to a mortgage.*—A judgment-creditor applied on the 22nd May 1882, for execution of a decree, dated 7th November, 1881, and certain property of the judgment-debtors was attached. Thereupon a claim was preferred by a mortgagee and on the 10th August 1882, the judgment-creditor admitted the claim and applied that property might be sold subject to the claimant's mortgage, and the proceeds if any paid over to him in part satisfaction of his decree. On the 20th June 1885 another application was made for execution, and on the 29th November 1886, a third application was made. To the latter application objection was taken, and it was contended that the decree was barred by reason of more than three years having elapsed between the application of the 22nd May 1882 and that of the 20th June 1885: *Held* that the application of the 10th August 1882, by the judgment-creditor to allow the sale attached property subject to the mortgage of the claimant was "a step-in-aid of execution of the decree" within the meaning of art. 179, sch. II, Act XV of 1877, and that execution of the decree was therefore not barred. LALRADDI MULLICK v. KALA CHAND BERA, 15 C. 363 826

(28) *Art. 179 (para. 2)—Appeal against part of decree—Execution against judgment-debtors who were not joined in the appeal.*—By a decree of a Court of first instance, dated the 16th August, 1880, Rs. 15,260-5-6 was found due against *A*, and Rs. 20,099-2-6 against *A* and *B* jointly, the suit being dismissed as against two other defendants who were alleged to have been sureties. The plaintiff appealed against so much of this decree as dismissed the suit against the alleged sureties, not making either *A* or *B* parties respondents; this appeal was dismissed on the 1st May, 1885. On the 27th April, 1885, plaintiff applied for execution against *A* and *B*: *Held,* that the application was barred under art. 179 of the Limitation Act. RAGHANATH PERSHAD v. ABUL HYE, 14 C. 26

(29) *Art. 179 and art. 175—Application for execution of decree—Order on petition to pay by instalments—Civ. Pro. Code, s. 210.*—An application to execute a decree, dated 30th August, 1880, was made on 25th May, 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following orders: "According to the application of both parties it is ordered that the case be struck off, and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March, 1885: *Held,* that the order was not one recognising or sanctioning the arrangement within the meaning of s. 210 of the Civ. Pro. Code,

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inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by art. 175 of Act XV of 1877. The application for execution was, therefore, barred under art. 179 as not having been made within three years of 25th May, 1881. ABDUL RAHAMAN SODAGUR v. DALLARAM MARWARI, 14 C. 348=11 Ind. Jur. 377 ... 230

Lis Pendens.

(1) *Auction-purchaser bound by* lis pendens.—*K* brought a suit against *P* to recover possession of certain land. Whilst that suit was pending in the Court of first instance the right, title and interest of *P* in the land were sold in execution of a decree against him at the instance of a judgment-creditor and purchased by *G*. Subsequent to *G's* purchase *K's* suit was dismissed by the Court of first instance: but *K* appealed, and the Appellate Court reversed the decree of the Court below and gave judgment in *K's* favour. *G*, who was not made a party to the appeal, thereupon instituted a suit against *K* to eject him and obtain possession of the land. *Held*, that the doctrine of *lis pendens* applied, and that *G* was not entitled to maintain the suit. *Held*, further, that it made no difference to the application of the doctrine that the decree of the Court of first instance was in favour of *G's* predecessor in title, for that decree was open to appeal and the decree in the suit was that passed by the Appellate Court, the proceedings in the Appeal Court being merely a continuation of those in the suit; and as *G's* purchase was made whilst that suit was pending, *G* was still bound by the decree of the Appellate Court. GOBIND CHUNDER ROY v. GURU CHURN KURMOKER, 15 C. 94 ... 648

(2) "*Contentious suit*"—*Transfer of Property Act* (IV *of* 1882), *s.* 52.—*A* on the 9th September 1883 sold certain immoveable property to *S* for Rs. 99-12 by means of a conveyance which was not registered. On the 29th September 1883 *S* instituted a suit against *A*, on that conveyance to obtain possession of the property. On the 5th October 1883, when that suit was pending, but before the summons was served on *A*, *A*, by a duly registered conveyance, sold the same property to *R*, for Rs. 198-8. In the suit filed by *S*, *A*, filed a written statement, but did not further contest it, and *S* obtained a decree and got possession of the property. In a suit subsequently brought by *R* to obtain possession of the property from *S* upon the ground that his registered conveyance was entitled to priority over the unregistered document of *S*, it was contended that *R's* purchase having been made whilst *S's* suit was pending, his title could not prevail against that of *S*, *held*, that the doctrine of *lis pendens* did not apply to the facts of the case, as at the time of *R's* purchase there was no contentious suit or proceeding in existence, the summons in *S's* suit not having been then served. RADHASYAM MOHAPATTRA *alias* MADUN MOHUN MOHAPATTRA v. SIBU PANDA, 15 C. 647 ... 1015

Magistrate.

(1) *Jurisdiction of—Crim. Pro. Code* (*Act X of* 1882), *s.* 349—*Penal Code, Act* XLV *of* 1860, *s.* 411—*Receiving stolen property.*—Under s. 349 of the Crim. Pro. Code a Second Class Magistrate transmitted a case to the District Magistrate, being of opinion that a more severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record to the Second Class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second Class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second Class Magistrate to commit. QUEEN-EMPRESS v. CHANDU GOWALA, 14 C. 355 ... 235

(2) See CRIM. PRO. CODE (ACT X OF 1882), 15 C. 564.

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Mahomedan Law.
1.—DIVORCE.
2.—DOWER.
3.—GIFT.
4.—GUARDIAN.
5.—MAINTENANCE.
6.—MARRIAGE.
7.—PRE-EMPTION.
8.—WAKF.

Mahomedan Law—1.—Divorce.
See MAHOMEDAN LAW—MARRIAGE, 14 C. 276.

———2.—Dower.
Evidence—Written contract, Effect of failing to prove, when alleged.—A suit was brought by a Mahomedan wife for dower alleged to be due to her under a *kabinnamah* executed by her husband at the time of the marriage. She alleged the amount of dower to be Rs. 10,000, of which Rs. 5,000 was prompt and Rs. 5,000 deferred, and she claimed to be entitled to the whole on the ground that she had lawfully divorced her husband in pursuance of power reserved to her in that behalf by the *kabinnamah*. At the hearing she failed to prove the *kabinnamah*, but the Court gave her a decree, holding that there was evidence to show that a dower of Rs. 10,000 was usually payable in the plaintiff's family, and that, in the absence of evidence to the contrary, the whole amount must be considered *prompt*, but as the plaintiff only claimed Rs. 5,000 as prompt, the decree was limited to that amount. *Held*, that the Court was wrong in decreeing the case upon an oral contract not alleged in the plaint nor admitted by the defendant, the suit being based upon a written agreement, which the plaintiff failed to prove. KHAJA MAHOMED ASGHUR v. MANIJA KHANUM *alias* BAKKA KHANUM, 14 C. 420 279

———3.—Gift.
(1) See ISSUES, 15 C. 684.
(2) See MAHOMEDAN LAW—MARRIAGE, 14 C. 276.

———4.—Guardian.
See GUARDIAN, 14 C. 615.

———5.—Maintenance.
See MAHOMEDAN LAW—MARRIAGE, 14 C. 276.

———6.—Marriage.
Marriage—Shiah School Muta Marriage—Gift of term—Divorce—Maintenance.—In a suit brought by a Mahomedan of the Shiah sect against his wife, belonging to the same persuasion, for a declaration that the relationship of husband and wife had terminated, and that he was not liable to pay maintenance to her which he had been directed to do by an order passed under the provisions of the Code of Criminal Procedure, on the allegation that the marriage was a *muta* form, and that he, on the 22nd February 1882 had made *hiba-i-muddot* (gift of the term) of whatever period there then might remain unexpired, the wife pleaded *inter alia* that her husband was not competent to dissolve the marriage tie within the contracted period without her consent, and that if under the Mahomedan law the consent was unnecessary, the Court was bound, in administering justice, equity, and good conscience, to modify the strict law in this respect. *Held* that although the ordinary law of divorce does not exist in respect of marriages by the *muta* form, they can nevertheness be terminated by the husband giving away the unexpired portion of the term for which the marriage was contracted, and the consent or acceptance on the part of the wife is not necessary for the dissolution of the marriage. *Held*, further, that although the Court could not grant an injunction restraining the Magistrate from enforcing the order for maintenance, the plaintiff was entitled to ask the Magistrate to abstain from giving further effect to his order after the Civil Court had found that the relationship of husband and wife had ceased to exist. MAHOMED ABID ALI KUMAR KADAR v. LUDDEN SAHIBA, 14 C. 276=11 Ind. Jur. 296 183

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Mahomedan Law—7.—Pre-emption.

(1) *Pre-emption—Conditional sale—Right of pre-emption among co-parceners—Private partition of puttidari estate—Limitation Act,* 1877, *arts.* 10, 120.—*A* and *B* had certain proprietary rights in an 8 annas putti of a certain mehal. *C* and *D* had no rights in that putti, but *D* had a small share in the remaining 8 annas putti. A private partition between the puttis having taken place, *C* and *D's* brother lent to *B* two sums of Rs. 200 & Rs. 199 by deeds of *bai-bil-wufa* dated the 12th & 21st June, 1876. *C* & *D* subsequently instituted foreclosure proceedings & on the 5th May 1884 were put into possession of *B's* share in the first mentioned putti in execution of a decree which they had obtained. On the 18th April 1885, *A* sued *C* and *D* to enforce his right of pre-emption. *Held,* that though the coparcenary could not be said to have ceased to exist, or those who were coparceners be said to have become strangers to one another, yet, there being a finding that the puttis were separate, it was not necessary, in order to establish *A's* preferential right, that a partition by metes and bounds should be shown to have taken place; but that a private partition, if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that *A's* claim must, therefore succeed. *Held,* also, that the suit was not barred by limitation, it being governed by either art. 10, sch. II of the Limitation Act (Act XV of 1877), which gave the plaintiff a year from the 5th May 1884, the date on which the mortgagee obtained possession, or by art. 120, under which his right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time. DIGAMBUR MISSER v. RAM LAL ROY, 14 C. 761=12 Ind. Jur. 94 — 505

(2) *Joint purchase by co-sharer and stranger, Effect of—Co-sharer—Specification of share in a deed of sale, Effect of.*—Under the rule of mahomedan Law, if a sharer in the estate alienates his interest to a co-sharer and a stranger, the purchasing sharer, by joining an outsider in the purchase forfeits his right as a sharer, and another co-sharer has the right of pre-emption. *Held,* also that in the case of a joint-purchase made by two persons of shares in two villages, in one of which one of the purcahsers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares in the aggregate purchase would not affect the rule. SALIGRAM SINGH v. RAGHUBARDYAL, 15 C. 224 — 734

————8.—Wakf.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 617.

Management.

Of Estate by the Court—Summary enforcement of contract made by the Court—Izarah Lease—Lessee, Application by, though no party to the suit—Application by a person not a party to the suit.—A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit under an order in which the Court had derived its power of management. Case in which the Court passed summarily such an order on the application of a lessee not a party to the suit in which the order completing the agreement for lease had been passed and at a time when such suit was no longer in existence. SURENDRO KESHUB ROY v. DOORGASOONDERY DASSEE, 15 C. 253 — 753

Manager.

See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 312; 14 C. 659.

Managing Member.

See HINDU LAW—JOINT FAMILY, 15 C. 70.

Mandatory Injunction.

See INJUNCTION, 14 C. 189.

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Measurement.
See KABULIYAT, 14 C. 99.
Medical Witness.
See EVIDENCE, 15 C. 589.
Memorandum.
See CONFESSION, 14 C. 539.
Memorandum of Association.
See COMPANY, 14 C. 189.
Mesne Profits.
(1) *Decree for possession of immoveable property—Reversal of decree on appeal—Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Jurisdiction—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 244.—A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaraion that if the amount were not paid within fifteen days the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not, paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie as the matter might and should have been determined in the execution department under s. 244 of the Civ. Pro. Code. *Held,* that as the suit was instituted in the Munsif's Court, and the Munsif under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif, which he did not possess, and that upon the authority of the decision in 19 W. R. 90, this could not be made a ground of objection on appeal. *Held,* also, that, the point being one that was not raised in the pleadings or before either of the lower Courts and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. *Quære.*—Whether such a suit does not lie and whether the decisions in 2 C. L. R. 75, and analogous cases to the effect that such a suit does not lie are correct. AZIZUDDIN HOSSEIN v. RAMAUNGARA ROY, 14 C. 605 400
(2) See EXECUTION OF DECREE, 14 C. 484.
(3) See LIMITATION ACT (XV OF 1877), 14 C. 50.
Minor.
(1) *Objection to description of minor—Permission to sue, Proof of—Civ. Pro. Code, ss.* 440, 578—*Act* XL *of* 1858, *s.* 3.—Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet, there is, nevertheless, nothing in the nature of the sanction provided by s. 3 of Act XL of 1858 which takes it out of the general rule of evidence, that sanction may be proved by express words or by implication. Where on a construction of the plaint and the pleadings it is found that the minor is the real plaintiff, the mere fact of his not having been properly described in accordance with s. 440 of the Civ. Pro. Code is no ground for setting aside a decree passed in the suit. BABA PERSHAD KHAN v. THE SECRETARY OF STATE FOR INDIA, 14 C. 159 (F.B.) 106
(2) *Suit against—Error in the frame of a suit a minor defendant, Effect of—Guardian* "ad litem" *how appointed—Sanction of Court without formal order, Effect of—Service of summons—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 100 *and* 443.—The plaint in a suit described one of the defendants thus: "*N.C.*, guardian on behalf of her own minor son, *S.C.*" Upon the presentation of the plaint the Court directed

Minor—(*Concluded*).

the plaintiff to produce an affidavit to the effect that the mother of the minor defendant was his guardian, and an affidavit having been made that the "minor defendant" was under the guardianship of the mother, ordered the suit to be registered and summons to be issued on the defendants *N. C.* then filed a written statement, alleging that she held the land in suit on behalf of the minor. *Held,* that having regard to the orders of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, could not without proof of prejudice invalidate a decree against him in the suit. *Held,* also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit, when it appeared on the face of the proceedings that the Court had sanctioned the appointment. *Held* (O'KINEALY, J., dissenting) that the fact that an order appointing a guardian *ad litem* at the instance of the plaintiff was made *ex parte* was not necessarily fatal to the suit, unless it could be shown that the minor had in any manner been prejudiced thereby. *Per* MITTER, J. (PETHERAM, C.J., concurring) that, although the matter of the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor, or his friends and relatives in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit.

Per Prinsep and Wilson, JJ.—No order appointing a guardian *ad litem* for an infant defendant, on the application of the plaintiff, should be made *ex parte,* and no such order should be made until the Court is satisfied that the infant has been duly served, and there has been an opportunity for making an application on behalf of the infant.

Per Wilson, J.—*Quære.*—Whether service on a guardian *ad litem* is good service under the Code?

Per O'Kinealy, J.—Having regard to the provisions of s. 443 of the Civ. Pro Code, no *ex parte* order made at the instance of the plaintiff for the appointment of a guardian *ad litem* is valid, without notice to the minor in the mode prescribed by s. 100, and any decree in the suit under the circumstances is absolutely void as against the minor. SURESH CHUNDER WUM CHOWDHRY *v.* JUGUT CHUNDER DEB, 14 C. 204 **(F.B.)** ... 135

(3) *Suit against—Misdescription in title of the plaint and in decree, Effect of.*—In a suit brought against a minor widow as the heir of her deceased husband, she was described in the cause title of the plaint as "the deceased debtor Ramnath Acharjee's heir and minor widow Benodini Dabea's mother and guardian Anundomoyee Dassee." The plaintiff obtained no order for the appointment of a guardian *ad litem.* He, however, obtained a decree, and the minor defendant was described therein in the same manner. *Held,* that the minor was neither a party to the original suit nor to the decree, and that no property of the minor passed upon a sale in execution of such decree. GANGA PROSAD CHOWDHRY *v.* UMBICA CHURN COONDOO, 14 C. 754 ... 500

(4) See GUARDIAN, 14 C. 55.

(5) See LIMITATION ACT (XV OF 1877), 14 C. 50.

Minority.

See GUARDIAN, 14 C. 55.

Mischief.

See FISHERY, 15 C. 388.

Misdescription.

See MINOR, 14 C. 754.

Misjoinder.

(1) *Plea of misjoinder, when sustainable—Suit against several persons claiming under different titles, Effect of—Civ. Pro. Code, ss.* 31 *and* 53.—*A,* as auction purchaser at a revenue sale, brought a suit against a number of persons for possession of some *chur* land; the defendants

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Misjoinder—(*Concluded.*)

claimed portions of the land under different titles and pleaded misjoinder. The Court upon the Amin's report gave *A* the option to amend the plaint by withdrawing the suit against any particular sets of defendants. *A* elected to go to trial on the suit as brought: *Held* that, under the circumstances, it was necessary for the Court to adjudicate on the question of misjoinder. *Held,* also, that, the plaintiff was not entitled to join in one suit all the persons, on the ground that they obstructed his possession, unless he was able to show that those persons acted in concert or under some common title. *Held,* further, that, having regard to the provisions of ss. 31 and 53 of the Civ. Pro. Code, the proper order of the Court should have been to reject the plaint and not dismiss the suit on the ground of misjoinder. SUDHENDU MOHUN ROY *v.* DURGA DASI, 14 C. 435 289

(2) See MULTIFARIOUSNESS, 14 C. 681.

Mokurari Lease.

See SALE FOR ARREARS OF REVENUE, 14 C. 109.

Money.

(1) —paid on account of revenue, suit to recover—See LIMITATION ACT (XV OF 1877), 15 C. 542.

(2) —paid under compulsion—See VOLUNTARY PAYMENT, 15 C. 656.

(3) Suit for refund of—See NOTICE, 15 C. 259.

Mooktear.

(1) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 14 C. 556; 15 C. 152.

(2) See PLEADERS, 15 C. 638.

Mortgage.

1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—ENGLISH.
4.—FORECLOSURE.
5.—PRIORITY.
6.—SALE.

————1.—**General.**

(1) See RES JUDICATA, 14 C. 401.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 687.

————2—**By Conditional Sale.**

(1) *Suit for foreclosure—Conditional Sale—Reg.* XVII *of* 1806—*Transfer of Property Act* (IV *of* 1882), *s.* 2—*General Clauses Consolidation Act* (I *of* 1868), *s.* 6—"*Proceedings.*"—In a suit for foreclosure under a deed of conditional sale, where the due date of the deed expired and notice of foreclosure was served while Reg. XVII of 1806 was in force, but before the expiration of the year of grace that Regulation had been repealed by the Transfer of Property Act: *Held,* that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the General Clauses Consolidation Act I of 1868. The "Proceedings" referred to in that section are not necessarily judicial proceedings only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure. UMESH CHUNDER DAS *v.* CHUNCHUN OJHA, 15 C. 367 822

(2) See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761.

(3) See MORTGAGE—FORECLOSURE, 14 C. 599.

————3.—**English.**

(1) *Lien—Covenants that mortgagee be entitled to enter—Entry, Right of—Mortgage deed in English form.*—*B* executed a mortgage deed in the English form in favour of the *L* Bank, containing amongst other covenants one providing that, upon default, the mortgagees would be entitled to enter into possession of the mortgaged properties. *B* died, leaving a widow, a daughter and a sister *S,* his heiress. According to Mahomedan law *S* was entitled to a six annas share of the mortgaged properties. On the 9th of May 1872, after the mortgage money became due, the *L* Bank brought a suit, and on the 13th of July 1872, obtained a decree by consent. The existence or right of *S* to a share in the properties was not known to the Bank, and she was not made

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Mortgage—3.—English—(*Concluded*).

a party to that suit. The Bank, in execution of their decree, caused the mortgaged properties to be sold, and themselves purchased some of them. The sale proceeds did not satisfy the entire claim. On the 1st of December, 1875, *S* sold her share of six annas in the properties to *R*. In a suit by *R* against the purchaser of two of the mortgaged properties at the aforesaid sale it was held that the share of *S* in the estate of *B* did not pass to the purchasers, though the Bank purported to have brought the whole sixteen annas in the properties to sale. *R* then brought this suit for the recovery of possession of the six annas share of the properties purchased at the sale by the Bank themselves, and which were now in their possession. *Held* that the share of *S* not having been sold the lien imposed upon it by the mortgage deed remained intact and continued in the hands of the Bank, *Held*, also, that, under the covenant in the mortgage deed above referred to, the Bank were entitled to remain in possession as mortgagees until the proportion of the debt, which might legitimately be imposed upon the six annas share of the properties in their hands was paid LUTCHMIPUT SINGH BAHADUR, AND ON HIS DEATH HIS SON CHUTTERPUT SINGH DOOGUR v. THE LAND MORTGAGE BANK OF INDIA, 14 C. 464=11 Ind. Jur. 414 — 309

(2) See LIMITATION ACT (XV OF 1877), 14 C. 730.

————4.—**Foreclosure.**

(1) *Foreclosure—Regulation* XVII *of* 1806, *s.* 8—*Provision as to the year of grace—Extension of time by mutual agreement—Transfer of Property Act, s.* 2, *cl.* (*c*).—The year of grace allowed by s. 8, Reg. XVII of 1806, is a matter of procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already had under the section and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (*c*), s. 2 of the Transfer of Property Act. Proceedings under s. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession in pursuance thereof after the passing of the Transfer of Property Act. *Held* that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force. RAIJ NATH PERSHAD NARAIN SINGH v. MOHESWARI PERSHAD NARAIN SINGH, 14 C. 451 — 300

(2) *Foreclosure, Suit for—Conditional Sale—Regulation* XVII *of* 1806 —*Transfer of Property Act* (IV *of* 1882), *s.* 2, *cl.* (*c*), *and ss.* 86, 87—*Procedure.*—A suit was brought on the 24th January 1885, by a mortgagee upon a mortgage by conditional sale, asking for a declaration that the mortgagor's right to redeem had been extinguished, and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April 1881, and the mortgage money was repayable on the 13th May 1881. On the 9th July 1881, the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of Reg. XVII of 1806. The year of grace expired on the 10th July 1882. It was contended by the mortgagor that, as the Transfer of property Act came into force on the 1st July 1882, the proceedings taken by the mortgagee should be regulated by the procedure laid down in ss. 86 and 87 of that Act, and not by the procedure prescribed by Regulation XVII of 1806. *Held* that the procedure laid down by the Transfer of Property Act could not be applied to the case. Although the year of grace had not expired when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of Reg. XVII of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being

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Mortgage—4.—Foreclosure.— (*Concluded.*)
brought at the expiration of that year, and such right and liability came within the meaning of these terms as used in cl. (*c*). s. 2, the Transfer of Property Act, MOHABIR PERSHAD NARAIN SINGH v. GUNGADHUR PERSHAD NARAIN SINGH, 14 C. 599=12 Ind. Jur. 26 ... 397
(3) See MORTGAGE—BY CONDITIONAL SALE, 15 C. 357.
——5.—**Priority.**
See PARTIES, 15 C. 35.
——6.—**Sale.**
(1) *Sale in execution of mortgage decree—Sale certificate—Confirmation of sale—Sale for arrears of Government revenue—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 316—*Act* XI *of* 1859, *ss.* 13, 14, 54—*Transfer of Property Act* (IV *of* 1882), *s.* 73.—D having obtained a decree on a mortgage of a 5½ anna share of an estate paying revenue to Government caused the share to be put up for sale in execution of that decree on the 17th August 1883, and purchased it herself. The sale was not confirmed till the 18th September 1883. In the meantime a 14-anna share of the estate, including the 5½-anna share, which was separately liable for its own share of Government revenue, was on the 26th September 1883 sold for arrears of the June Kist of Government revenue under s. 13, Act XI of 1859, and purchased by one G, who sold it again to P, who obtained possession on the 6th August 1884. In a suit by D against P and the judgment debtor to obtain possession of the 5½ anna share so purchased by her: *Held*, that the mortgage debt was not extinguished, and the mortgage merged in the decree on the 17th August, 1883, but having regard to the provisions of s. 316, of the Code of Civil Procedure, the mortgagee's rights were kept alive, and remained in existence until the property vested in her by virtue of the granting of the sale certificate, and that between the date of the sale, 17th August 1883, and the date of its confirmation, 18th December 1883, the mortgage lien was fully preserved; that P's purchase being governed by s. 54 of Act XI of 1859, he acquired the share subject to all encumbrances, including the mortgage lien of D; that s. 73 of the Transfer of Property Act does not in such a case deprive a mortgagee of his lien over the property and confine him to proceeding against the surplus sale proceeds; that as the judgment-debtor had the right, at any time between the 17th August 1883 and the 18th December 1883, to redeem the property upon payment of principal, interest and costs to D, P having acquired the rights of the judgment-debtor by virtue of his purchase on the 26th September 1883, was equally entitled to redeem between that date and the 18th December 1883, but not having availed himself of that right the property became absolutely vested in D on the 18th December 1883, and that consequently D was entitled to the relief claimed. PREM CHAND PAL v. PURNIMA DASI, 15 C. 546 ... 948
(2) See HINDU LAW—JOINT FAMILY, 15 C. 70.
(3) See LIMITATION ACT (XV OF 1877), 14 C. 730.

Mortgage Bond.
See EXECUTION OF DECREE, 14 C. 185.

Mortgage Decree.
See EXECUTION OF DECREE, 14 C. 661.

Mortgagee.
See LIMITATION, 14 C. 674.

Mortgagors.
See PARTIES, 15 C. 35.

Mother's Share.
On partition—See HINDU LAW—PARTITION, 15 C. 292.

Moveable Property.
See HINDU LAW—GIFT, 14 C. 446.

Multifariousness.
Misjoinder of causes of action—Misjoinder of parties.—The plaintiff, a talukdar, obtained a decree under s. 52 of the Rent Act (Bengal Act VIII of 1869) to eject his tenant for arrears of rent and to obtain

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Multifariousness.—(*Concluded.*)

possession of his tenure. In attempting to execute that decree he was opposed as regards certain plots, which he alleged were comprised in the tenure, by parties in possession, who instituted proceedings against him under s. 332 of the Civ. Pro. Code. These proceedings resulted in their claims being decided in their favour. The plaintiff thereupon instituted one suit against his judgment debtor and all parties who had opposed him in such proceedings to obtain a declaration that all the several plots claimed against him belonged to the tenure in respect of which he had obtained a decree for khas possession, and he also prayed for khas possession of the various plots. It was found that the titles relied on by the defendants, and which had been set up by them in the proceedings under s. 332, were quite distinct one from another, and that there had been no collusion or combination amongst them to keep the plaintiff out of possession, but on the contrary that the defences were *bona fide*. *Held,* that the suit was bad for misjoinder of causes of action and was properly dismissed. RAM NARAIN DUT v. ANNODA PROSAD JOSHI, 14 C. 681 — 452

Munsif.

Jurisdiction of—Bengal Civil Courts Act (VI *of* 1871), *s.* 20—*Value of the subject-matter in dispute—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 283—*Attached property, Suit to establish right to—Valuation of suit.*—A Munsif has jurisdiction to try a suit brought under s. 283 of the Civ. Pro. Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over one thousand rupees, but the amount of the debt being less than that sum. In such suits the amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him, and not the value of the property attached, unless the two amounts happen to be identical. MODHUSUDUN KOER v. RAKHAL CHUNDER ROY, 15 C. 104 — 654

Muta Marriage.

See MAHOMEDAN LAW—MARRIAGE, 14 C. 276.

Mutation of Names.

See ENHANCEMENT OF RENT, 14 C. 795.

"Naslan bad naslan."

Construction of—See DOCUMENT, 14 C. 296.

Navigable River.

Obstruction on—See PUBLIC NUISANCE, 14 C. 656.

New Point.

See APPEAL—SECOND APPEAL, 14 C. 586.

Nikash.

See STAMP ACT (I OF 1879), 15 C. 162.

Non-payment of Rent.

(1) See LANDLORD AND TENANT, 14 C. 751.
(2) See RIGHT OF OCCUPANCY, 15 C. 17.

Notice.

(1) *Of action—Bengal Act* IX *of* 1871, *s.* 27—*Tolls paid in excess of powers given—Suit for refund of money.*—In certain suits brought against a Toll Collector for the refund of money alleged to have been exacted by him improperly as toll under Bengal Act IX of 1871, the defendant pleaded that no notice of suit in accordance with s. 27 of that Act had been given. *Held* that such notice not having been given, the suit should be dismissed. RAM PITAM SHAH v. SHOOBUL CHUNDER MULLICK, 15 C. 259 — 758
(2) See ACT IX OF 1880 (BENGAL CESS), 15 C. 237.
(3) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 659.
(4) See FURTHER ENQUIRY, 15 C. 608.
(5) See SALE FOR ARREARS OF RENT, 14 C. 365.

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Notice to quit.

Service of notice to quit by registered letter, Sufficiency of.—Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal of the addressee to receive the letter: *Held*, that this was sufficient service of notice. JOGENDRO CHUNDER GHOSE v. DWARKA NATH KORMOKAR, 15 C. 681 1038

Novation.

See CONTRACT ACT (IX OF 1872), 15 C. 319.

Nuisance.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 60.

(2) See PUBLIC NUISANCE, 14 C. 656.

Objection.

(1) To attachment by judgment-debtor on behalf of others—See APPEAL, 15 C. 437.

(2) To decree by respondent—See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 610.

Obstruction.

(1) On tidal navigable river—See PUBLIC NUISANCE, 14 C. 656.

(2) To alleged highway—See SPECIFIC RELIEF ACT (I OF 1877), 15 C. 460.

Occupancy Ryot.

See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 317, 450.

Occupancy Tenant.

See LANDLORD AND TENANT, 14 C. 751.

Omission.

See EXECUTION OF DECREE, 14 C. 124.

Open Space.

See HINDU LAW—PARTITION, 14 C. 497.

Order.

(1) As to property as to which offence has been committed—See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 834.

(2) Finality of—See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 640.

(3) In petition to pay by instalments—See LIMITATION ACT (XV OF 1877), 14 C. 348.

(4) Receiving deposit of rent, Review of—See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 166.

(5) Staying execution where decree was not yet appealed to Privy Council refused—See APPEAL TO PRIVY COUNCIL, 14 C. 290.

Outsider.

Practising as Muktear, liability of—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 14 C. 556.

Parol Evidence.

See WILL, 15 C. 83.

Partial Partition.

See HINDU LAW—PARTITION, 14 C. 835.

Parties.

(1) *Civil Procedure Code, ss. 27 and 32—Limitation—Institution of suits —Change of parties.*—The change of parties as plaintiffs, in conformity with the provisions of s. 27 of the Code, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under s. 32. SUBODINI DEBI v. CUMAR GANODA KANT ROY BAHADUR, 14 C. 400. 265

(2) *Practice—Wife having an English domicile suing without her husband—Representatives of mortgagors—Priorities of mortgagees.*—Case in which it was held that a wife having an English domicile is capable of suing without joining her husband as a co-plaintiff; and in which the representatives of certain mortgagors were held to be necessary parties to the suit (which was one to determine the rights of mortgagees *inter se*) on the following grounds: (*a*) that the rights of the mortgagees could not be determined without at the same time determining the liability of the mortgagees; (*b*) to avoid multiplicity of

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Parties—(*Concluded*).

suits; (*c*) to give them an opportunity of being present at the taking of any account that might be ordered as between the mortgagees; and (*d*) to entitle the plaintiff or defendant to obtain costs out of the proceeds of the sale of the mortgaged property. HUGHES v. DELHI AND LONDON BANK, 15 C. 35 — 609

(3) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 201.
(4) See LIMITATION, 14 C. 791.
(5) See MULTIFARIOUSNESS, 14 C. 681.
(6) See SPECIFIC RELIEF ACT (I OF 1877), 15 C. 460.

Partition.

(1) Of puttidari estate—See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761.
(2) Suit for—See JURISDICTION, 15 C. 198.

Partition Wall.

See HINDU LAW—PARTITION, 14 C. 797.

Partnership.

(1) Accounts—See LIMITATION, 14 C. 791.
(2) Debt—See ATTACHMENT, 14 C. 384.

Patient.

Act XV *of* 1859, *s.* 24—*Licensee, Application by, under s.* 24 *of Patent Act—Petitioner under Patent Act and licensee, having no separate interest.*—A licensee under a patent cannot, as between himself and the patentee challange the soundness of the patent during the continuance of his license. Case in which the petitioner on the record in a proceeding under s. 24 of Act XV of 1859 was found to have had no real interest in the matter apart from that of the licensee; and in which the petition, having been taken to be in reality that of the licensee, was dismissed accordingly. *In the matter of* D. H. R. MOSES, 15 C. 244 — 748

Payment.

See CO-SHARERS, 14 C. 809.

Penal Code (Act XLV of 1860).

(1) *Ss.* 52, 88, 304 A—*Causing death by a rash and negligent act—Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk."*—A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged, under s. 304-A of the Penal Code, with causing death by doing a rash and negligent act. It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that at all events he was entitled to the benefit of s. 88 of the Penal Code as he did the act in good faith, without any intention to cause death and for the benefit of the patient who had accepted the risk. *Held,* that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88. *Held,* further, that s. 88 did not apply to the case, as it was not shown by the accused on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk. *Held,* also, that under the circumstances the conviction under s. 304-A was a proper one. SUKAROO KOBIRAJ v. THE EMPRESS, 14 C. 566 — 375

(2) Ss. 75, 179, 511—See SENTENCE, 14 C. 357.
(3) Ss. 143, 378, 403, 426, 447—See FISHERY, 15 C. 388.

S. 177—*Furnishing false information for the purpose of preventing the commission of an offence, Meaning of.*—The information which, under the second branch of s. 177 of the Penal Code, a person is legally bound to give "for the purpose of preventing the commission of the offence" relates not to the commission of offences generally, but to the commission of some particular offence. *In the matter of the petition of* PANATULLA. PANATULLA v. QUEEN-EMPRESS, 15 C. 386 — 841

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Penal Code (Act XLV of 1860)—(*Concluded*).

(4) *S. 182—False information to the police—Charge made against no specific person—Specific charge.*—S. 182 of the Penal Code must be read as an entire section, and when so read, it applies to those cases in which the police are induced, upon information supplied to them, to do or omit to do something which might affect some *third person,* and which they would not have done had they known the truth of the matter laid before them. *In the matter of the petition of* GOLAM AHMED KAZI, 14 C. 314 208

(6) Ss. 193, 199—See FALSE EVIDENCE, 14 C. 653.

(7) S. 211—See FALSE CHARGE, 14 C. 633, 707.

(8) Ss. 268, 283, 290—See PUBLIC NUISANCE, 14 C. 656.

(9) Ss. 379, 447—See FISHERY, 15 C. 402.

(10) S. 411—See MAGISTRATE, 14 C. 355.

(11) S. 411—See RECEIVING STOLEN PROPERTY, 15 C. 511.

(12) S. 466—See FORGERY, 14 C. 513.

(13) S. 503—See CRIMINAL INTIMIDATION, 15 C. 671.

Penalty.

See INTEREST, 14 C. 248.

Pending Suit.

Application of new act to—See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 376.

Personal Appearance.

(1) See ARREST BEFORE JUDGMENT, 14 C. 695.

(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 15 C. 775.

Personally working for gain.

See JURISDICTION, 14 C. 256.

Petitioner.

See PATENT, 15 C. 244.

Plaint.

(1) *Form of, Civil Procedure Code,* 1882, *ss.* 50 *and* 53, *sub-s.* (*d*)—*Charges of fraud—Pleading—Amendment of plaint—Rejection of plaint.*—A plaint charging fraud must set forth particulars; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice. After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth, a good cause of action in regard to the above. *Held,* that dismissal was not the proper mode of disposal of the suit; but the plaint should have been rejected—a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint. GUNGA NARAIN GUPTA v. TILUCKRAM CHOWDHRY, 15 C. 533 939

(2) See MINOR, 14 C. 754.

Pleader.

Pleaders' taids—Mukhtear—Legal Practitioners Act (XVIII *of* 1879)—*Ministerial duties of pleaders, Delegation of, to their* bona fide *clerks.*—A Judge has a right to control his Court premises in such way as is most convenient to the public and to persons working there, but does not act rightly in passing any general order by which he excludes as a general body from his Court any portion of the community acting in an orderly manner. The pleaders of this country are a body of men who from the earliest times have combined in their own persons the duties performed in England by barristers and attorneys, and in acting in this second and ministerial capacity are, on their own responsibility, entitled to work through any number of clerks or taids properly selected and paid by them; and no Court other than a High Court as established by Charter has the right to make rules defining the ministerial duties to be performed by them as distinct from the duties of ther *bona fide* taids or clerks; nor does the Legal Practitioners Act of 1879 control in any way the privilleges which have always

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Pleader—(*Concluded*).
existed in them or restrict their powers, the Act being one passed to bring mukhtears under the control of the Court. *In the matter of the petition of* KHODA BUX KHAN, 15 C. 638 — 1009

Pleading.
(1) *Basis of decision of case.*—The determination in the cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case hereby made. MYLAPORE IYASAWMY VYAPOORY MOODLIAR v. YEO KAY, 14 C. 801 (**P.C.**)=14 I.A. 168=11 Ind. Jur. 397=5 Sar. P.C.J. 50 — 531
(2) See PLAINT, 15 C. 533.

Pleading and Proof.
Variance between—See POSSESSION, 14 C. 592.

Police Officer.
See DISMISSAL, 14 C. 141.

Police Report.
See FALSE CHARGE, 14 C. 707.

Possession.
(1) *Adverse possession—Issues—Variance between pleading and proof.*—The plaintiff sued to recover possession of certain land, alleging that it was lakhiraj land, which he had purchased from a third party. The Court of first instance found that he had not proved the title he alleged, and, although it had been contended at the hearing that a title by twelve years' adverse possession had been proved, the Court held that it was not proved, and as it was not alleged in the plaint, and no issue was raised as to it, the plaintiff was not entitled to succeed, and accordingly dismissed the suit. The plaintiff appealed, and one of his grounds of appeal was that he was entitled to succeed by virtue of the title of adverse possession proved. The lower Appellate Court considered that the plaintiff had proved that he and his vendor had held adverse possession for a period of over twelve years and gave the plaintiff a decree on the strength of that title. The defendant appealed to the High Court, and it was contended on his behalf that the plaintiff was not entitled to succeed upon a title of adverse possession when it was not alleged in his plaint and no issue had been laid down in respect of it. *Held,* that, as the suit was one for possession and the defendant had express notice in the lower Appellate Court that the plaintiff relied on the title of adverse possession, and as he took no objection on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower Appellate Court, the decree of that Court should be confirmed. SUNDURI DASSEE v. MUDHOO CHUNDER SIRCAR, 14 C. 592 — 392
(2) *Suit for possession by purchaser at sale in execution of decree—Civil Procedure Code* (*Act* XIV *of* 1882), *s.* 11, 318—*Concurrent remedies—Limitation Act* (XV *of* 1877), *art.* 138, *sch.* II.—A purchaser at a sale in execution not having applied to the Court for possession under s. 318 of the Code of Civil Procedure, brought a regular suit to obtain possession of the property purchased: *Held,* that, although a remedy might be open to the plaintiff under s. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent. The words "the date of the sale," in the third column of art. 138, sch. II of the Limitation Act, 1877, signify the date of the actual sale, and not that of the confirmation of such sale. KISHORI MOHUN ROY CHOWDHRY v. CHUNDER NATH PAL, 14 C. 644 — 427
(3) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 624.
(4) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 317.
(5) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 14 C. 169; 15 C. 31.
(6) See EVIDENCE, 15 C. 353.
(7) See EXECUTION OF DECREE, 14 C. 484.
(8) See HINDU LAW—GIFT, 14 C. 446.
(9) See ISSUE, 15 C. 684.

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Possession—(*Concluded*).
(10) See LIMITATION ACT (XV OF 1877), 14 C. 544, 610, 801.
(11) See MESNE PROFITS, 14 C. 605.
(12) See SPECIFIC RELIEF ACT (I OF 1877), 14 C. 649.
(13) See TITLE, 14 C. 740.

Possessory Suit.
See SPECIFIC RELIEF ACT (I OF 1877), 14 C. 649.

Poverty.
(1) See COSTS, 14 C. 580.
(2) See SECURITY FOR COSTS, 14 C. 533.

Power-of-attorney.
See EVIDENCE ACT (I OF 1872), 14 C. 176.

Power of Court.
See COMPANIES ACT (VI OF 1882), 14 C. 219.

Practice.
(1) *Costs—Attorney's lien—Lien—Attaching creditor—Fund in Court attached.*—A sum of money had been paid into Court as admittedly due to the plaintiff in a certain suit; the plaintiff not having satisfied in full his attorney's taxed bill of costs, the attorney applied for payment out of the fund in Court; previously to this application the fund had been attached by a third party. *Held* that the attorney was entitled to enforce his lien as against the attaching creditor for all costs incurred up to the date of attachment; that the attaching creditor was then entitled to be satisfied before the attorney could claim payment out of the balance in Court of any sum remaining due to him on account of his costs. SUBRAMANYAN SETTY v. HURRY FROO MUG, 14 C. 374 248

(2) *Crim. Pro. Code (Act X of 1882), s. 435—Revision by the High Court; Revision where lower Court has concurrent jurisdiction with High Court.*—The High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, save on some special ground shown, unless a previous application shall have been made to the lower Court; but in cases in which concurrent jurisdiction is not possessed by the lower Courts no such general rule exists. *In the matter of* QUEEN-EMPRESS v. REOLAH, 14 C. 887 585

(3) *Evidence—Prosecutor's right of reply—Witness called by Court—Tendering witnesses for cross-examination—Crim. Pro. Code (Act X of 1882), ss. 289, 540.*—The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court should not call a witness on whose evidence it could not put implicit reliance. EMPRESS OF INDIA v. KALIPROSONNO DOSS, 14 C. 245 163

(4) *Interrogatories—Refusal to answer—Particulars of damage—Civ. Pro. Code, (Act XIV of 1882), ss. 125, 127.*—The plaintiff alleged that the defendant Bank improperly and without notice, and in violation of an agreement, sold some Government promissory notes, which had been deposited as security for certain loans, and claimed a specified sum as damages, or in the alternative a decree for an account. The defendant Bank denied the alleged agreement, and asserted that the notes had been sold after due notice and on failure of the plaintiff to comply with the terms on which the loans were made. Interrogatories were administered for the examination of the plaintiff, and amongst them one in the following terms:—"State how your estimate of damages to the amount of Rs. 1,30,000 mentioned in the eighth paragraph of the plaint is arrived at?" Upon the plaintiff declining to answer that interrogatory the defendant Bank applied on notice for an order under s. 127 of the Code of Civil Procedure requiring him to answer it fully. *Held,* that the plaintiff was not bound to

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Practice—(*Concluded*).

answer it. If, on the one hand, it was intended to elicit the principle on which the damages were estimated by the plaintiff, the defendant was not entitled to discovery on that point. If, on the other hand, it was sought to elicit an account of the transactions between the parties, it was unnecessary, as the transactions were within the knowledge of the defendant Bank; and if it were not, then the enquiry was premature, as the question whether there had been any wrongful act committed and whether the plaintiff was entitled to any damages should be first determined. NECKRAM DOBAY v. THE BANK OF BENGAL, 14 C. 703 ... 466

(5) *Liberty to apply—Relief after judgment—Damages—Specific performance—Review—Alternative relief.*—On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract, or in the alternative for damages; and on the 24th November 1886, obtained therein a decree for specific performance with the usual liberty to apply. On the 6th December 1886 the plaintiff discovered that it was out of the defendant's power to specifically perform his contract, and he thereupon, on the 13th April 1887, applied to the Court which had granted the decree for a rehearing of suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages, when assessed might be entered up. *Held,* that he was entitled to as for such relief. PEARISUNDARI DASSEE *v.* HARI CHARAN MOZUMDAR CHOWDRY, 15 C. 211 ... 725

(6) *Production of documents—Discovery—Civ. Pro. Code,* 1882 *ss.* 136, 139.—If a notice under s. 131 of the Civ. Pro. Code be not answered as provided by s. 132, the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136, unless the provision of s. 134 are strictly complied with. DHAPI v. RAM PERSHAD, 14 C. 768=12 Ind. Jur. 97 ... 509

(7) *Second Appeal—Vakeel, Right of, to be heard without certified grounds of appeal or without any order admitting the appeal—Rules and Orders of Court* (*Appellate Side*), 86 *and* 162.—A vakeel will not be heard on behalf of an appellant on second appeal, when neither duly certified ground or grounds of appeal have been filed nor the appeal been admitted by order of Court under Rules 86 and 162 of Court. OLIULLAH v. BACHU LAL KHOTTA, 15 C. 706 ... 1054

(8) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 659.

(9) See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 610.

(10) See COSTS, 15 C. 507.

(11) See CRIM. PRO. CODE (ACT X OF 1882), 15 C. 31.

(12) See LIMITATION ACT (XV OF 1877), 15 C. 242.

(13) See PARTIES, 15 C. 35.

Pre-emption.

(1) *Perpetual lease—Sale.*—Where a co-proprietor does not part with his entire interest in land by an absolute sale, but merely grants a lease of it, even though it be a *mourasi* lease, the doctrine of pre-emption will not apply. DEWANUTULLA v. KAZEM MOLLA, 15 C. 184 ... 707

(2) See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761; 15 C. 224.

Prescription Act.

See EASEMENT, 14 C. 839.

Presidency Towns.

See CONFESSION, 15 C. 595.

Presumption.

(1) Arising from possession—See TITLE, 14 C. 740.

(2) Of validity of order for sale—See CIV. PRO. CODE (ACT XIV OF 1882) 14 C. 18.

(3) Rebuttal of.—See WILL, 15 C. 83.

Previous Conviction.

(1) Enhancement of sentence for—See SENTENCE, 14 C. 357.

(2) For purpose of increasing evidence at trial against accused—See EVIDENCE, 14 C. 721 (**F.B.**)

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Price of Goods.
Refuse, Suit for—See SALE, 15 C. 1.

Principal and Agent.
Suit by principal for an account—Object of a decree for an account, as distinguished from a decree made upon the hearing—Costs—Limitation under Act IX *of* 1871, *sch.* II, *art.* 118.—A continued agency, or employment as dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him. The principal claimed also any further sum that might be proved to be payable. The dewan having denied the receipt of the money, and any kind of accountability, it was found against him that the relation of agency existed between the parties. But, on the ground that it was impossible to decide, upon the evidence aduced at the hearing, how much of the principal's money was unaccounted for, though the attempt had been made to prove a balance due, the Appellate Court dismissed the suit. *Held,* that such a suit was essentially one for an account and that the Courts below should have followed the regular course, *viz.*, to order an account to be taken of the defendant's dealings with the plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it. As, however, the defendant had falsely denied his fiduciary position, he was ordered to pay the whole costs of this suit hitherto, including the costs of this appeal, without regard to the result of the account. Limitation under Act IX of 1871, s. 118, which was applicable, commenced from the date on which the agency ceased. HURRINATH RAI v. KRISHNA KUMAR BAKSHI, 14 C. 147 (**P.C.**)=13 I.A. 123=10 Ind. Jur. 475=4 Sar. P.C.J. 751 98

Private Partition.
See MAHOMEDAN LAW—PER-EMPTION, 14 C. 761.

Probate.
Executor, Power of, before Hindu Wills Act—Evidence Act (I *of* 1872), *s.* 41—*Probate Act* (V *of* 1881), *ss.* 2, 148.—S. 41 of the Evidence Act is applicable to probates granted prior to the passing of the Hindu Wills Act. GRISH CHUNDER ROY v. BROUGHTON, 14 C. 861=12 Ind. Jur. 179 — 569

Procedure.
(1) See ACT XVIII OF 1870 (LEGAL PRACTITIONERS), 15 C. 152.
(2) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 14 C. 9.
(3) See CERTIFICATE OF ADMINISTRATION, 15 C. 574.
(4) See MORTGAGE—FORECLOSURE, 14 C. 599.

Production of Documents.
See PRACTICE, 14 C. 768.

Proof.
See DECREE, 14 C. 376.

Property.
(1) See ATTACHMENT, 15 C. 329.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 834.
(3) See HINDU LAW—INHERITANCE, 14 C. 387.
(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 14 C. 241.

Prosecution.
(1) See FALSE CHARGE, 14 C. 707.
(2) See FALSE EVIDENCE, 14 C. 653.

Prosecutor.
——'s right of reply—See PRACTICE, 14 C. 245.

Public Document.
See EVIDENCE ACT (I OF 1872), 14 C. 486.

Public Nuisance.
Penal Code, Act XLV *of* 1860, *ss.* 268, 283, 290—*Obstruction on tidal navigable river.*—Persons placing a bamboo stockade across a tidal

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Public Nuisance—(*Concluded*).

navigable river for the purpose of fishing, although leaving in such stockade narrow opening for the passage of boats, which passage was, however kept closed except on the actual passage of a boat, were charged at the instance of a subdivisional officer with causing an obstruction under s. 283 of the Penal Code. *Held* that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code. *In the matter of the petition of* UMESH CHUNDRA KAR, 14 C. 656 ... 435

Public River.

See FISHERY, 15 C. 388.

Public Tenure.

See SALE, 15 C. 345.

Public Way.

See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 60; 15 C. 564

Purchase.

Pendente lite—See RES JUDICATA, 15 C. 756.

Purchase-money.

See LIMITATION ACT (XV OF 1877), 15 C. 51.

Purchaser.

(1) See BURDEN OF PROOF, 15 C. 555.
(2) See LIS PENDENS, 15 C. 94.
(3) See POSSESSION, 14 C. 644.
(4) See SALE, 15 C. 1.

Purdah-nashin.

See CRIM. PRO. CODE (ACT X OF 1882), 15 C. 775.

Putnidar.

(1) See LAND ACQUISITION ACT (X OF 1870), 14 C. 749.
(2) See SALE, 15 C. 345.

Putnidari Estate.

See MAHOMEDAN LAW—PRE-EMPTION, 14 C. 761.

Pykes.

See RIGHT OF OCCUPANCY, 15 C. 100.

Question and Answer.

See CONFESSION, 14 C. 539.

Receiver.

(1) *Appointment of—Civ. Pro. Code*, 1882, *s.* 503—*Discretion.*—The appointment of a receiver is a matter resting in the discretion of the Court. The powers of appointing a receiver conferred by s. 503 of the Code of Civil Procedure must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out. SIDHESWARI DAVI v. ABHOYESWARI DABI, 15 C. 818 ... 1128

(2) *Power of—Suit to eject tenant claiming permanent tenure without leave of Court.*—*D* was appointed receiver in a partition suit pending in the High Court by an order which, amongst other things, gave him power to let and set the immoveable property, or any part thereof as he should think fit, and to take and use all such lawful and equitable means and remedies for recovering, realizing and obtaining payment of the rents, issues and profits of the said immoveable property, and of the outstanding debts and claims by action, suit, or otherwise as should be expedient. *D*, without special leave of the Court, served a notice to quit on certain tenants of the estate, who claimed to hold a permanent lease, and afterwards instituted a suit to eject them, also without a special leave of the Court. *Held*, that the order appointing him did not give him power to serve such notice or to institute such suit without the special leave of the Court, and that he was appointed

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Receiver—(*Concluded*).

under the provision of s. 503 of the Code of the Civil Procedure and not vested with the general powers referred to in the section, but only with the power referred to in the order appointing him, and as a receiver is not otherwise authorized to institute such suits without special leave of the Court, the suit must be dismissed. DROBOMOYI GUPTA v. C. T. DAVIS, 14 C. 323 214

(3) See EXECUTION OF DECREE, 15 C. 762.

Receiving Stolen Property.

(1) *Evidence—Penal Code* (*Act* XLV *of* 1860), s. 411.—To constitute the offence of receiving stolen property there must be some proof that some person other than the accused had possession of the property, before the accused got possession of it. ISHAN MUCHI v. THE QUEEN-EMPRESS, 15 C. 511 925

(2) See MAGISTRATE, 14 C. 355.

Record of Rights.

See SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), 15 C. 765.

Recovery.

See TRANSFER OF PROPERTY ACT (IV OF 1882,) 15 C. 436.

Rectification.

See SPECIFIC RELIEF ACT (I OF 1877), 14 C. 308.

Re-entry.

See LANDLORD AND TENANT, 14 C. 176.

Reference.

To High Court, Costs of—See COSTS, 15 C. 507.

Refusal.

To answer interrogatories—See PRACTICE, 14 C. 703.

Registered Contract.

See LIMITATION ACT (XV OF 1877), 15 C. 221.

Registered Putnidars.

See SALE, 15 C. 345.

Registering Officer.

See EVIDENCE ACT (I OF 1872), 14 C. 176.

Registration Act (III of 1877).

(1) *Ss.* 34, 77—*Presentation for registration—Limitation for registration after acceptance by Registrar—Acceptance for registration.*—Although under Act III of 1877 it is imperative to present an instrument for registration within a prescribed time from its execution, there is no time fixed within which an instrument presented and accepted for registration must be registered. SATCOURIE PYNE v. LUCKEY NARAIN KHETTRY, 15 C. 538 943

(2) *S.* 60—*Certificate of registration—Document registered by officer having no jurisdiction—Admissibility of evidence.*—The Court can go behind a certificate of registration, and, where it finds that a document was registered by an officer who had no jurisdiction to register it, will refuse to receive it in evidence on the ground that it is not duly registered. BANI MADHAB MITTER v. KHATIR MONDUL, 14 C. 449 299

Regulation VIII of 1793.

(1) Ss. 48, 52—See ENHANCEMENT OF RENT, 14 C. 133.

(2) S. 54—See ILLEGAL CESS, 15 C. 828.

Regulation XLIV of 1793.

Ss. 2, 5—See ENHANCEMENT OF RENT, 14 C. 133.

Regulation XVII of 1806.

(1) See MORTGAGE BY CONDITIONAL SALE, 15 C. 357.

(2) See MORTGAGE—FORECLOSURE, 14 C. 599.

(3) S. 8—See MORTGAGE—FORECLOSURE, 14 C. 451.

Regulation V of 1812.

Ss. 2 & 3—See ILLEGAL CESS, 15 C. 828.

Regulation XVIII of 1812.

S. 2—See ILLEGAL CESS, 15 C. 828.

Regulation IX of 1816.

See SALE FOR ARREARS OF REVENUE, 14 C. 440.

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Regulation VIII of 1819.
(1) Ss. 3, 5, 6, 14—See SALE FOR ARREARS OF RENT, 15 C. 345.
(2) S. 8, para. 2—See SALE FOR ARREARS OF RENT, 14 C. 365.
Regulation III of 1828.
See SALE FOR ARREARS OF REVENUE, 14 C. 440.
Regulation III of 1872.
See SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872), 15 C. 765.
Regulation I of 1886.
See ASSAM LAND AND REVENUE REGULATION (I OF 1886), 15 C. 227.
Relief.
(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 15 C. 422.
(2) See PRACTICE, 15 C. 211.
Relinquishment.
Evidence of—See RIGHT OF OCCUPANCY, 15 C. 17.
Rent.
(1) See ACT IX OF 1880 (BENGAL CESS), 15 C. 237.
(2) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 47, 15 C. 166.
(3) See APPEAL—SECOND APPEAL, 15 C. 107.
(4) See ASSAM LAND AND REVENUE REGULATION (I OF 1886), 15 C. 227.
(5) See ENHANCEMENT, 15 C. 145.
(6) See LANDLORD AND TENANT, 14 C. 176, 14 C. 751.
(7) See LIMITATION ACT (XV OF 1877), 15 C. 221.
(8) See RIGHT OF OCCUPANCY, 15 C. 17.
(9) See SMALL CAUSE COURT—MOFUSSIL, 15 C. 174.
Rent Charge.
See SALE, 14 C. 518.
Rent Suit.
(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE) 14 C. 570.
(2) See APPEAL—SECOND APPEAL, 15 C. 107.
Representative.
(1) See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION) 15 C. 54.
(2) See EXECUTION OF DECREE, 15 C. 371.
(3) See PARTIES 15 C. 35.
(4) See RES JUDICATA, 14 C. 401.
Res-Judicata.
(1) *Civ. Pro. Code,* 1877, *ss.* 13 *and* 43—*Act* XII *of* 1879, *s.* 6—*Act* VIII *of* 1859, *s.* 7—*Inclusion of whole claim in suit.*—The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgage. The first suit in which he with another claimed as under-proprietors was dismissed in 1866, on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional sale which had become absolute. Another suit was then brought to recover the talukdari right under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held,* that the present suit to redeem the same property under a mortgage was not barred under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879. The claim to redeem did not arise out of the former cause of action within the meaning of the sections of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before it could not be regarded as a "portion of his claim," and he was not precluded by having omitted it from bringing it forward. AMANAT BIBI v. IMDAD HUSAIN, 15 C. 800 (**P.C.**)=15 I.A. 106=12 Ind. Jur. 255=5 Sar. P.C.J. 214=Rafique & Jackson's P.C. No. 103 ... 1117
(2) *Civ. Pro. Code.* 1882 *s.* 13—*Matter adjudged in a former suit—Purchase pendente lite.*—A zemindar having granted a putni lease

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Res-Judicata—(*Continued*).

mortgaged the zemindari to the putnidar, who, having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest, subject to the mortgage. Before that purchase, though after the attachment, another holder of a decree against the zemindar brought the right, title and interest in the zemindari to sale in execution of his decree, and himself became the purchaser. He then, claiming to have obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lessee had ceased on the purchase by the latter. The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held,* that the dismissal of the rent suit, which involved the title, barred the present one; and the opinion was expressed that the plaintiff had been rightly adjudged in the rent suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made. RADHAMADHUB HOLDAR v. MONOHUR MUKERJEE, 15 C. 756 (**P.C.**)=15 I.A. 97=12 Ind. Jur. 297=5 Sar. P.C.J. 211 .. 1088

(3) *Code of Civil Procedure, s.* 13—*Identity of cause of action with that of prior suit, to which the plaintiff in a subsequent suit had been a party—Effect of judgment, that a will had been revoked, to bar, between the parties, any claim founded solely on the will.*—The widow of a talukdar, acting under his supposed will, appointed the present appellant to succeed to the taluks and other estate which had belonged to the deceased. The heir of the deceased under the Oudh Estates Act, I of 1869, obtained the judgment of the Judicial Committee, declaring that he was entitled to the taluks as against the present appellant, whose title was under the will which had been revoked, as the Committee found. Another suit brought by the present appellant for a decree declaring that, in virtue of his appointment by the widow under the will, he was entitled to the whole of the estate of the deceased, talukdari and non-talukdari, was dismissed by the Judicial Committee on the ground that he had no such title to the whole or any part of the estate. *Held,* that this prior judgment was conclusive to bar the present suit which, being founded entirely upon the appellant's appointment in pursuance of the will, was brought for possession of all the estate of the deceased as well as a declaration of right thereto. Although the heir was not entitled to possession of the estate of the deceased other than talukdari, inasmuch as the widow took her estate therein, nevertheless, the claim of the present appellant being only founded upon her appointment under the will, as if unrevoked, and not being a claim for property as descending to the widow upon her husband's intestacy, the prior judgment was binding in the present suit. TRILOKI NATH SINGH v. PERTAB NARAIN SINGH, 15 C. 808 (**P.C.**)=15 I.A. 113=12 Ind. Jur. 332=5 Sar. P.C.J 219=Rafique & Jackson's P.C. No. 104 1122

(4) *Estoppel — Auction-purchaser — "Representative" — Mortgage—Adoption—Hindu Law, Mitakshara—Evidence Act* (I *of* 1872), *s.* 115—*Limitation Act* (XV *of* 1877), *sch,* II, *arts.* 118, 140, 141.—A purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of s. 115 of the Evidence Act. A Hindu governed by the Mitakshara School of Law, died on the 12th May 1867, leaving him surviving a widow *B* and a brother *R* who was admittedly the next reversioner. In July, 1867, *B* purported to adopt a son *D* to *A*, and subsequently in September, 1867, obtained a certificate under Act XL of 1858. In 1872 *B* obtained a loan from the plaintiff *M* of Rs. 9.000, and to secure its repayment executed a mortgage of seven mouzahs in favour of *M* as guardian of *D*. The money was advanced and mortgage executed at the instigation of *R* and with his consent, and upon his representation

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that *D* was the duly adopted son of *A* and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against *A* in his lifetime and against his estate after his death. *B* died in 1878. On the 14th August 1880, *M* instituted a suit against *D* upon his mortgage, and in that suit he made *S* a party defendant as being the purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June, 1882, *M* obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged mouzahs. In the proceedings taken in execution of that decree *M* was opposed by *L*, who was afterwards held to be a *benamidar* for *S*, who claimed that he had on the 8th November 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against *R*. On the 29th February 1884, *L*'s claim was allowed, and on the 11th August, 1884, *M* brought this suit against *L*, *S*, *R* and *D*, and the decree-holders in the suits against *R*, for a declaration of his right to follow the mortgaged property in the hands of *S*. It was found as a fact that the adoption of *D* was invalid; that the advance by *M* to *B* was justified by legal necessity; and that *L* was the *benamidar* of S. It also appeared that *M* had himself become the purchaser of one of the mortgaged mouzahs. The lower Court gave *M* a decree declaring him to be entitled to recover the full amount of the mortgage money from the five mouzahs in the hands of *S*. *L* and *S* appealed, and *M* filed a cross appeal, alleging the adoption to be valid and binding on *S*. It was contended that *S* as the representative of *R* was estopped from denying the validity of *D*'s adoption, and thus having been a party to *M*'s first suit the question as to the liability of the mouzahs to satisfy the mortgage lien was *res judicata* as against him. It was also contended that the five mouzahs should not be saddled with the whole of the mortgage debt, but that the mouzah in the hands of *M* should bear its proportionate part thereof. *Held* that, as *S* was merely a party of *M*'s original suit as purchaser of one mouzah, and as he, subsequently to the institution of that suit, acquired *R*'s interest in the five mouzahs, and as *R* was not a party to that suit nor was his interest represented in any way, the decree was in no way binding against *R*, and therefore *S* was not barred by *res judicata* from setting up the interest of *R* in the five mouzahs so acquired by him. *Held*, further, that, though *R* was estopped by his conduct from disputing the validity of the adoption, or of *M's* rights as mortgagee, *S* being an auction-purchaser was not bound by *R*'s acts, and was not estopped from disputing the adoption, as he derived his title by operation of law adversely to *R*, and was thus in a different position from a person claiming under a voluntary alienation. *Held*, also, that, though *B* purported to execute the mortgage as guardian for *D*, though *D* was not the adopted son of *A*, the substance of the transaction and not the form had to be looked at, and as *B* had full power to alienate for legal necessity the mortgage was still binding on the estate of *A*; and further that, even if there had been no legal necessity, having regard to the fact that it was made with the consent of *R*, the next reversioner, it equally created a valid charge upon the property, but that the mouzah in the hands of *M* must bear its share of the mortgage debt, and that the decree of the lower Court was wrong in declaring that the five mouzahs in suit were to bear the whole amount of the debt. It was further contended that *D* had acquired an absolute title by more than twelve years' adverse possession from the date of his adoption in 1867 before the purchase by *S* in 1880. *Held* that, as *B* died within twelve years of the alleged adoption, although under art. 118, sch. II, Act XV of 1877 (which came into force before the adoption could become perfected by efflux of time), a suit for a declaration that an adoption was invalid should be brought within six years from the date

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when the adoption becomes known to the plaintiff, still, having regard to the provisions of arts. 140 and 141, the next reversioner was not thereby prevented from suing to obtain possession within twelve years from the date of the widow's death or when the estate fell into possession, and therefore that *S* was not barred by limitation from disputing *D*'s title. *Quære.*—Whether the ruling in 12 M.I.A. 397, applies to cases governed by the Mitakshara Law in Northern India, and whether an adoption made by a widow after the death of the husband without his express consent, but with the consent of his near kindred, is valid, or whether the recognition of the adopted son by the next reversioner would likewise render the adoption valid. LALA PARBHU LAL v. MYLNE, 14 C. 401 267

(5) See LIMITATION, 14 C. 323.

Restitution.

Of property after reversal of decree—See—EXECUTION OF DECREE, 14 C. 484.

Restriction.

On bequest, Effect of, if contrary to Hindu Law,—See—HINDU LAW,—WILL 15 C. 409.

Resumption.

See BURDEN OF PROOF, 14 C. 382.

Resumption Chittas.

See TITLE, 14 C. 120.

Retrospective Enactment.

See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 376.

Revenue.

(1) Payment of arrears of, by one co-sharer—See CO-SHARERS, 14 C. 809.

(2) Suit to recover money paid on account of—See LIMITATION ACT (XV OF 1877), 15 C. 542.

Revenue-paying Estate.

(1) See JURISDICTION, 15 C. 198.

(2) See MESNE PROFITS, 14 C. 605.

Review.

(1) *Error of law—Law, Mistaken view of—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 623.—A review of judgment may be granted (if it is necessary for the ends of justice that the judgment should be reviewed) where there is an error of law on the fact of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law. In this case, without deciding whether there was or not any error in law, the application for review of judgment was refused on the ground that it did not appear there was any danger of its causing a miscarriage of justice. *In the matter of the petition of* SHARUP CHAND MALA. SHARUP CHAND MALA v. PAT DASSEE, 14 C. 627 416

(2) *Of judgment of High Court—Crim. Pro. Code* (*Act* X *of* 1882), *s.* 369.—The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, and the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision or interfere with it in any way. *In the matter of petition of* F. W. GIBBONS, 14 C. 42 (F.B.) 29

(3) *Second application for review—"Final"—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 378—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 623, 629.—There is nothing in the Civ. Pro. Code (Act XIV of 1882) which prevents a second application for a review being made after a previous application for a review has been made and rejected, and such an application can therefore be entertained. The word "Final" in s. 629 of Act XIV of 1882 bears the same meaning, and ought to have the same construction put upon it as was put upon the same word in s. 278 of Act VIII of 1859 by the Full Bench in B.L.R. Sup. Vol. 367. GOBINDA RAM MONDAL v. BHOLANATH BHATTA, 15 C. 432 872

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 166.

(5) See LIMITATION ACT (XV OF 1877), 15 C. 242.

(6) See PRACTICE, 15 C. 211

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Revision.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 768.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 361.

(3) See PRACTICE, 14 C. 887.

Right of Occupancy.

(1) *Agreement restricting right of occupancy—Bengal Tenancy Act (Act VIII of 1885), s. 178, applicability of, to suits pending when act came into force.*—S. 178 of the Bengal Tenancy Act (Act VIII of 1885) has no application to suits instituted before the date on which that Act came into force. So where a landlord sued to eject a tenant who had executed a *solenamah* agreeing to hold the land in suit for a specified period at a specified rent and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on the 6th October 1885, and where it was found that at the date of the *solenamah* the tenant had acquired a right of occupancy with respect to some of the lands in suit: *Held,* that the tenant was not entitled to the benefits conferred by s. 178, cl. 1, sub-cl. (*b*) of the Bengal Tenancy Act, but was liable to be ejected. MOHESHWAR PERSHAD NARAIN SINGH v. SHEO BARAN MAHTO. MOHESHWAR PERSHAD NARAIN SINGH v. DURSUN RAUT, 14 C. 621 ... 411

(2) *In Assam—Pykes, their rights and privileges.*—The plaintiff who held land in Assam under a settlement from Government sued to eject the defendant from certain lands within his holding. It was proved that the defendant was a descendant from one of the pykes who held lands under the Assam Rajahs; that the Assam *Rajahs* granted the *pyke* to a certain *lakherajdar;* that the pyke held the lands in suit as before under the *lakherajdar* that the *lakheraj* was subsequently resumed by Government; and that the defendant had his house and gardens on the land for a long time, and had paid rent for many years at Government rate. *Held,* that the defendant was not liable to ejectment. The rights of such tenants explained and discussed. DINABUNDHU SURMAH v. BODIA COCH, 15 C. 100 ... 651

(3) *Non-payment of rent—Relinquishment—Evidence of.*—Mere non-payment of rent does not extinguish or amount to a relinquishment of the right of occupancy. NILMONEY DASSY v. SONATUN DOSHAYI, 15 C. 17 ... 597

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 553, 15 C. 376.

(5) See LIMITATION, 14 C. 323.

Right of Reply.

See PRACTICE, 14 C. 245.

Right of Suit.

(1) *Civ. Pro. Code, s. 11—Hereditary right to an office—Declaratory decree—Jurisdiction—Emolument.*—A suit for the establishment of a right to the hereditary title of musicians to a satra will lie under s. 11 of the Code of Civil Procedure notwithstanding that the right sought to be established is one which brings in no profit to those claiming it. MAMAT RAM BAYAN v. BAPU RAM ATAI DURA BHAKAT, 15 C. 159 ... 690

(2) *Slander—Privilege of witness—Slander uttered by witness whilst under examination in a judicial proceeding.*—A witness in a Court of Justice is absolutely privileged as to anything he may say as a witness, having reference to the enquiry on which he is called as a witness. The plaintiff sued to recover damages for slander, the statement complained of, being alleged in the plaint to have been made by the defendant while being examined as a witness during the hearing of a case before a Magistrate. It was found that the statement was made in answer to questions put to the defendant as a witness and allowed by the Court as relevant to the case. The plaintiff alleged that the statement was made maliciously that the defendant bore him a grudge, and that it was to give vent to that grudge and to injure his reputation that the statement was made. *Held,* that the plaint disclosed no cause of action, and that the suit had been properly dismissed. BHIKUMBER SINGH v. BECHARAM SIRCAR. BHIKUMBER SINGH v. GOTI KRISTO DAS, 15 C. 264 ... 761

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Right of Suit.—(*Concluded*).

(3) *Subscription, Suit for—Liability of subscribers to a proposed Town Hall.*—A suit will lie to recover a subscription promised, the subscriber knowing that, on the faith of his and other subscriptions, an obligation is to be incurred to a contractor for the purpose of erecting a building to be paid for out of the moneys subscribed. KEDAR NATH BHATTACHARJI v. GORIE MAHOMED, 14 C. 64 43

(4) *Suit to set aside sale—Fraud—Sale under Act* X *of* 1859—*Civ. Pro. Code, s.* 244—*Act* XXIII *of* 1861, *s.* 11.—*B* obtained an *ex parte* decree for arrears of rent against *S* under Act X of 1859, and in execution of that decree brought the tenure to sale. At the sale the tenure was purchased by *N*. *S* then brought a suit against *B* and *N* to set aside the sale on the ground that the rent decree and all execution proceedings taken thereunder were fraudulent, and alleging that *B* was the actual purchaser in the name of *N*. An objection was taken that the suit would not lie, and that the questions in the suit were such as could have been determined, and were determined by the Court executing the decree. *Held,* that neither s. 244 of the Civ. Pro. Code, nor the corresponding s. 11 of Act XXIII of 1861, has any application to proceedings in execution of a decree under Act X of 1859, and that the suit, being one to set aside the sale on the ground of fraud, was maintainable. BROJO GOPAL SIRCAR v. BUSIRUNNISSA BIBI, 15 C. 179 704

(5) See CRIM. PRO. CODE (ACT X OF 1882), 15 C. 527.

Rioting.

See IRREGULARITY, 14 C. 358.

Rival Claimants.

See CERTIFICATE OF ADMINISTRATION, 15 C. 574.

Road Cess.

See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 14 C. 1.

Rule.

See ACT V OF 1861 (POLICE), 15 C. 194.

Rules of High Court.

See PRACTICE, 15 C. 706.

Sale.

(1) *By Registrar—Title to property purchased at Registrar's sale—Doubtful title, Enforcements of—Endowment—Rent charge.*—The Court will not enforce a doubtful title on a purchaser where (*a*) there is a reasonable probability of litigation resulting; or (*b*) where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court. Case in which the title sought to be enforced did not fall within these rules. KALLY DOSS SEAL v. NOBIN CUHNDER DAS, 14 C. 518 343

(2) Certificate—See MORTGAGE—SALE, 15 C. 546.

(3) Certificate—See SALE IN EXECUTION OF DECREE, 14 C. 572.

(4) *For arrears of rent—Construction of Regulation* VIII *of* 1819, *s.* 8, *para.* 2—*Publication of copy or extract of such part of the notice of sale as may apply to the tenure of the defaulter.*—Publication of the notice of sale of a tenure under Regulation VIII of 1819 is required to be in the manner prescribed in s. 8, clause 2; and personal service on the defaulter is not sufficient. The objects of directing local publication of the notice, *viz.*, to warn the under-lessees of the sale proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant katcheri or to serve it personally. If there is a katcheri on the land of the defaulting putnidar, meaning the land which is to be sold for arrears of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that katcheri, and if there is no such katcheri, on the land held by the defaulter, the copy or extract must be published at the principal town, or village on the land. In the description of this in clause, 2, as "the notice required to be sent into the mofussil," the word "mofussil," is

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opposed to the sadar katcheri of the zemindar, and refers to the subordinate estate, which is the subject of the sale proceedings. Where a zemindar, selling the tenure of a defaulting putnidar under the Regulation, had caused to be stuck up the requisite petition and notice at the Collector's katcheri, and the notice at the zemindar's katcheri, but not the copy or extract which is directed by the Regulation to be similarly published at the katcheri nor had published it at any other place upon the land of the defaulter: *held*, that the zemindar had not observed a substantial part of the prescribed process and that this was for the defaulting putnidar "a sufficient plea" within the meaning of the Regulation. THE MAHARANI OF BURDWAN v. KRISHNA KAMINI DASI, 14 C. 365 (**P.C.**)=14 I. A. 30=11 Ind. Jur. 275=4 Sar. P. C. J. 772 ... 242

(5) *For arrears of rent—Regulation* VIII *of* 1819, *ss.* 3, 5, 6, 14—*Sale of putni tenure—Registered putnidars—Suit by unregistered putnidars.*—An unregistered proprietor of a putni tenure is entitled to sue to set aside a sale held under Regulation VIII of 1819. JOYKRISHNA MUKHOPADHIA v. SARFANNESSA, 15 C. 345 ... 814

(6) *For arrears of rent—Under-tenure—Bengal Act* (VIII *of* 1869), *ss.* 34, 59—61 *and* 65—*Sale of property other than under-tenure.*—Where a decree had been obtained for arrears of rent of an under-tenure, and in execution thereof application was made for the attachment and sale of a certain property of the judgment-debtor, other than the tenure for which the arrears were due—objection was taken that the *kabuliyat* stipulated that the tenure itself should be first sold in execution of the decree: *Held,* that the *kabuliyat* not being referred to, or incorporated with, the terms of the decree, it was not open to the judgment-debtor to go behind the decree, as to the mode in which it was to be executed. But, *held,* on the construction of Bengal Act VIII of 1869, ss. 59-61 and 65, that the under-tenure should first be sold before any other immoveable property could be made available. Section 34 of that Act (introducing the procedure laid down in the Civil Procedure Code into rent suits, "save as is in Act VIII of 1869 otherwise provided,") made no alteration in this respect, ss. 59—61 and s. 65 especially providing for such mode of execution. LALIT MOHUN ROY v. BINODAI DABEE, 14 C. 14 ... 10

(7) *For arrears of revenue—Act* XI *of* 1859, *s.* 36—*Certified purchaser, Suit against—Civil Procedure Code,* 1882, *s.* 317.—*A,* the certified purchaser of a taluk at a sale held under the provisions of Act XI of 1859 for arrears of revenue, and who had obtained symbolical possession had at the time of the sale agreed with *B,* the former owner of the taluk, to reconvey to him (*B*) after the sale had been completed. In a suit by *B* to compel specific performance of the contract, alleging that he had never quitted actual possession of the taluk, objection was taken that the suit was not maintainable under s. 36 of Act XI of 1859 and s. 317 of Act XIV of 1882. *Held* that the suit, not being one to oust the certified purchaser from possession, was not barred by s. 36; and that neither was it barred by s. 317 of the Civil Procedure Code, that section applying only to sales in execution of decrees of Civil Courts held under the Procedure Code. FAZAL RAHAMAN v. IMAM ALI, 14 C. 583 ... 386

(8) *For arrears of revenue Act* XI *of* 1865, *ss.* 37, 52—*Sunderbund estate—District of which portion only is permanently settled—District, meaning of—Beng. Regs.* IX *of* 1816 *and* III *of* 1828—*Estate—Bengal Act* VII *of* 1868.—The plaintiff was the auction-purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of an estate in the Sunderbunds on which the defendant was the holder of a *mokurari maurasi jungleburi* tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, and therefore within that Collectorate with regard to the provisions of

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Bengal Act VII of 1868, s. 10. The district of the 24-Pergunnahs is a permanently settled district, but the portion of it forming the Sunderbunds was declared by Reg. III of 1828, s. 13, not to be included in the permanent settlement. The Sunderbunds tract was moreover under Reg. IX of 1816 formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled: *Held* that, whether the term "district" was used with reference to the jurisdiction of the Civil Courts or the Revenue Collector, the plaintiff was the purchaser of an estate in a "permanently-settled district" within the meaning of s. 37 of Act XI of 1859, and not in a district "not permanently settled" within s. 52 of that Act; and he was therefore entitled to eject the defendant. The position of the estate within the district of the 24-Pergunnahs was not affected by the appointment of the Commissioner of the Sunderbunds as an officer specially invested with the powers of the Collector within a certain portion of that district. *Held,* also, that the defendants' tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859. *Held,* further, that, though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Beng. Act VII of 1868. BHOLANATH BANDYOPADHYA v. UMACHURN BANDYOPADHYA AND UMACHURN BANDYOPADHYA v. BHOLA NATH BANDYOPADHYA, 14 C. 440 292

(9) *For arrears of revenue—Ejectment, Right of—Benami lease obtained by defaulting proprietor from purchaser at revenue sale, Effect of, on under-tenures—Act* XI *of* 1859, *ss.* 37, 53.—A mehal belonging to defendants Nos. 1 and 2 was brought to sale for arrears of Government revenue and purchased by defendant No. 6, from whom the plaintiff obtained a talukdari pottah of a portion of the land comprised in the mehal. The plaintiff thereupon sued to eject defendant No. 4, who was in possession of the land under a lease which was found to have been granted previous to the revenue sale. In the suit it was found that the plaintiff obtained the talukdari pottah as mere benamidar for defendant No. 1. *Held,* that the provisions of s. 53 of Act XI of 1859 applied to the case, and that the plaintiff was not entitled to interfere with the tenancy of defendant No. 4 or eject him, and that the suit had been rightly dismissed. RASH BEHARI GHOSE v. PURNA CHUNDER MOZUMDAR, 15 C. 350 817

(10) *For arrears of revenue—Liability to encumbrances—Act* XI *of* 1859, *ss.* 13 *and* 54—*Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Surrender of dur-mokurari interest, how proved—Limitation.* (*Act* XV *of* 1877), *sch. II, art.* 144.—After the sale of a share in an estate under the provisions of Act XI of 1859 a suit was brought to establish a mokurari lease, as an encumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch. II, art 144, the twelve years' bar commencing from the date of possession first held adversely. The mokuraridar having granted a dur-mokurari lease of part of his holding, which was afterwards surrendered for good consideration, ikrarnamas to this effect were executed, but not being registered were not receivable in evidence. *Held,* that to prove a

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formal deed of reconveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dur-mokurari interest. The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional, that the whole rent reserved should be paid: *Held* that this condition should have been omitted, the amount of rent being determinable by a future proceeding if necessary. [IMAMBANDI BEGUM v. KAMIESWARI PERSHAD, 14 C. 109 (**P.C.**)=13 I.A. 160=10 Ind. Jur. 468=4 Sar. P.C.J. 732 — 72

(11) For arrears of Road Cess—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 14 C. 1.

(12) *In execution of decree—Judgment-debtor's share in joint ancestral estate—Mitakshara Law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.*—The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right. *Held* that, as the mortgage and decree, as well as the sale certificate, expressed only the father's right the *prima facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only, did not counteract but supported. The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances. SIMBHUNATH PANDE v. GOLAP SINGH, 14 C. 572 (**P.C.**)=14 I.A. 77=11 Ind. Jur. 311=5 Sar. P.C.J. 5 — 379

(13) *In execution of Decree—Suit to set aside sale—Fraud—Auction-purchaser acting* bona fide—*Fraudulent execution of decree after adjustment—Execution of decree adjusted, but of which satisfaction has not been entered, Effect of, on rights of innocent purchaser—Adjustment of decree without certifying.*—In 1881 *R* obtained a decree against *M* for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between *R* and *M*, one of the terms of which was that *R* gave up his claim to costs. Satisfaction of the decree was not entered up in Court. In 1884 *K*, purporting to be acting on behalf of *R*, but without his knowledge or sanction, applied for execution of the decree for costs, and in the execution proceedings which followed a share of *M* in a tank was sold and purchased by *A*. *M* thereupon brought a suit against *A*, *R*, *K* and others to set aside the sale, alleging that the whole of the execution proceedings, had been taken without notice to him, and had been fraudulently taken by the defendants in collusion with one another in order to deprive him of his share in the tank. It was found that *A*'s purchase was an innocent one, and untainted with fraud. *Held*, upon the authority of 13 I.A. 106, 14 C. 18, that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not having been certified to the Court, the Court had jurisdiction to execute it. *Held*, further, that the execution proceedings could not be held to be void, as although instituted by a person who had no authority to institute them, they were instituted

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Sale—(*Concluded*).

in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made *bona fide* on his behalf. MATHURA MOHUN GHOSE MONDUL v. AKHOY KUMAR MITTER, 15 C. 557 ... 956

(14) *Of goods by description—Purchaser's right to reject—Whether goods according to contract or not, how relevant—Delivery of part of the goods—Contract Act, s. 78—Suit for prices of goods rejected.*—B.K. agreed to buy from M.R. five bales of chrome orange twist, "or any part thereof that may be in a merchantable condition ex 'City of Cambridge' "or other vessel or vessels," with specific marks and numbers, each bale containing 500 lbs. at so much per lb., to be paid for on or before delivery. B.K. took delivery of and paid for only one bale, but rejected the others. M.R. brought a suit for the price of the four bales rejected. *Held,* that the property in the goods did not pass to the defendant by the terms of the contract, nor was the delivery that was taken by him of the one bale a delivery of "part of the goods" within the meaning of ss. 78 and 92 of the Contract Act; the suit therefore, did not lie. *Held* also that the question whether the defendant was entitled to refuse the goods, in other words whether the goods were according to the contract or not, was one that was unnecessary for the purposes of the present suit; but it would have been otherwise if the suit were one for damages on the ground of the defendant's refusal to accept the goods. A purchaser's right to reject goods by reason of their not answering the description in the contract may be independent of the question whether the property in the goods has passed to him or not. MITCHELL REID & Co. v. BULDEO DAS KHETTRI, 15 C. 1 ...

(15) Of property—See BURDEN OF PROOF, 15 C. 555.

(16) Of property—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 679, 15 C. 488, 15 C. 771.

(17) Of property—See EXECUTION OF DECREE, 14 C. 661.

(18) See GHATWALI TENURE, 15 C. 471.

(19) See HINDU LAW—ALIENATION, 15 C. 717.

(20) See HINDU LAW—JOINT FAMILY, 15 C. 70.

(21) See MORTGAGE—SALE, 15 C. 546.

(22) See PRE-EMPTION, 15 C. 184.

(23) See RIGHT OF SUIT, 15 C. 179.

(24) See SALE FOR ARREARS OF RENT, 14 C. 14.

Sanction of Court.

(1) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 627.

(2) See MINOR, 14 C. 204.

Sanction to prosecute.

See FALSE EVIDENCE, 14 C. 653.

Search Warrant.

See INSPECTION OF DOCUMENTS, 15 C. 109.

Secretary of State.

(1) See JURISDICTION, 14 C. 256.

(2) See LIMITATION ACT (XV OF 1877), 14 C. 256.

Security.

(1) See APPEAL TO PRIVY COUNCIL, 14 C. 290.

(2) See ARREST BEFORE JUDGMENT, 14 C. 695.

Security for Costs.

Poverty—Speculative suit.—The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him; it is otherwise where he is not the real litigant, but a mere puppet in the hands of others. KHAJAH ASSENOOLLAJOO v. SOLOMON, 14 C. 533 ... 353

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Sentence.

Penal Code, Act XLV *of* 1860, *ss*, 75, 179, 511—*Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction.*—A person who has been convicted of the offence of theft (an offence punishable under Chapter XVII of the Penal Code) does not, on being convicted of an *attempt* to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code. QUEEN-EMPRESS v. SRICHARAN BAURI, 14 C. 357 ... 236

Separate Charges.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 14 C. 395.

Separate Suit.

See SURETY, 15 C. 497.

Service of Notice.

See NOTICE TO QUIT, 15 C. 681.

Service of Summons.

See MINOR, 14 C. 204.

Sessions Judge.

See VERDICT OF JURY, 15 C. 269.

Settlement Officer.

See SONTHAL PERGANAS SETTLEMENT REGULATION (III OF 1872), 15 C. 765.

Sharer.

See LIMITATION ACT (XV OF 1877), 14 C. 544.

Short Delivery.

See LIMITATION ACT (XV OF 1877), 14 C. 457.

Slander.

See RIGHT OF SUIT, 15 C. 264.

Small Cause Court, Mofussil.

(1) *Jurisdiction or arrears of rent of homestead or bustoo land, suit for—Provincial Small Cause Courts Act* (*Act* IX *of* 1887), *sch.* II, *cls.* 7 *and* 8.—A Mofussil Small Cause Court has no jurisdiction to entertain a suit for arrears of rent of homestead or bustoo land under the provisions of the Provincial Small Cause Court Act (Act IX of 1887). UMA CHURN MANDAL v. BIJARI BEWAH, 15 C. 174 ... 700

(2) *Contract Act* (IX *of* 1872), *ss.* 59, 70—*Small Cause Court Act* (XI of 1865), s. 6—*Putni rent—Implied Contract.*—The plaintiff, a purchaser in execution of a putni right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the putni right, a sum of money which she had been compelled to pay to the zemindar for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court *held* that assuming the suit to lie independent or any express promise, it was one cognizable by a Court of Small Causes and no appeal would therefore lie. Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. KRISHNA KAMINI CHOWDHRANI v. GOPI MOHUN GHOSE HAZRA, 15 C. 652 ... 1018

(3) *Maintenance, suit for arrears of—Fixed maintenance—Small Cause Courts* (*Provincial*) *Act* (*Act* IX *of* 1887), *sch.* II, *cl.* 38.—A suit for arrears of fixed maintenance is a suit relating to maintenance within the meaning of that term as used in cl. 38 of sch. II of the Provincial Small Cause Courts Act (Act IX of 1887), and is therefore not cognizable by a Court of Small Causes. AMRITOMOYE DASIA v. BHOGIRATH CHANDRA *alias* JOGESSAR SHADHOO, 15 C. 164 ... 693

(4) *Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *arts.* 2, 41, 42 *and* 44—*Suit for costs paid by one of two persons jointly liable.*—*N. C.* granted a lease of three plots of land to *B. S.* The heirs of the former lessee brought a suit against *N. C.* and *B. S.* to recover possession of the same three plots of land. The suit was decreed with costs; and the costs amounting to Rs. 80 and annas 5, were recovered from *B. S.* alone. Thereupon *B. S.* brought this suit against *N. C.* in the Court of Small Causes at Pabna for the recovery of that amount. *Held,* that the suit was one which did not come under arts. 2, 41, 42

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Small Cause Court, Mofussil—(*Concluded*).

or 44 of sch. II, Act IX of 1887, and was cognizable by the Small Cause Court. BISVA NATH SHAH v. NABA KUMAR CHOWDHARY, 15 C. 713 1059

(5) *Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *art.* 35, *cl.* (*g*)—*Suit for actual pecuniary damages for breach of contract of marriage Jurisdiction.*—A suit for actual pecuniary demages for breach of contract of marriage comes within cl. (*g*) of art. 35 sch. II of Act IX of 1887, and as such is excluded from the jurisdiction of the Small Cause Court. KALI SUNKER DASS v. KOYLASH CHUNDER DASS, 15 C. 883 1138

Son.

(1) Liability of, to pay father's debt—See HINDU LAW—ALIENATION, 15 C. 717.

(2) Partition by—See HINDU LAW—PARTITION, 15 C. 292.

Sonthal Parganas Settlement Regulation III of 1872.

Ss. 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights.—Onus of proof,*—In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Regulation III of 1872, and to recover *khas* possession of a mouzah, alleging that the defendant held the lands as *chakran,* and that the services for which he held them had ceased, the defendant pleaded that the tenure was *Dur mokurari,* that the lands had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. The plaintiff sought to set aside the settlement on the ground of the non-publication of the record of rights and fraud of the defendant, and both the lower Courts found that the record of rights had not been published by its being posted conspicuously in the village as required by s. 24. On second appeal it was contended on behalf of the defendant that such publication was not essential, but that it was open to the Settlement Officer to publish the record in such manner as might be convenient. *Held,* that posting the record conspicuously in the village is an essential part of the publication, and that the suit was not barred by limitation. It was further contended that the onus of proving the tenure to be *dur mokurari,* which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree. *Held,* that the onus of proving the validity and propriety of the settlement proceedings upon which he relied had been properly thrown on the defendant. NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU, 15 C. 765 1094

South Breeze.

See EASEMENT, 14 C. 839.

Specific Charge.

See PENAL CODE (ACT XLV OF 1860), 14 C. 314.

Special Defence.

See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 15 C. 54.

Specific Performance.

See PRACTICE, 15 C. 211.

Specific Relief Act (I of 1877).

(1) *S.* 9—*Possessory suit—Constructive possession by receipt of rents.*—The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act. The object of that section is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent. *In the matter of the petition of* TARINI MOHUN MOZUMDAR. TARINI MOHUN MOZUMDAR v. GUNGA PROSAD CHUCKERBUTTY *alias* TINCOWRIE CHUCKERBUTTY, 14 C. 649 431

(2) *S.* 31—*Rectification of instrument.*—A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there

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Specific Relief Act (I of 1877).—(*Concluded.*)

was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under s. 31 of Act I of 1877 (the Specific Relief Act), to have the instrument rectified was held to have been rightly dismissed. AMANAT BIBI v. LACHMAN PERSAD, 14 C. 308 (**P.C.**)=14 I.A. 18=11 Ind. Jur. 197=4 Sar. P.C.J. 768=Rafique and Jackson's P. C. No. 96 ... 204

(3) *S.* 42—*Obstruction to alleged highway—Crim. Pro. Code, Act* X *of* 1882, *ss.* 133, 137—*Parties.*—An owner of land has a right to bring a suit under s. 42 of the Specific Relief Act against any one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party. Such a suit is not barred by an order of a Criminal Court, under s. 137 of the Crim. Pro. Code. CHUNI LALL v. RAM KISHEN SAHU, 15 C. 460 (**F.B.**)= 12 Ind. Jur. 425 ... 892

(4) S. 42—See DECLARATORY DECREE, 14 C. 586.

(5) S. 55—See CO-SHARERS, 14 C. 236.

Specification of Share.
See MAHOMEDAN LAW—PRE-EMPTION, 15 C. 224.

Speculative Suit.
See SECURITY FOR COSTS, 14 C. 533.

Spirituous Liquor.
See ACT III OF 1880 (CANTONMENTS), 15 C. 452.

Stamp.
See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 537.

Stamp Act (I of 1879).

(1) *Sch.* I, *cl.* 1—*Acknowledgment—Balance sheet—Nikash.*—A *nikash* or balance sheet made out and signed by a gomastah of a business showing a balance due by him to the owner of the business is not an acknowledgment of a debt within the meaning of art. 1, sch. I of the Stamp Act, and is admissible in evidence without being stamped. NUND KUMAR SHAHA v. SHURNOMOYE (OR SHURNOMOYE DASI), 15 C. 162. ... 692

(2) *Cl.* 5—*Document—Agreement to pay.*—A document was executed in these terms; "This document, a hand-note, is executed by me for the purpose of purchasing a *ghor.* I take from you Rs. 7. I will pay interest on the sum at half-anna per rupee per mensem. Having received the Rs. 7 in cash, this hand note is executed:" *Held* that the document was not a promissory note nor a bond; but was an agreement to pay, and as such was chargeable with duty under cl. 5, sch. I of the Stamp Act. MURARI MOHUN ROY v. KHETTER NATH MULLICK, 15 C. 150 ... 684

Statement of Accused.
See EVIDENCE, 15 C. 589.

Statute.
Construction of—See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 383.

Statute 32, Hen. VIII, c. 34.
See LANDLORD AND TENANT, 14 C. 176.

Statute 2 and 3 Will, IV., C. 71.
See EASEMENT, 14 C. 839.

Statute 21 and 22 Vic., c. 100.
See JURISDICTION, 14 C. 256.

Stay of Proceedings.
See COSTS, 14 C. 580.

Step-in-aid of execution.
See LIMITATION ACT (XV OF 1877), 15 C. 363.

Stipulations.
See KABULIYAT, 14 C. 99.

Subject matter in dispute.
See MUNSIFF, 15 C. 104.

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Subscription.
See RIGHT OF SUIT, 14 C. 64.

Succession.
See HINDU LAW—PARTITION, 15 C. 292.

Succession Act, (X of 1865).
(1) S. 128—See WILL, 15 C. 83.
(2) S. 187—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 14 C. 37.

Sudras.
See HINDU LAW—MARRIAGE, 15 C. 708.

Suit.
(1) Against several persons claiming under different titles—See MISJOINDER, 14 C. 435.
(2) By Agent for purchase of Government Stores against Secretary of State —See LIMITATION ACT (XV OF 1877), 14 C. 256.
(3) By third party claiming rent paid into Court in Rent Suit—See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 537.
(4) For declaration of right and confirmation of possession—See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 60.
(5) For partition of portion of joint family property—See HINDU LAW—PARTITION, 14 C. 122
(6) On mortgage-bond—See LIMITATION ACT (XV OF 1877), 14 C. 730.
(7) Pending when Bengal Tenancy Act came into force—See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 553.
(8) To set aside deed—See LIMITATION ACT (XV OF 1877), 15 C. 58.
(9) To set aside sale—See SALE, 15 C. 557.
(10) See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 450.
(11) See RIGHT OF OCCUPANCY, 14 C. 621.

Summary Procedure.
(1) See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 174.
(2) See SURETY, 15 C. 497.

Summons.
See MINOR, 14 C. 204.

Sunderband Estate.
(1) See SALE FOR ARREARS OF REVENUE, 14 C. 440.
(2) *Of High Court—Civ. Pro. Code, 1882, s. 622—Jurisdiction.*—S. 622 of the Code is one of very limited operation; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions. KRISHNA MOHINI DOSSEE v. KEDARNATH CHUCKERBUTTY, 15 C. 446 882

'urety.
(1) *Execution of decree against surety—Surety for costs of appeal—Separate suit—Summary procedure—Civ. Pro Code, 1882, s. 253*—S. 263 of the Civ. Pro. Code is not applicable to a surety who has become security in an Appellate Court. A security bond therefore, executed by a surety on behalf of an appellant for the costs of an appeal under s. 549 of the Code cannot be summarily enforced against the surety in the execution proceedings; the remedy is by separate suit. KALI CHARUN SINGH v. BALGOBIND SINGH, 15 C. 497=13 Ind. Jur. 18 ..... 9..
(2) *Liability of surety—Judgment-debtor applying to be declared an insolvent—Civ. Pro. Code, ss. 336, 344.*—S on the 16th January 1886 obtained a decree for a certain sum of money against C. In execution of that decree, C was arrested on the 28th January, and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Ch. XX of the Code of Civil Procedure, and he was thereupon released upon furnishing security under the provisions of s. 336 of the Code. K became surety for C and executed a bond undertaking to produce C at any time when the Court should direct him so to do, and in default of so producing him, to pay the amount of the decree and standing security for C's applying to be declared insolvent. On the 19th February C filed his petition to be declared an insolvent before

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Surety—(*Concluded*).
the District Judge under s. 344 of the Code, and on the 14th May 1886 his petition was dismissed owing to his non-appearance. S thereupon applied for execution of the decree against K. *Held*, that K was released from his obligation under the bond executed by him when C filed his petition under s. 344 to be declared an insolvent. KOYLASH CHANDRA SHAHA v. CHRISTOPHORIDI, 15 C. 171 ... 698
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 757.

Surgical Operation.
See PENAL CODE (ACT XLV OF 1860), 14 C. 566.

Surplus.
See ATTACHMENT, 15 C. 329.

Surrender.
See SALE FOR ARREARS OF REVENUE, 14 C. 109.

Survey Maps.
(1) See ASSESSMENT, 14 C. 67.
(2) See EVIDENCE, 15 C. 355.

Suspended Proceedings.
See EXECUTION OF DECREE, 14 C. 385.

Suspicion.
See FALSE CHARGE, 14 C. 707.

Symbolical Possession.
See CRIM. PRO. CODE (ACT X OF 1882), 14 C. 169.

Talukdar.
See WILL, 15 C. 725.

Talukdari Estate.
See HINDU LAW—JOINT FAMILY, 14 C. 493.

Tank.
See FISHERY, 15 C. 402.

Tari.
See ACT III OF 1880 (CANTONMENTS), 15 C. 452.

Tenant.
(1) See ENHANCEMENT OF RENT, 14 C. 795.
(2) See RECEIVER, 14 C. 323.

Tenure.
See BURDEN OF PROOF, 15 C. 89.

Theft.
See FISHERY, 15 C. 388, 402.

Time.
See CIV. PRO. CODE (ACT XIV OF 1882), 14 C. 610.

Title.
(1) *Evidence of—Resumption Chittas.*—Government resumption chittas, in the absence of the resumption proceedings, are not conclusive evidence of title as against third persons. DWARKA NATH MISSER v. TARITA MOYI DABIA, 14 C. 120 ... 80
(2) *Presumption arising from possession—Issue as to identity of land re-formed on a site formerly submerged.*—In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. The issue was found in favour of the plaintiffs by the first Court; and the appellate Court, finding that the plaintiffs had been in possession for more than 12 years, concluded that, at all events, they had a title by adverse possession. On an appeal the High Court considered that the latter decision was not upon the issue, raised, the plaintiffs' claim being founded on an original title to the site of the chur—a title denied by the defendants; and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favour of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs. Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held*, that this was erroneous.

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Title—(*Concluded*).

On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownreship, because *presumitur retro*. ANANGAMANJARI CHOWDHRANI v. TRIPURA SUNDARI CHOWDHRANI, 14 C. 740 (**P.C.**)=14 I.A. 101=11 Ind. Jur. 350=5 Sar. P.C.J. 45 ... 490

(3) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 14 C. 624

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 14 C. 537.

(5) See CERTIFICATE OF ADMINISTRATION, 15 C. 574.

(6) See CRIM. PRO. CODE (ACT XIV OF 1882), 14 C. 169; 15 C. 564.

(7) See EVIDENCE, 15 C. 353.

(8) See SALE, 14 C. 518.

Tolls.

See NOTICE, 15 C. 259.

Touts.

Employed by pleaders—See PLEADER, 15 C. 638.

Trading.

See COMPANY, 24 C. 189.

Transfer.

(1) See ACT XL OF 1858 (MINORS), 15 C. 40.

(2) See EVIDENCE, 15 C. 20.

(3) See EXECUTION OF DECREE, 15 C. 177.

Transfer of Property Act (IV of 1882).

(1) S. 2.—See MORTGAGE BY CONDITIONAL SALE, 15 C. 357.

(2) S. 2, cl. (*c*)—See MORTGAGE—FORECLOSURE, 14 C. 451.

(3) *S. 6, cl. (d)—Property—Actionable claim—Transferable Claim—Civ. Pro. Code, s. 266—Execution of Decree—Attachment.*—Under the Transfer of Property Act, property includes an actionable claim. There was sold in execution of a decree the judgment-debtor's right to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, but which at the time of the execution sale was in the possession of the donee of the estate, the land never having been appropriated by measurement as provided in the deed. In a suit brought by the auction-puchaser decree-holder, for the area of the land reserved by measurement and division. *Held,* that the claim of the judgment-debtor to the land was a transferable claim, and therefore capable of being attached and sold in execution under s. 266 of the Civil Procedure Code. RUDRA PERKASH MISSER v. KRISHNA MOHUN GHATUCK, 14 C. 241 ... 160

(4) S. 52—See LIS PENDENS, 15 C. 647.

(5) Ss. 58, 60, 67, 83, 87—89, 92, 93, 100—See LIMITATION ACT (XV OF 1877), 14 C. 730.

(6) Ss. 68, 100—See EXECUTION OF DECREE, 15 C. 492.

(7) S. 73—See MORTGAGE SALE, 15 C. 546.

(8) Ss. 86, 87—See MORTGAGE—FORECLOSURE, 14 C. 599.

(9) *S. 100—Charge on immoveable property—Mortgage—Construction of document—Limitation.*—Under s. 100 of the Transfer of Property Act, for a document to create a charge on immoveable property, it must be a document that creates such charge immediately on its execution, and not operate only as a charge at some future time, such as in the event of non-payment of the money secured by it, the latter being the possibility of a charge ultimately arising on the land, and not "a charge" within the meaning of that section. *A* lent *B* Rs. 99, and *B* executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Baisakh 1289 F. S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that *A* should take possession thereof, and that after *A* took possession of the land no interest should be paid by him (*B*), and that *A* should pay the rent of the lanlord out of the profits of the land without any objection. *A* instituted a suit on the 3rd August 1885 to recover the Rs. 99. *Held,* that the document did not amount

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Transfer of Property Act (IV of 1882)—(*Concluded*).

to a mortgage, nor did it create a charge under s. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years being the period applicable. MADHO MISSER v. SIDH BINAIK UPADHYA *alias* BENA UPADHYA, 14 C. 687 ... 456

(10) See HINDU LAW—GIFT, 14 C. 446.

(11) *S. 135—Actionable claim—Transfer of a claim for an amount less than its value—Recovery of full amount of debt.*—S. 135 of the Transfer of Property Act does not protect a defendant from payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim, where the money is recovered by suit after a contest as to the liability of the defendant. KHOSHDEB BISWAS v. SATAR MONDOL, 15 C. 436 ... 875

Transferability.

See BURDEN OF PROOF, 14 C. 382; 15 C. 89.

Transferable Claim.

(1) See ENHANCEMENT OF RENT, 14 C. 795.

(2) See TRANSFER OF PROPERTY ACT (IX OF 1882), 14 C. 241.

Trustee.

See LIMITATION ACT (XV OF 1877), 15 C. 703.

Trust Property.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 14 C. 617.

Ultra Vires.

See COMPANY, 14 C. 189.

Under-Tenure.

(1) See EXECUTION OF DECREE, 15 C. 492.

(2) See SALE FOR ARREARS OF RENT, 14 C. 14; 15 C. 350.

Undue Influence.

See ISSUES, 15 C. 684.

Unlawful Assembly.

See FISHERY, 15 C. 388.

Unskilled Medical Practitioner.

See PENAL CODE (ACT XLV OF 1860), 14 C. 566.

Use and Occupation.

See LANDLORD AND TENANT, 14 C. 176.

Vakeel.

See PRACTICE, 15 C. 706.

Valuation of Suit.

See MUNSIF, 15 C. 104.

Verdict of Jury.

Sessions Judge, Opinion of—Crim. Pro. Code, s. 307—High Court, Power of.—In the exercise of its powers, under s. 307 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so, the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight. QUEEN-EMPRESS v. ITWARI SAHO, 15 C. 269 ... 701

Voluntary Payment.

Money paid, but not due and paid under compulsion—Contract Act (IX *of* 1872), *ss.* 15, 72.—In execution of a decree, the plaintiff purchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree, against the same property. The plaintiff thereupon preferred a claim, which was disallowed as he had not then obtained, and consequently could not produce the sale certificate. In order to prevent the sale, he then paid the amount of the defendant's decree into Court and subsequently instituted a suit against the defendant to recover the amount so paid into Court to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back. *Held,* that it was not a voluntary payment, and that the plaintiff was entitled to a decree. JUGDEO NARAIN SINGH v. RAJA SINGH, 15 C. 656=13 Ind. Jur. 217 ... 1021

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Waiver.
(1) See DECREE, 14 C. 352.
(2) See LANDLORD AND TENANT, 14 C. 176.
(3) See LIMITATION ACT (XV OF 1877), 14 C. 397.

Wajib-ul-araiz.
(1) See CUSTOM, 14 C. 296.
(2) See EVIDENCE, 15 C. 20.

Wife.
(1) Having English domicile suing without husband—See PARTIES, 15 C. 35.
(2) See COSTS, 14 C. 580.

Will.
(1) *Construction of—Gift over on failure of prior devise.*—A testator made the following disposition by his will; "I appoint my brother *N* sole executor of my estate and effects after my decease, who shall pay all my debts and collect all outstandings. My wife is supposed to be in the family way; should she bring forth a male, in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed from my estate. I also wish that she should receive a legacy of a Government 4 per cent. promissory note for Rs. 2,000 on her attaining proper age. *In case my son dies before attaining proper age all my estates and property should be taken possession of by my brother.* My wife is to receive a Government 4 per cent. promissory note for Rs. 1,000 as a legacy, and is to be maintained from my estate if she continues to live in our family dwelling house, under my brother's protection. The child with which the widow was *enciente* turned out to be a daughter: *Held,* that the clause in italics was one purporting to give the property, and not only the management of it to *N*, the power of management having already been given him in appointing him executor; that the provisions for maintenance of the widow, and for the marriage expenses of the daughter, tended to show (putting aside the legacies) that the widow and daughter were not to take the larger estate which they would have successively taken as heiresses; and that the wife of the testator not having borne to him a son, and the apparent intention of the testator having been to give the estate to *N*, if the son did not take, or if the estate to the son failed by reason of his not attaining proper age, the gift over to *N*, on the principle laid down in *Jones* v. *Westcomb,* 1 Eq. Cas. Abr. 245, took effect on failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift. OKHOYMONEY DASEE v. NILMONEY MULLICK, 15 C. 282. — 773

(2) *Construction of—Oudh Estates Act* (I *of* 1869), *ss.* 8, 13 *and* 22—*Unregistered will of talukdar—Meaning of "Maharani Sahiba" as applied to wife or wives—Decree for maintenance to widow under the will on which her suit was based though her claim was for a different relief—Costs.*—A talukdar, who died childless, but leaving two widows, bequeathed, by an unregistered will to the "Maharani Sahiba" his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption. *Held,* that, to determine whether the will referred, in such bequest and power only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with his views, as evidenced by his conduct and his will generally. As his views appeared to favour single heirships, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one: and the donee of the power to adopt being one: *Held,* that accordingly the words "Maharani Sahiba" were not here used as a collective term for both

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Will—(*Concluded*).

widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both. *Held*, also, that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. 1 of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukdari as out of the non-talukdari estate of the testator. *Held*, also, that this had been rightly decreed to her, as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed: *Held*, also, that the difficulty of construction having been caused by the testator himself, and in regard to the circumstances and position of the parties, costs should come out of the estate. INDAR KUNWAR v. JAIPAL KUNWAR, 15 C. 725 (**P.C.**)=15 I.A. 127=12 Ind. Jur. 377=5 Sar. P.C.J. 150=Rafique and Jackson's P.C. No. 102 1067

(3) *Legacy to person appointed executor—Rebuttal of presumption—Parol evidence—Succession Act* (X *of* 1865), *s.* 128—*Hindu Wills Act* (XXI *of* 1870), *s.* 2.—The language of s. 128 of the Succession Act is peremptory and leaves no room for a presumption, and it is not left to the Court to decide whether the legacy is given to the person in his character as executor or not. The rule as to the admissibility of parol evidence to rebut the presumption, which may possibly upon the decisions obtain in England, has no force in this country where such evidence is inadmissible. PROSONO COOMAR GHOSE v. ADMINISTRATOR-GENERAL OF BENGAL, 15 C. 83 ... 640

(4) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 14 C. 37.

(5) See HINDU LAW—WILL, 15 C. 409.

(6) See LIMITATION ACT (XV OF 1877), 14 C. 801; 15 C. 66.

Witness.

(1) See COMPANIES ACT (VI OF 1882), 14 C. 219.

(2) See PRACTICE, 14 C. 245.

(3) See RIGHT OF SUIT, 15 C. 264.

Words and Phrases.

(1) "Any Person"—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 14 C. 556.

(2) "Carry on business or personally work for gain"—See JURISDICTION, 14 C. 256.

(3) "Case"—See CIVIL PROCEDURE CODE, 1882, 14 C. 768.

(4) "Complaint"—See FALSE CHARGE, 14 C. 707.

(5) "Debtor"—See ACT XXVII OF 1860 (SUCCESSION CERTIFICATE), 15 C. 541.

(6) "District"—See SALE FOR ARREARS OF REVENUE, 14 C. 440.

(7) "Enquiry"—See FURTHER ENQUIRY, 15 C. 608.

(8) "Established Usage"—See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 714.

(9) "Final"—See REVIEW, 15 C. 432.

(10) "Further relief"—See DECLARATORY DECREE, 14 C. 586.

(11) "Good faith"—See PENAL CODE (ACT XLV OF 1860), , C. 566.

(12) "Intoxicating Drugs"—See ACT III OF 1880 (CANTONMENT), 15 C. 4-2.

(13) "Judgment-debtor"—See ACT VIII OF 1885 (BENGAL TENANCY), 15 C. 482.

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Words and Phrases—(*Concluded*).

(14) "Judicial Officer"—See Act VIII of 1885 (Bengal Tenancy), 15 C. 327.
(15) "Maharani Sahiba"—See Will, 15 C. 725.
(16) "Mofussil"—See Sale for Arrears of Rent, 14 C. 365.
(17) "Mokurari"—See Lease, 15 C. 342.
(18) "Naslan bad naslan"—See Document, 14 C. 296.
(19) "Person whose immoveable property has been sold"—See Civil Procedure Code (Act XIV of 1882), 14 C. 240.
(20) "Proceedings"—See Appeal—Second Appeal, 15 C. 107.
(21) "Proceedings"—See Mortgage—by Conditional Sale, 15 C. 357.
(22) "Records of any case"—See Civil Procedure Code, 1882, 14 C. 768.
(23) "Spirituous Liquor"—See Act III of 1880 (Cantonment), 15 C. 452.
(24) "Step-in-aid of execution"—See Limitation Act (XV of 1877), 15 C. 363.
(25) "Suit"—See Act VIII of 1885 (Bengal Tenancy), 15 C. 450.
(26) "Tari"—See Act III of 1880 (Cantonments), 15 C. 452.
(27) "The amount of rent payable by the tenant"—See Act VIII of 1885 (Bengal Tenancy). 15 C. 166.
(28) "The full amount of money then due"—See Act VIII of 1885 (Bengal Tenancy), 15 C. 166.
(29) "Toddy"—See Act III of 1880 (Cantonment), 15 C. 452.
(30) "Wine"—See Act III of 1880 (Cantonment), 15 C. 452.

Written Contract.

See Mahomedan Law—Dower, 14 C. 420.

Year of Grace.

See Mortgage—Foreclosure, 14 C. 451.

Zemindar.

See Land Acquisition Act (X of 1870), 14 C. 749.